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IN THE
COUNCIL OF CONSTITUTIONAL INQUIRY
THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
ADDIS ABABA
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ON THE QUESTION OF
A constitutional interpretive solution to the issue of the expiry of parliamentary term during a state of emergency that made timely elections impossible.

BRIEF AMICUS CURIAE
OF

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IDENTITY AND INTEREST OF AMICI

The authors of this Amicus Brief are Ethiopian and Ethiopian origin legal scholars and advocates concerned about the wellbeing of the Ethiopian peoples, the preservation of their sovereignty, and continued vitality of the Ethiopian polity.
BRIEF

I. INTRODUCTION

The Chair of the Council of Constitutional Inquiry (“the Council”) has on 11 May 2020 invited parties with interest and identified qualifications to submit amicus curiae briefs by 15 May 2020 pertaining to the following constitutional questions that the House of Peoples’ Representatives referred to the House of Federation that the Council advises.

(1) [Under the FDRE Constitution] How should the concurrent terms of the two Houses of Parliament and the Executive Branch be understood if their terms expire but elections could not be held due to a declared emergency?

(2) How soon after the emergency recedes shall such elections be held?

The Council’s response to these questions should presumably be informed by reference to, among others provisions, Articles 54(1), 58(3), and 93 of the Constitution.

Twenty-five years after its adoption, the Constitution of the Federal Democratic Republic of Ethiopia finds itself in the midst of unprecedented interpretive challenge. Its relative youth coupled with the incrementality of the rootedness of the principles of the rule of law and maturation of the legal institutions that it establishes did not permit the flourishing of a robust domestic constitutional jurisprudence. For that reason, meaningful constitutional interpretive dialogue requires reference to jurisprudence of other societies who have had the historical opportunity to nurture a profound culture of the rule of law through judicial opinion and academic literature. This Brief thus makes extensive reference to judicial opinion and academic literature primarily from the United States. The authors of this Brief believe that this is a historic opportunity for the development of Ethiopian constitutional jurisprudence which would help the continued maturation of the legal institutions and a better understanding and prevalence of the rule of law.

II. CONSTITUTIONAL INTERPRETATION

In one of the most celebrated nineteenth century federalism cases, McCulloch v. Maryland, the Supreme Court of the United States famously stated that the written Constitution “was intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Congruously, one of the most preeminent constitutional scholars, Harvard’s Richard Fallon, has also acknowledged that “[t]he questions of when, how, and to what extent the rule-of-law ideals associated with a written constitution should accommodate needs for adaptation and change are

1 McCulloch v. Maryland, 17 U.S. 316, 415 (1819).
notoriously difficult.” He postulates that: “[o]n a spectrum running from theories that would allow no adaptation at all to those that would reduce constitutional law to an unmediated clash of value arguments, originalism occupies the first untenable extreme. It is a normative deficiency of originalism that its premises deny any scope whatsoever for accommodation.”

The interpretive spectrum could be remarkably wide ranging from the pure originalist-textualist to the most accommodating pragmatic-enthusiast. Constitutional theories around the world have over the ages been deployed to yield preferred values at every step of the way.

To answer the interpretive questions that the House of Federation has been asked, we believe that its decision may be informed by general principles of constitutional interpretation of various nations with matured constitutional jurisprudence. The expertise of the authors of this particular amicus brief is limited to Ethiopia and the United States. As such, all the references are from these jurisdictions. Other amici would hopefully share their respective experiences of comparative law.

Within the spectrum indicated above, we believe that six broadly framed and readily cognizable methods of constitutional interpretation could be considered in the interpretive process. Following Fallon’s famous typology, these include: arguments from text, arguments from the framer’s intent, arguments of constitutional theory, arguments from precedent, value arguments, and a combination thereof with a hierarchy. Each is described briefly below and shall then be applied to the given interpretive question in Section III.

a. Text

Although unambiguous textual guidance might at first appear to present no interpretive problem in constitutional law, as Fallon indicates “[i]f there is any surprise, it is how seldom the text is relied on directly, in comparison with arguments based on historical intent, precedent, and social policy or moral principle” Recognizably, text is perhaps the most direct indicator of what is intended and as such there is a broad scholarly agreement that when it is clear, it cannot be ignored without justification. Fallon argues that: “when it says that the President must be at least thirty-five years old - its plain meaning is dispositive.”

