PARTICIPATION OF *AMICUS CURIAE* IN THE ETHIOPIAN CONSTITUTIONAL INTERPRETATION PROCESS: EXAMINING ITS CONSTITUTIONAL-LEGAL BASIS AND PRACTICAL RAMIFICATIONS

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ABSTRACT

The participation of amicus curiae in the Ethiopian constitutional interpretation process is a recent phenomenon. The Council of Constitutional Inquiry (CCI), while it was entertaining the constitutional interpretation case which was referred to it from the House of Peoples' Representatives in relation to the 2020 national election postponement case, admitted amicus briefs from different professionals before offering its recommendations to the House of Federation (HoF). The CCI also conducted a public hearing in which different amici curie presented their opinions on the case. Until now, no full-fledged study is conducted on the constitutional-legal basis, theoretical underpinning and practical repercussions of the participation of amicus curiae in the constitutional interpretation process in Ethiopia. As a result, there is a knowledge gap in the area. This article attempts to fill this gap by undertaking a thorough examination of the constitutional-legal basis, theoretical underpinning and practical ramifications of the participation of amicus curiae in the Ethiopian constitutional interpretation process with particular reference to the election postponement case. The article employed doctrinal legal research method and it is guided by the interpretivist epistemology framework. Primary data sources such as the constitution of the country, subsidiary legislations and relevant rules of international law were used. Besides, secondary data sources such as books and journal articles were considered. The article also examined the issue from the perspective of comparative amicus curiae practice in the constitutional interpretation cases of other carefully selected countries. The article used qualitative data analysis method. It concludes that the participation of amicus curiae in the case at hand has an implied constitutional-legal basis and it has offered both virtuous lessons to be built upon and defective lessons to be rectified. Finally, the article recommends that the CCI and the HoF should come up with rules that, ex ante, regulate amicus procedure to make the utmost use of such practice.

Key words: *Amicus curiae*, Constitutional Interpretation, Election Postponement Case, Human Rights, Federal-Regional-Balance

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1. INTRODUCTION [1]

> *Although amicus participation may occur in any number of disputes, it may be most helpful in less traditional litigation, such as challenges involving fundamental rights and freedoms, economic and social rights, gender discrimination, or election disputes. These cases are multivariable and almost always require information that lies beyond a judge's experience and training. Moreover, reaching the right decision is never more important than in these cases since the impact will be felt throughout many communities and for years to come* (Christopher Kerkering and Christopher Mbazira 2017).

On 8th April 2020, Ethiopia proclaimed a national emergency decree through proclamation no. 3/2020 in order to contain the spread of COVID-19 pandemic. Adding fuel to the fire, the country was trapped in another uneasy situation, that was, the overlap of the sixth national election with the outbreak of COVID-19. Claiming the obstacle posed by the pandemic and the concomitant emergency decree, the National Election Board of Ethiopia (NEBE), the constitutionally mandated election management body in the country, made a report to the House of Peoples' Representatives (HPR) explaining that it would be unable to conduct election within the constitutionally provided timeframe.[2] The HPR accepted and approved the report of the NEBE. Even though the constitution of the country stipulates for

[1]I want to make a clear demarcation in order to avoid confusion and contradictions. The gist of this article is not to examine the constitutionality or practical feasibility of settling the election postponement case through 'constitutional interpretation'. The only aim of this article is to examine the constitutional-legal basis, theoretical underpinning and practical repercussion of admitting *amicus curiae* in the constitutional interpretation process at hand. In case the article makes some comments on the constitutional interpretation issue itself, it is only to indicate the positive or negative impact such interpretation process has on the effectiveness of using *amicus curiae*. As such, narrating the long history of constitutional interpretation case at hand is necessitated not in its own sake, but to show the context that required the participation of *amicus curiae*. So, every road in the article ultimately leads to *amicus curiae*.