Equally preeminent constitutional scholars, however, consider this conclusion simplistic. Georgetown’s Gary Peller, for example, in his well-regarded article The Metaphysics of American Law, argues that: “even a seemingly determinate clause such as the minimum age for presidents remains indeterminate. It is possible the age thirty-five signified to the Framers a certain level of maturity rather than some intrinsically significant number of years. If so, it is open to argument whether the translation in our social universe of the clause still means thirty-five years of age. It may be that a younger age should be used since children today, through mass media, are more worldly at an earlier age. Or it may be an older age should be used since children are actually given less social responsibility than in revolutionary times. The choice between the ‘literal’

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3 Fallon, Exhibit 1, at 1214.
4 Fallon, Exhibit 1, at 1195.
5 Fallon, Exhibit 1, at 1195.
and ‘functional’ interpretation is indeterminate, as is the application of the abstract choice in the terms of a particular social field.”

Fallon’s own analysis that follows supports the conclusion that text is no more than the starting point. He explains subtle distinctions between “arguments about the text” and “arguments from the text.” He states that “[f]rom arguments that are merely about the meaning of the text, we can distinguish arguments from the text: arguments that purport to resolve a question by direct appeal to the Constitution’s plain language.” For greater clarity, the interpretive effort in the former case is the ascertainment of the exact meaning of the term but in the latter case, it is about finding a solution in reference to the text but not necessarily limited to the ascertainment of the exact meaning. He very aptly relies on several demonstrations. First of all, he accurately states that the text of the constitution itself resolves so few problems. For example, the most recognizable of all freedoms in America, the freedom of speech is negatively formulated in the First Amendment as: “Congress shall make no laws abridging the freedom of speech.” It was argued that no prohibition is allowed. That literal reading was not sensible as it allowed speech that was libelous, defamatory, obscene as well as false advertising, solicitation of crime, misrepresentation et cetera.

Profound First Amendment jurisprudence since has shown that text is just the beginning. The great majority of constitutional principles in the United States have developed through judicial interpretation of powerful concepts such as “due process,” “equal protection,” and “cruel and unusual punishment” all of which continue to be interpreted to this day. The texts of these principles are only indicative of what the drafters might have imagined at the time. This leads to the next question of what value should the framer’s intent be given.

6 Gary Peller, The Metaphysics of American Law, 37 Southern California Law Review 1151 (1985), Exhibit 2 at 1174. This proposition supports his overall thesis that: “It is a commonplace that law is ‘political.’ Ever since the realists debunked ‘formalism’ in legal reasoning, the received learning has been that legal analysis cannot be neutral and determinate, that general propositions of law cannot decide particular cases. Some policy judgment or value choice necessarily intervenes. It is ‘transcendental nonsense’ to believe that it could be any other way.” Id. at 1152. The term “transcendental nonsense” is borrowed from the famous Felix S. Cohen’s 1935 article, Transcendental Nonsense and the Functional Approach in Vol. 35 of Columbia Law Review 809.

7 Fallon, Exhibit 1, at 1195.
8 Fallon, Exhibit 1 at 1195.
9 Fallon, Exhibit 1 1195-96 citations omitted.
11 The most infamous of all due process cases, Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that slaves and their descendants are not citizens of the United States and more importantly as properties cannot be taken away from their owners without due process of law.) This was only cured after the Civil War in 1868 by the Fourteenth Amendment (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”)
12 The most infamous equal protection case Plessy v. Ferguson (163 U.S. 537 (1857) interpreted “equal protection” to mean “separate but equal”. The Court reversed it in Brown v. Board of Education (347 U.S. 483 (1954) and ruled separate is inherently unequal.
13 See Wilkerson v. Utah (99 U.S. 130 (1978) (holding that it is difficult to determine what the meaning of cruel and unusual is but while torture qualifies killing by a gun shot does not.) Later in Forman v. Georgia, 408 U.S. 238 (1972) the Court held the death penalty unconstitutional considering it cruel and unusual as it disproportionately affected minorities only to find it constitutional again a few years later in Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty serves a legitimate purpose of retribution and deterrence.)
b. Framer's Intent