[2] HPR is the Ethiopian parliament that is mandated by Art. 55 of the country's constitution with legislative power over the matters that fall under the jurisdiction of the federal government.

a limited government that has to be elected through free, fair and universal suffrage each five year, it does not offer a clear guidance as to the possibility of postponing election in case of national emergency situations that make the conduct of election difficult to undertake. Owing to this constitutional lacuna (which some call "constitutional crisis"), the HPR has requested the House of Federation (hereafter the HoF) through the Council of Constitutional Inquiry (Hereafter the CCI) to interpret Arts. 54 (1), 58(3) and 94 of the Constitution and to decide on the manner of governing the country amid COVID-19 borne national health emergency situation until the sixth national election takes place after the disappearance of the pandemic.[3] With a view to solicit professional assistance on the issue, the CCI has made a public call for the submission of *amicus* briefs and some legal experts have made the submission accordingly. Even more, the CCI has conducted a kind of "public hearing" on which the *amici curiae* presented their oral statements in relation to the constitutional interpretation request presented before it. Given the unprecedented nature of such grand constitutional issue in relation to election in the history of Ethiopian constitutional interpretation, some called the phenomenon a "constitutional moment"[4]. Others saw it as a political opportunism, implicating that the incumbent regime has manipulated the COVID-19 pandemic as a pretext to postpone election under the shield of constitutional interpretation so as to get more time to consolidate its power. The case could be mentioned as a "hard case" (in the sense of Dworkin's theory of adjudication).

[3]The CCI is an organ that is established by the Ethiopian constitution to investigate constitutional dispute and to recommend solution to the HoF as understood from the cumulative reading of Arts.82 and 84 of the constitution of the country. The HoF is the upper house in the Ethiopian federation that is mandated with the power to interpret the constitution as stipulated under Arts. 62(1) cum. 82 (1). The articles of the constitution which were referred for interpretation stipulate the following matters. Art. 54 (1) reads that "members of the House of Peoples' Representatives shall be elected by the People for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot. Whereas, Art. 58 (3) provides that "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. Art. 94 of the Constitution regulates the issue of state of emergency, but it does not give direct hint as to the path that should be taken if the state of emergency is the one that makes national election impossible to conduct.

[4] In the present sense, the term "constitutional moment" is used to explain the special opportunity or occasion of dealing with constitutional issue of high importance.

Relying on the provisions of the constitution and subsidiary laws of the country and by drawing insights from comparative constitutional interpretation jurisprudence in which *amici curiae* have participated, this article undertakes a two stage evaluation of the participation of *amicus curiae* in the election postponement case at hand. At the first stage, it evaluates the constitutional-legal basis and theoretical underpinning of admitting *amicus curiae* in constitutional interpretation process under the Ethiopian constitutional order. I will call this first stage evaluation a *"constitutional-legal basis and theoretical underpinning"* test.

At the second stage, the article critically evaluates the practical repercussions of the participation of *amicus curiae* in the case at hand by taking two main issues into consideration. The first is whether the participation of *amicus curiae* in the election postponement case at hand has adequately served to safeguard human rights, mainly the electoral rights of citizens and the collective right to self-determination of Nations, Nationalities and Peoples that is characterized as the defining feature of the Ethiopian federation. The second is whether the participation of *amicus curiae* has been undertaken in a way that takes into account the constitutional scale of the federal-regional-balance. I will generally call the second stage evaluation a "*human rights and federal-regional-balance*" test.

The article is confined to the subject of the participation of *amicus curiae* in the case at hand rather than the constitutionality or otherwise of the constitutional interpretation alternative taken by the country in postponing the sixth national election. To accomplish the aforementioned two tiers of evaluation, the article is divided into six sections. The first section generally introduces the overall component and objective of the article followed by the second section which explores the meaning and historical evolution of *amicus curiae*. The third section elaborates on the status of *amicus curiae* under comparative law at the level of the two gigantic legal systems – Civil Law and Common Law. Section four, which is the core of the article, undertakes a two tier evaluation of the admission of *amicus curiae* in the election postponement case at hand. First, it evaluates the constitutional-legal basis and potential utility of admitting *amicus curiae* in constitutional interpretation process under the Ethiopian constitutional order. Second, the article critically evaluates whether the participation of *amicus curiae* in the election

postponement case under consideration has adequately served to safeguard human rights, mainly, the electoral rights of citizens and the right to self-determination of Nations, Nationalities and Peoples that is seen as the hallmark of Ethiopian federation and whether it has properly kept the scale of the federal-regional balance. Section five brings the article to an end by a way of conclusion while section six offers some feasible recommendations.