Although the academic literature is divided as to what weight the intent of the framers should be given, the United States Supreme Court regularly refers to the framer’s intent in interpreting the constitution. Reliance, however, is not free of serious problems. An example frequently cited is that the drafters of the equal protection clause of the Fourteenth Amendment probably did not think that the principle mandated the desegregation of schools\(^{14}\) as it was later seen in \textit{Plessy v. Ferguson} and \textit{Brown v. Board of Education}.\(^{15}\) As such, this too is not without serious challenges.

c. Constitutional Theory

Constitutional theory interpretive argument is functional in essence and seeks structural solutions to broader problems that cannot be strictly resolved by reliance on the text of the constitution. An example, Fallon relies on is Justice Marshall’s opinion in \textit{McCulloch v. Maryland}, he notes that “\textit{with the state and national governments structured as they were, under the Constitution, it would make no sense, Marshall reasoned, for the states to be able to frustrate constitutionally legitimate federal policies}.”\(^{16}\) In essence that is why he concludes that: “[a] constitutional theory must seek not only to explain constitutional guarantees and prohibitions but also to do so in a normatively attractive way.”\(^{17}\) That is to say that whatever interpretive choice is made, it has to be sensible under the circumstances.

d. Precedent

Precedent is the easiest to appreciate. As jurisprudence accumulates and veers further off the text, the interpretive exercise becomes more jurisprudential than textual i.e., reasoning by analogy and distinction. The debate then becomes about the meaning of previous cases rather than the text of the constitution itself although the cases had decided constitutional matters. According to Fallon, reliance on precedent must at a minimum be descriptively accurate and normatively attractive.\(^{18}\)

e. Value judgment

When it comes to value judgment arguments, we cannot improve on Fallon’s own words:

\(^{14}\) Fallon, \textit{Exhibit 1} 1199.
\(^{15}\) See Note 12 supra.
\(^{16}\) Fallon at \textit{Exhibit 1}, at1200 citing \textit{McCulloch v. Maryland}, 17 U.S. 316(1819). Emphasis added. Also citing to Justice Marshall’s more famous opinion in \textit{Marbury v. Madison}, 5 U.S. 137 (1803) in which he stated that the concept of separation of powers and checks and balances would be meaningless if the court lacked the power of judicial review.
\(^{17}\) Fallon, \textit{Exhibit 1} at 1202.
\(^{18}\) Fallon, \textit{Exhibit 1} at 1203.
Sometimes openly, sometimes guardedly, judges and lawyers make arguments that appeal directly to moral, political, or social values or policies. Every now and then, of course, courts assert that value choices are never for them to make but are solely the domain of the political branches. However, protestations of this kind are simply not credible. Indeed, at least occasionally they signal that the court is about to implement a value choice so controversial that denial is easier than explanation. Value arguments are even more prominent; indeed, they enjoy almost total predominance, in much of the most respected modern constitutional scholarship.\textsuperscript{19}

Whether it is easier to deny or explain, the recognition that no court or interpretive organ could or should be free of value judgment is “transcendental nonsense” as it is central to its function of not mechanically interpreting terms but resolving concrete and consequential real life matters whether by reference to moral, efficiency, expediency, or other forms of timely imperatives.

\textbf{f. Constructive Coherence with Hierarchy}

Having assessed all five forms of constitutional interpretive arguments, Fallon proposes a constructive coherence theory. First, the various types of arguments function interactively not independently but if they point in different directions, they are ranked in the order discussed: text, intent, theory, and precedent. When these tools fail to yield a correct and sensible result, resort may be had to value judgment i.e., what the decision maker considers the best outcome from the values standpoint.\textsuperscript{20} This last approach gives emphasis to the overall circumstances of the case and wishes to correct social ills and bring about desirable political outcome as in \textit{Brown v. Board of Education}.

\section*{III. APPLICATION OF CONSTITUTIONAL INTERPRETIVE ARGUMENTS TO THE QUESTIONS REFERRED FOR INTERPRETATION}

This section applies the various arguments described above to the specific constitutional provisions referred for interpretation and the overall question of constitutional resolution of the conflict between the term limit and the impossibility of holding elections for a new parliament due to the pandemic.

\textbf{a. Article 54(1)}

Article 54(1) of the Constitution reads: “1. Members of the House of Peoples’ Representatives shall be elected by the People \textit{for a term of five years} on the basis of universal suffrage and by direct, free and fair elections held by secret ballot.” The key relevant portion is “\textit{for a term of five years}.” A literal reading of the text finds no ambiguity although a functionalist reading would look at the metaphysics by inquiring further: Had the drafters known that twenty-five years after they adopted it a pandemic would make elections impossible, would they have insisted that the term shall remain five years, even if it means that the country remains without a legislature while it fights a pandemic?

\textsuperscript{19} Fallon, \textit{Exhibit 1} at 1204. Emphasis added.

\textsuperscript{20} Fallon, \textit{Exhibit 1} at 1245ff.
The constitutional theories of interpreting in a functional and normatively attractive way, and precedent-based interpretation could easily give way to the values argument as either they are analytically merged (as in the case of theories) or almost non-existent (as in the case of precedent.) Even values-based interpretation would yearn for an alternative normative predicate than to extending a matter of numerical certainty analogous to Fallon’s example; when the Constitution says the president has to be thirty-five years of age, a bright thirty-four-year-old person cannot unfortunately become president that year.

b. Article 58(3)

Subsection (3) of Article 58 similarly provides: “3. The House of Peoples’ Representatives shall be elected for a term of five years. Elections for a new House shall be concluded one month prior to the expiry of the House’s term.” As this is also a matter of numerical certainty, none of the above interpretive arguments could credibly move the time frame for the election of the House. It follows the exact same analytical steps as section (a) above.

c. Article 93

The most contentious provision is subsection 4(b) of Article 93. It reads: “(b) The Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.” The next subsection limits the suspension to certain rights but not those related to elections.

The main interpretive question is thus: Can the Council of Ministers suspend the right to vote until the pandemic passes? A simple textual analysis would easily yield a yes answer and none of the other interpretive tools would contradict it. This does not, however, resolve the main question of what happens to the term limit if replacement elections are constitutionally suspended because of a pandemic. This conundrum requires a constructivist coherence theory that amalgamates all of the various arguments to find a descriptively accurate and normatively attractive structural interpretation provided below.

d. The General Conflicts Question and Alternative Constructivist Solutions

The general questions that the House of Peoples’ Representative referred to the House of Federation are:

(1) How should the term of the two Houses of Parliament and the Executive Branch be understood if their term expires and elections could not be held due to emergency?

(2) How soon after the emergency recedes shall elections be held?
i. Functional Interpretation

There is no specific text that answers this question; hence there can never be a textual response. Going down the analytical list of intent, theory, precedent and values, and applying the constructivist coherence approach of functional interpretation, it becomes abundantly clear that inherent in the structure of the Constitution itself is the notion of self-preservation. All of the provisions of the Constitution are designed to work in tandem to ensure the continuity of the Republic and guarantee the safety and security of its peoples. It anticipates that a pandemic could cause the disruption of normal life and that most of the provisions of the Constitution could be suspended with few exceptions. It allows the declaration of emergency for six months and renewable every four months until the emergency shall have passed. The same parliament and the same administration are empowered to shepherd the country through emergencies in the manners prescribed with enormous deference necessitated by the exigencies.

It would be “transcendental nonsense” to believe that the framers intended that the peoples of the country shall write a new constitution every time a pandemic strikes during election year. The most normatively sensible approach is to interpret the Constitution as one coherent grand norm that establishes a republic and guides its existence ad infinitum.

No one single provision of the Constitution could be interpreted to provide a logical solution to the problem at hand. However, the provisions pertaining to the term of office of the legislature and the executive (Articles 54 and 58) in conjunction with the provisions that set forth the declaration of a state of emergency (Article 93) juxtaposed against this unprecedented worldwide pandemic leave no room for doubt that the legislature has the inherent power to extend its own term until such time as the emergency recedes and normal life resumes. This is particularly true if the choice is between constitutional continuity of the polity or its imminent constitutional extinction. These provisions, read cumulatively, support a conclusion that they cannot otherwise support severally. The House of Federation, as an interested party, must, however, be sensitive to the question of the jurisdiction to determine when the emergency is deemed to have receded so as to enable new elections.