2. *AMICUS CURIAE:* MEANING AND HISTORICAL EVOLUTION

Amicus curiae (plural *amici curiae*), Latin for friend of court, is a non-litigious party to litigation that assists courts to reach a decision on areas of the law it (the *amicus curiae*) regards as complex and beyond its (courts') expertise.[5] There is no unanimity among scholars as to the exact origin of *amicus curiae*. However, there appears to be relative consensus among the scholars studying the subject that its beginning was in Roman law.[6] Under Roman law, the *amicus,* at the court's discretion, provided information on areas of law beyond the expertise of the court.[7] Such *amicus* was usually court-appointed and offered non-binding opinions on law unfamiliar to the court.[8] For those who

[5]Amanda Spies, 'Amicus Curiae Participation, Gender Equality and the South African Constitutional Court' (PhD Dissertation, University of Witwatersrand, 2014). However, it has to be understood that owing to the flexible nature of *amicus curiae* institution, the definition given here is not universal. Cf. S. Chandra Mohan, *The amicus curiae: Friends no more?* Singapore Journal of Legal Education (2010), Vol.2 <https://ink.library. smu. edu.sg/sol_ research/975> accessed 27 June 2021

[6] Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?* The American University Law Review (1992), Vol. 41, Pp1243, 1249. See also Katia Fack Gomez, *Rethinking the Role of Amicus curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest,* Fordham International Law Journal (2012), Vol. 35, Pp 513, 516; Allison Lucas, 'Friends of the court? The ethics of amicus Brief Writing in First Amendment Litigation, Fordham Urban Law Journal (1999),Vol.25,No.5, Pp 1605, 1607https://ir.lawnet.fordham.edu/ulj/vol26/iss5/12 accessed 27 June 2021. Cf. Mohan, as cited in S. Chandra Mohan, *supra* note 5. Mohan tries to note the controversial nature of the historical origin of amicus curiae. To put in his exact words, he writes "To many scholars the exact origin of the amicus curiae is unclear and remains controversial. One commonly held view is that it had its origins in the common law despite its presence in civil law jurisdictions. The other view, shared by the writer (Mohan himself) is that it most probably originated during Roman times. This is because the Roman practice of appointing a *consilium* or group of independent advisors to magistrates is in keeping with the appointment and use of the amici in all aspects of Roman life. Occasionally, the amicus curiae's origin is attributed to both the common law and Roman law".

[7]Michael K. Lowman, *Supra* note 6, P.1243

[8]Allison Lucas, *Supra* note 6, P1605

advance such development trajectory of *amicus curiae* practice, it is from the practice of *amicus curiae* that originated under Roman law that it got to the English Common Law System.[9] The manner by which the *amicus curiae* has been informing the court on points of law has been known as "oral shepardizing" (the bringing up of case laws or precedents unknown to the judge) and the *amicus* is said to serve as oral shepardizer.[10] In addition to its role of "oral shepardizer," an *amicus* could also act on behalf of infants or alert the court to manifest error, such as the death of a party.[11]

Owing to the influence of the English judicial practice in the United States, the *amicus* practice entered the American Common Law System in the early Nineteenth Century (as of 1823).[12] When an *amicus* was introduced to the Common Law world (both England and the United States), the aim was to serve as an impartial friend who assists the court by helping it to avoid error, and to assist it to maintain judicial honor and integrity.[13] However, as Allison Lucas notes, the *amicus curiae*, which was a neutral friend of the court at the beginning has latter moved from neutrality to partisanship, from friendship to advocacy.[14] That is why Mohan entitled his illuminating article on *amicus curiae* as "*amicus curiae*: Friends no more?" with a view to indicate how the institution which was previously seen as friends of the court gradually turn out to be guardians of partisan interests.[15]

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[9] *Ibid.* See also, Center for International Environmental Law, Protecting the Public Interest in International Dispute Settlement: The *Amicus Curiae* Phenomenon (2009) < www.ciel.org > accessed on June 27, 202. However, it has to be made clear that the literatures that historicize the coming of *amicus curiae* practice from Roman law to common law do not tell us the manner through which it got from Roman law to common law.