This leads to the next question of how long after the emergency ended shall elections be held. We are of the opinion that the Constitution itself provides guidance by providing a six-month first window followed by four months of instrumentality for purposes of checks and balances. The same formula could be adopted for renewal of the term. The decision may be linked to international and independent pronouncements of the end of the pandemic.

That said, however, the ordinary constitutional mechanism that is designed to address this type of unforeseen circumstances is decidedly constitutional amendment. Indeed, except for the Bill of Rights, the great majority (10 out of 27) of the Amendments to the United States Constitution touch and concern electoral matters. It is clear that the

21 12th Amendment, Electoral College (1804); 15th Amendment, right to vote to all races (1870); 17th Amendment, election of senators directly by the people (1913); 19th Amendment, women’s right to vote (1920); 20th Amendment, beginning and end of executive term and legislative term (1933); 22nd Amendment, Presidential term limit (1951); 24th Amendment, voting in the primaries (1964); 25th Amendment, Presidential line of succession (1967); 26th Amendment, voting age from 21 to 18 (1971); and 27th Amendment prohibition on compensation raise of senators until a new senate shall have been elected (1982).
preferred way of addressing election related matters in the United States has been constitutional amendment. By the same token, the easiest and preferred option here as well would be a surgical constitutional amendment to address this particular problem now and for the future. The functional interpretation described above may only be exercised if the House of Peoples’ Representatives determines that pursuing an amendment under the conditions of pandemic is impracticable.

ii. Amendment

As indicated above, the principal constitutional design to cure defects of this type is ordinarily a constitutional amendment. The only foreseeable obstacle appears to be the public consultation and decision required for the initiation of the amendment process under Article 104(1) (not the amendment per se under 105(2)). Article 104(1) on initiation reads: “Any proposal for constitutional amendment, if supported by two-thirds majority vote in the House of Peoples’ Representatives, or by a two-thirds majority vote in the House of the Federation or when one-third of the State Councils of the member States of the Federation, by a majority vote in each Council have supported it, shall be submitted for discussion and decision to the general public and to those whom the amendment of the Constitution concerns.”

There is at least one requirement in this provision that needs interpretation in light of the existing emergency. That is the requirement of “discussion and decision” by the general public. This discussion and decision clearly refers to the initiation stage. It is clear that the text does not require a referendum for each constitutional amendment. This is for two reasons: (1) the initiation cannot logically be subject to a more cumbersome procedure than the amendment itself; (2) the drafters have used the term “referendum” in at least five other provisions including in Article 39 and, as such, it could be presumed without fear of contradiction that if they had intended a referendum, they would have said so. Therefore, this is not a referendum.

The second issue that the express term of Article 104 does not answer is the nature of the public consultation and decision in general, and in times of emergency in particular. This requires the House of Federation’s considered interpretation. Ordinarily, public consultations take place in town halls, stadia, streets, and other traditional fora in rural communities. It also traditionally takes place via radio, television, telephone and other mechanisms of remote communication. There is no doubt that this is the nature of the anticipated discussion. Decision on the other hand seems to suggest some level of agreement to initiate or refer the matter for formal amendment under Article 105. Because Article 105 sets forth the minimum threshold for both the sensitive provisions under sub-article (1) and the less sensitive ones under sub-article (2), it cannot be assumed that the decision of the public under Article 104 would be more rigorous than both. Discussion and decision may therefore, safely be said to refer to a reasonable level of consultation and agreement on the initiation.

The more pertinent question, however, is what nature should the said discussions take when a pandemic makes public gathering impossible and the desired amendment relates to a constitutional gap created by the presence of the pandemic itself. We believe that the House of Federation should give the interpretation that is commensurate with the nature of the emergency. The pandemic forecloses the possibility of discussions in the ordinary manner. The Constitution does not prescribe any particular form of

22 Other provisions are also found in Article 47 of the Constitution.
As such, discussions could take place in all remote means available such as radio, television, teleconference, videoconference, email, and all other forms of online communication. Given the exigencies of the time, the House of Federation could impose a time limit during which the discussions may take place. This is perfectly within the interpretive power of the House of Federation.

Finally, it is important to identify the most appropriate provision that could be surgically cured to offer the least intrusive and the most normatively attractive solution. In our opinion, the best candidate is Article 58(3), which states: “3. The House of Peoples’ Representatives shall be elected for a term of five years. Elections for a new House shall be concluded one month prior to the expiry of the House’s term.” A subsection (a) thereunder may be inserted to account for times of emergency such as a pandemic. It could, for example, provide:

3(a) “If the five-year term of both Houses of Parliament and the Executive thereof shall have expired during a state of emergency duly declared under Article 93 because of a pandemic that makes the holding of free and fair elections impracticable, a two-thirds majority of both Houses of Parliament may by legislation extend the five-year term of both Houses and the Executive thereof until the pandemic shall have passed and elections are held for a new Parliament.”

(b) “Such legislation shall set the outer limit of the temporal scope during which elections for a new parliament shall take place. Such time shall in no event exceed one year after the pandemic is internationally declared to have ended by public health officials authorized by law.”

(c) Notwithstanding any provisions to the contrary, subsections (a) and (b) shall also apply to the regional states mutatis mutandis.

This may eventually be known as The Pandemic Amendment.

IV. MATTER OF JURISDICTION

It is suggested that Proclamation No. 798/2013 is unconstitutional because Articles 83 and 84 on the powers of the House of Federation are limited to “disputes,” and that as such, the House of Federation lacks the jurisdiction to engage in abstract or facial review or otherwise provide an advisory opinion.23 This argument entirely rests on the meaning of the term “dispute” and seeks authoritative meaning from Black’s Law Dictionary. The core of this representative argument is summarized in the following paragraph: “Dispute’ is defined by Black’s Law Dictionary as a conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other.” And concludes that: “Dispute’ therefore obviously involves ‘contest’ between parties with an interest that could contextually be secured or lost depending on the outcome of the ruling by the CCI/HoF.”24

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23 See e.g., Mulugeta Aregawi, There is only one winner when legislation clashes with the Constitution, Ethiopia Insight (May 12, 2020). Exhibit 3.
24 Aregawi, Exhibit 3 at p. 2. (emphasis added).
This is not accurate for several reasons. First, the Constitution does not define the term “dispute” but this argument relies on the dictionary meaning of the term as dispositive without any legislative command. Various dictionaries give the term “dispute” different meanings. Unless one assigns a hierarchy of dictionaries, the ordinary meaning of the term “dispute” could be ascertained from other authoritative dictionaries as well. The Cambridge English Dictionary defines the term “dispute” as: “an argument or a disagreement, especially an official one between, for example, workers and employers, or two countries with a common border.” It gives further examples. Two are most interesting: “I don’t think her ability is in dispute, what I question is her attitude.” “The chances of settling the dispute through talks seem increasingly slender.” The obviousness of the meaning indicated in the previous paragraph is thus itself disputable.

Secondly, and more importantly, the power to decide the meaning of the term “dispute” resides in the House of Federation itself. This much cannot be disputed. In legal language, this is the principle of competence-competence; the power to determine the scope of its own power, which includes interpreting constitutional provisions on jurisdiction such as this.

Third, in interpreting the term “dispute” the House of Federation would follow the recognized canons of constitutional interpretation. Although they come in various shapes and forms, some of the most common tools, at a minimum, include the ascertainment of the ordinary meaning in light of the intent and purpose of the particular provision. If this does not resolve the issue, other tools indicated above such as theories and values may be deployed. Here, the Council should have no difficulty finding that the meaning of the term “dispute” is broader than a formal legal controversy between two contesting parties who strive to win a monetary judgment or an equitable relief such as an injunction. There are at least five fundamental reasons for this:

1. The House of Federation is not a judicial organ. As such, the Marbury v. Madison line of reasoning is not only inapt but also affirmatively misleading. Although the matured United States constitutional jurisprudence is infinitely illuminating, the significant structural differences must not be ignored. In the tripartite separation of powers design, Article III of the United States Constitution limits judicial power to “cases and controversies” generally interpreted to require contesting parties because the court’s review needs to resolve a dispute that is ripe as applied to a set of facts. That is why the main question in the United States pertains not to whether there is a dispute but about “facial challenge” versus “as-applied challenge”. The most notable case, United States v. Salerno, articulates the most known test for a facial challenge i.e., whether there is “no set of circumstances” under which the challenged law could be applied constitutionally. Even in the United States, the court sometimes reviews the constitutionality of state and federal laws on their face; this is a practice analogous to abstract review in other jurisdictions. In any case, the limitation of the jurisdiction of Article III courts in the United States is structural and is a function of the original design. Such limitation does not sit comfortably in a system with an entirely different allocation of powers between the three branches of government.