[10] Michael K. Lowman, *Supra* note 6.

[11] Ibid.

[12] Ibid.

[13] *Ibid*. Lowman also notes that although the *amicus curiae* device originally served as the judiciary's impartial friend, the common law maintenance of an adversary judicial process gradually undermined this role. Common law procedures were based on the theory of "trial by duel. Here, the parties were deemed to be the masters of the suit. Under common law procedure, it was the parties' sole privilege and prerogative to control the course of the litigation, free from a stranger's interference. As a result, the common law system was particularly resistant (inflexible) to expanding third-party involvement at the trial level. Later on, in response to the potential inequity of the common law adversarial system, common law courts gradually molded the *amicus curiae* device into an informal judicial method of representing third-party interests previously ignored under the adversarial system.

[14] Allison Lucas, *Supra* note 6, P1605

[15] Mohan, Cf. S. Chandra Mohan, *Supra* note 6.

Talking at the level of the two gigantic legal systems, the literature relating to the evolution of *amicus practice* in Civil Law jurisdiction indicates that it is a recent phenomenon. In this respect, Stephen Kochevar once wrote:

> Historically, *amicus* briefs did not appear in modern Civil Law[16] jurisdictions. Today, although Civil Law *amicus* practice is by no means universal, *amicus* briefs appear, formally or informally, in Civil Law courts around the world. This broad development can be split into two trends. First, various Civil Law Jurisdictions have formally recognized *amicus* activity through rules, statutes, or court decisions. Second, NGOs regularly submit *amicus* briefs to Civil Law courts, even when such courts have adopted no formal mechanisms to accept their submissions. Both trends are interregional and relatively recent.[17]

As understood from the above quote, even though modern Civil Law is believed to be descended from the early Roman Law, it does not precede the Common Law in practicing the *amicus* procedure. The question now is where Ethiopia stands in the Common-Civil Law divide in relation to *amicus* practice. This issue is dealt in depth under the fourth section. Under the present section, it is sufficient to have a general picture of the institution of *amicus curiae* and its development trajectory under the Common Law and Civil Legal systems. What could be generally deduced in relation to the meaning and historical evolution of the use of *amicus curiae* is that there are variations at general comparative law level (at Common and Civil Law) and even in individual jurisdictions as to the meaning ascribed to the practice and the growth path it has been going through.

[16]Even though Kochevar has not made clear what he exactly mean by "modern civil law" or where the old/traditional civil law ends and the modern civil law begins, two possible meaning may be implied from the whole body of the article and from general literature on common law legal system. The first is that modern civil law could be contrasted with Roman law which is often described as an intellectual ancestor of the civil law legal system. The second possibility is that modern civil law refers to codified civil law as opposed to the fragmentary pre-codification civil law.

[17]Stephen Kochevar, '*Amicus Curiae* in Civil Law Jurisdictions' (2013) 122 Yale Law Journal 1653

Apart from the meaning and historical evolution of *amicus curiae* in early Roman Law, in Common Law and under Civil Law Legal Systems, the other point to consider under this section is whether *amicus* issue is considered as a substantive or procedural matter. The existing literature on *amicus curiae* elaborate that in countries that have clearly recognized the *amicus* practice in their laws, the matter is incorporated in their procedural laws rather than in substantive laws.[18] This indicates that *amicus curiae* participation is a matter of procedure than substance. To offer one example, *amicus curiae* is recognized under Art. 22 (3) (e) of the 2010 Constitution of Kenya and under the rules of court proceeding on the enforcement of the bill of rights, known as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013. Under the rules, friend of the court is defined as an independent and impartial expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise.

The other issue is whether only individual professionals (mainly professional lawyers) could be admitted as an *amicus curiae* or whether organizations could be admitted as such too. As Allison Orr wrote (in the context of the American *amicus practice*), those who stand as *amici* were originally individual professional lawyers, not organizations.[19] However, since the early 1990s, both individuals and different governmental and non-governmental organizations are participating as amicus curie.[20]

Another equally important point to consider under the present section is whether *amicus curiae* practice relates only to the factual or legal aspects of a given case or to both. The existing literature indicates that the *amicus curiae* submission might relate to both question of law and fact. In *Hoffman v. South African Airways*, the Constitutional Court of South Africa, under paragraph 64 of its ruling stated that:

[18]John Mubangizi and Christopher Mbazira, *Constructing the Amicus Curiae Procedure in Human Rights Litigation: What can Uganda Learn from South Africa*, Law, Democracy and Development (2012), Vol.16, p199

[19] Allison Orr Larsen, 'The Trouble with *Amicus* Facts' 100 Virginia Law Review (2014) 1757

[20] *Ibid.*

> *Amicus curiae* assists the Court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the Court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.[21]

In similar vein, Adem K. Abebe also wrote that *amicus curiae* engages in a given case by offering a court information on points of law or fact.[22]

The last point worth mentioning here is the difference between *amicus curiae* and third party intervener. In this regard, Palchetti observes that unlike third party intervener, the *amici curiae* would not become parties to the case nor be bound by the court's decision; they would not necessarily be entitled to have access to the pleadings and other documents of the case. Their participation to the proceedings would be limited simply to the submission of briefs presenting their views on specific questions.[23] Similarly, Obonye wrote that:

> … although an *amicus* intervention is a third-party procedure to all intents and purposes, it must not be conflated or confused with the classical third-party intervention, with which it cohabits the same conceptual space. While intervening third parties are mostly parties to the treaty with the necessary *locus standi* and intervene in proceedings to protect their right(s) or legal interest(s) which are likely to be affected by the expected judgment of the court, an *amicus curiae* may not have any specific legal interest in the

[21]Amanda Spies, *Supra* note 5.
[22]Frans Viljoen and Adam Kassie, *Amicus Curiae Participation Before Regional Human Rights Bodies in Africa,* Journal of African Law (2014), Vol.22, P58
[23] Paolo Palchetti , Opening the International Court of Justice to Third States (2002) 6 Max Planck UNYB 139, 166

> dispute but nonetheless intervenes to bring information that is relevant for the resolution of the matter before the court.[24]

The historical origin of the institution of *amicus curiae* being where it may and the development trajectory of the institution being as it may, the undeniable truth this date is that the participation of *amicus curiae* before the adjudicatory bodies of different countries is an undeniable fact and it is also on an increasing rate.[25] Its theoretical underpinning is serving the interest of justice by assisting the adjudicatory organ. *Amicus curiae* practice is now common in South Africa, Kenya, Canada, United States and in many other countries and both individuals and different organizations such as Non-Governmental Organizations (NGOs)[26] are participating in different cases as *amicus curiae*. The type of cases in which *amicus curiae* participate also encompasses many areas that includes, but not limited to environmental issues, issues relating to human rights litigation, election cases, constitutional interpretation cases and criminal cases. The manner in which the *amicus curiae* participates in a given case could be through the submission of *amicus* brief or both by submission of *amicus* briefs[27] and by presenting oral information (argument) to the adjudicatory organ.

[24]Jonas Obonye, The Participation of *Amicus Curiae* in the African Human Rights System (PhD Dissertation, University of Bristol, 2018).