(2) The design of the Ethiopian Constitution is radically different. The power of constitutional review is given to one House of Parliament, which is not a part of the judicial branch. It does not have the power of adjudicating “cases and controversies” of any kind as in the United States constitutional sense. To deny it judicial power and yet say that it could only resolve constitutional questions through the judicial function of adjudicating cases and controversies defies logic.

(3) The *Marbury v. Madison* judicial review power is qualitatively different from constitutional interpretation envisioned under the Ethiopian Constitution. In *Marbury*, the Court’s function is checking the constitutionality of subordinate laws. Its interpretive function is incidental and self-granted. It could only do so when cases are submitted to it for adjudication in its judicial capacity. Even then as indicated above, as an incidence of judicial function, it sometimes conducts facial review under very strict standards.

(4) Generating a case or a controversy in this case requires an unnecessary or even an impossible and purposeless maneuver. It would require the House of Peoples’ Representatives to take an action such as extending its term followed by an interested party who can establish a standing to challenge the action and sue in court, and exhaust all the remedies through the judicial process, and finally seek interpretation at the end of the judicial process. From a normative values interpretive standpoint, this needless procedural shenanigan cannot be logically countenanced.

(5) Finally, if cases and controversies are always required to validate or invalidate laws, the same could be said about the constitutionality of Proclamation 798/2013 itself. It does not appear that it has ever been challenged. By the same token the House of Federation cannot review its constitutionality *sua sponte*. It remains presumptively valid.

For all of the above reasons, we believe that Proclamation No. 798/2013 that gives the House of Federation facial or abstract interpretive power is constitutional. As such, it cannot be an obstacle to the House of Federation’s interpretation of the various constitutional provisions referred to it and provides a solution to the exiting constitutional problem.

V. CONCLUSION

The House of Federation may rightfully opine that this Federal Democratic Republic has the inherent power of self-preservation enshrined in the collective wisdom of the various pertinent provisions. Such power is exercised through the lawful representatives of the citizenry and the institutions that the Constitution establishes. As it is often said, extraordinary problems require extraordinary solutions. This *Amicus Brief* has outlined at least two possible solutions to the existing constitutional interpretive issue.
The first possible solution is the cumulative reading of Articles 54, 58 and 93. As indicated in Section II, short of an amendment, a disjunctive, independent and literal construction of these provisions would lead to an absurd result of constitutional freeze. No permanent constitution could be interpreted to sanction its own extinction. As a living document, it must be interpreted to provide a solution, not to purposefully deny one. The term limits under Article 54 and 58 must be understood to give way to the state of emergency under Article 93 and cumulatively be understood to grant the legislator the implicit legislative power of extending its term and that of the Executive until the emergency shall have passed. This is inherent in the essence of sovereignty and the nation’s interest of self-preservation that the Constitution codifies in so many complex words. A contrary reading would nullify the entire Constitution unless the interpretive problem is unequivocally resolved by an amendment. Such interpretation could only be relied on in situations where constitutional amendment cannot be secured due to the nature of the emergency itself.

We have also outlined the possibility of a cure through a surgical amendment of only one procedural provision and offered our view of what the initiation process might look like and provided a narrowly tailored addition to Article 58 to achieve the legitimate objective of ensuring the continuation of a functioning government to shepherd the nation out of this extraordinary emergency.

The temptations of extra-constitutional solutions are high but their perils are immeasurably grave. The task of constitutional interpretation is thus not only leaden with the selection and application of canons, theories, and arguments, but is also continually startled by the reckoning of the practical consequences of the outcome. But at the very end, no matter how indeterminate or however intricate, the metaphysics of constitutional law is such that it always gravitates towards commonsense.

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