[25]Nowadays, the practice of *amicus curiae* is not confined to domestic jurisdictions alone. It is also getting its way to international adjudication process. One area of international adjudicatory process in which amicus curiae is now in practice is

[26] For instance, as Allison Lucas writes, The American Civil Liberties union, for instance, is playing a tremendous role as amicus curiae through the amicus briefs submission it makes to different levels of courts in the United States (See Allison Lucas, *Supra* note 6, Pp 1605, 1608).

[27]'*Amicus* briefs' simply refers to a written document which states the position of a given amicus curiae on a factual or legal or both aspect of a given case and being submitted to a given adjudicatory organ.

3. PARTICIPATION OF *AMICUS CURIAE* IN CONSTITUTIONAL INTERPRETATION PROCESS AND ITS SIGNIFICANCE: PRACTICAL LESSONS FROM SOME SELECTED COUNTRIES

This section elaborates on how *amicus curiae* could serve in safeguarding human rights in the process of constitutional interpretation by drawing insights from comparative practice. The countries selected are Kenya, South Africa and Albania with aim of drawing some valuable lessons for Ethiopia. These countries are selected purposively based on three reasons that indicate resemblance among them. First, the countries have adopted their living constitutions in nearly the same historical periods. By ‘’living constitutions” I mean the constitutions that are currently in force in the four jurisdictions as opposed to the constitutions that were adopted and discarded in those countries historical past. The living constitution of Ethiopia, officially named the Constitution of the Federal Democratic Republic of Ethiopia, was adopted in 1994 while the living constitution of South Africa was adopted in 1996 and the living constitution of Kenya was adopted in 2010 replacing the country’s independence Constitution of the 1963. Similarly, the living constitution of Albania was adopted in 1998. Second, even though to varying degrees, of the four countries, Albania, South Africa and Ethiopia have practiced an *amicus* procedure in their constitutional interpretation process. Whereas, Kenya, as the only country in the world that has heretofore explicitly recognized *amicus curiae* in its living constitution is, for stronger reason, included into the selection. Besides, as the three countries in the selection are in the African continent, they share some common (if not uniform) socio-economic, political and cultural settings. It should be clear from the outset that as the gist of this article is the issue of *amicus curiae* in the constitutional interpretation process, it does not delve into the comparison of *amicus* practice in other areas of adjudicatory processes except as a matter of co-incidence.

3.1.PARTICIPATION OF *AMICUS CURIAE* IN THE SOUTH AFRICAN CONSTITUTIONAL INTERPRETATION PROCESS AND ITS SIGNIFICANCE

South Africa is one of the African countries with rich practice of *amicus curiae* participation in the process of constitutional interpretation. Regarding the

status of the institution of *amicus curiae* in the country's constitutional interpretation process, Amanda Spies wrote:

> Although not unknown in South African law, *amicus curiae* participation was previously restricted to the English Common Law understanding of primarily assisting the court, or a litigating party, with regard to a specific legal requirement. The Constitution of South Africa entrenched a new constitutional democratic order in which the principle of participatory democracy was firmly established. This favorable constitutional climate and the establishment of the Constitutional Court as the highest court in all constitutional matters played an important role in establishing and developing the new-found role of *amici curiae*. The Constitutional Court was the first to adopt specific rules that regulated *amicus curiae* participation and has set the benchmark for *amicus* participation, remaining the preferred court in which to lodge these applications.[28]

As clearly observed from the preceding quote, the practice of *amicus curiae* in the South African constitutional order is rooted in the very fabric of constitutional right to democratic participation and this is favorably put into practice through the positive role played by the country's constitutional court by enacting the rules of the game for *amicus* procedure and by admitting *amicus* briefs in the process of constitutional interpretation cases it has been entertaining. The relevant rule that the constitutional court adopted for the regulation of *amicus curiae* participation is known as "rule 10".[29] According to the rule, the admission of *amicus curiae* is dependent on the written consent of the litigating parties except in the situation in which the chief justice of the court might allow *amicus curiae* participation in the absence of written consent of the parties.[30] The constitutional court has elaborated on the significance of *amicus curiae* in *Minister of Health v. Treatment Action* Campaign (as cited in Amanda Spies) by arguing that:

[28]Amanda Spies, s*upra* note 5.
[29] *Ibid.*
[30] The South African Constitutional Court Rules, Rule 10.

> The role of an *amicus* is to draw the attention of the Court to the relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the Court. Ordinarily, it is inappropriate for an *amicus* to try and introduce new contentions based on fresh evidence.[31]

Mubangazi also tells us that the significance of the role of *amicus curiae* has been acknowledged and recognized in South Africa through legislative and judicial practice.[32] Legislatively, provision was first made for *amicus curiae* through the Constitutional Court Rules in 1995. In the year 2000 a rule modelled upon the Constitutional Court Rule 10 was introduced into the rules regulating such practice in the High Courts of the country. Essentially, Rule 10 of the Constitutional Court Rules provides guidelines as to who can act as an *amicus curiae* in a Constitutional Court hearing. In that regard, the rule provides that any person interested in any matter before the Court may, with the written consent of all the parties, be admitted as an *amicus curiae*. Under Rule 10(4), if consent is not given by the parties to the case, an application may be made to the Chief Justice of the Court. The rule also provides for the form and content of an *amicus curiae* application. Essentially, the application should briefly describe the interest of, and the position to be adopted by, the *amicus*. It should also set out the submissions and state their relevance to the proceedings. Rule 16A of the High Court Rules, which is drafted along the same lines as Rule 10 of the Constitutional Court Rules, provides for submission by *amicus curiae* in th High Court.[33]

The literature indicates that *amicus curiae* has been playing a crucial role in advocating human rights in the constitutional interpretation process.

[31] '*Amicus Curiae* Participation, Gender Equality and the South African Constitutional Court' (PhD Dissertation, University of Witwatersrand 2014) as cited in Amanda, *supra* note 5.
[32] Mubangizi and Mbazira, *supra* note 18.
[33] *Ibid.*

According to Mubangazi, the prevalence of *amicus curiae* participation in South Africa in human rights litigation has to be appreciated in two contexts. The first is the general context of public interest litigation which was born out of the apartheid era as part of the political struggle in which human rights activists and civil society organizations sought to fight the apartheid regime through advocacy, mobilization and litigation. With the advent of democracy, there was "an inevitable shift from challenging an unjust system towards litigating cases that are aimed at enforcing rights enshrined in the Constitution." This has been greatly helped by the liberal position adopted by the South African Constitution on *locus standi* for those wishing to enforce the rights in the Bill of Rights of the Constitution by litigating in the public interest. Although, technically, *locus standi* can be distinguished from the *amicus curiae* procedure, the courts have applied the same *locus standi* flexibility to the *amicus curiae* procedure.[34]

The second is that the role of *amicus curiae* has to be seen in the context of the prevalence of human rights NGOs in South Africa. Again, due to its unique history, South Africa is known to have numerous human rights NGOs.[35] Many of these NGOs have either used the liberalized standing requirement to initiate court cases or have sought to be admitted as *amicus curiae* on behalf of individuals or groups in litigation on various human rights issues. Indeed, in many of the case discussed earlier, most of the parties that appeared as *amici curiae* were NGOs. In this respect, the Treatment Action Campaign (TAC), the Freedom of Expression Institute (FXI) and the Institute for Democracy in South Africa have been particularly active and most successful. To that list should be added Lawyers for Human Rights (LHR) which has been involved in several Constitutional Court cases including the famous *S v Makwanyane and others* which abolished the death penalty. In addition to NGOs, university-based research centers and law clinics have also played a big role in developing the *amicus curiae* procedure. These centers have taken advantage of their research capacity to make precise and clearly pointed intervention supported by research evidence. Examples in this regard include the Community Law Centre (CLC) at the University of the Western Cape, the

[34] *Ibid.*
[35] *Ibid.*

Centre for Child Law at the University of Pretoria, and the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand.[36]

The other example of constitutional interpretation cases having human rights issues and in which the constitutional court has admitted *amicus* participation is the *Omar v. Government of the Republic of South Africa and Others*.[37] The applicant was challenging the validity of the Domestic Violence Act section 8 which mandated the issuance of an arrest warrant pursuant to a criminal protection order. The Court dismissed the application and held that the possibility that complainants will exploit, manipulate or misuse the procedure provided by section 8 did not render the Act unconstitutional. The Commission for Gender Equality was the only *amicus* admitted in this matter. The Commission advanced submissions dealing with the context of the Domestic Violence Act, the context of the present application, the constitutional framework within which the application falls, the relevant international law instruments, the legislative scheme in respect of section 8, the legislative history and background thereto as well as the constitutional imperatives sought to be advanced. More importantly, they argued that the recognition and protection of the right of every person to physical safety and integrity was recognized by the South African courts even prior to the advent of the current constitutional democracy. Furthermore, they argued that this right is now entrenched in section 12(1) (c) of the Constitution and is bolstered by several other related rights. These *amicus* submissions were of great assistance to the court and many of them were clearly taken into consideration in arriving at the decision as reflected in the judgment.[38]

The other relevant case is *Mazibuko and Others v City of Johannesburg and Others.*[39] Mazibuko and four other residents of Phiri, Soweto challenged, firstly, the City of Johannesburg's Free Basic Water policy in terms of which six kilolitres of water were provided monthly for free to all households in Johannesburg and, secondly, the lawfulness of the installation of prepaid water meters in Phiri. The three respondents were the City of Johannesburg, Johannesburg Water and the national Minister for Water Affairs and Forestry.

[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*

The Centre on Housing Rights and Evictions (COHRE) (an international non-governmental organization which works to promote and protect economic, social and cultural rights) was admitted as *amicus curiae* to address the issues that arose in the appeal in the context of international and comparative law on the right to water. The Constitutional Court held, firstly, that section 27 (of the constitution) places an obligation on government to take reasonable legislative and other measures to seek the progressive realization of the right to water and, secondly, that the installation of the meters was neither unfair nor discriminatory. COHRE's role was crucial as it addressed the court on important issues, including; the duty to consider international and foreign law, the right to water in international law, the positive right to free basic water, the negative right to water, the procedural challenge to pre-payment meters and the equality challenge.[40] What we could understand from the above case is that *amicus curiae* is important in assisting the court in disposing constitutional issues in general and in upholding human rights in the constitutional interpretation process in particular.

3.2.PARTICIPATION OF *AMICUS CURIAE* IN THE KENYAN CONSTITUTIONAL INTERPRETATION PROCESS AND ITS SIGNIFICANCE

In Kenya, the role of *amicus curiae* has been recognized only in a limited way until the adoption of the 2010 Constitution of the country which gives an explicit and broader recognition to *amicus curiae*.[41] The situation changed radically with the introduction of the constitution. The country, unlike any other jurisdiction, has incorporated the friend of the court within its constitution.[42] It is worthwhile to reproduce the relevant provision of the constitution as follows:

> 'An organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court'.

It has to be noted that under the Kenyan Constitution, the explicit recognition given to *amicus curiae* as quoted above is found under chapter 4 of the very

[40] *Ibid.*
[41] Kerkering and Mbazira (eds), Supra note 18; See also the 2010 of Kenyan Constitution, Art.22 (3) (e).
[42] *Ibid.*

constitution which stipulates the bill of rights. This is an indication of the trust that the Constitution attaches to the institution of *amicus curiae* in assisting the prevalence of human rights. Besides, it provides as procedural tool for the enforcement of human rights and the power to make rules for these procedural rules for the enforcement of human rights, including rules of *amicus* procedure is, vested in the chief justice.[43] Based on the power constitutionally conferred on him, the chief justice has come up with "The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013".[44]

Amicus is especially welcome in constitutional cases, which inherently involve issues in the public interest. These cases require a nuanced perspective that the parties may not be able to provide but that *amicus* can.[45] In Kenya, unlike the case of the three other countries in the selection[46], there is no separate adjudicatory organ entrusted with constitutional interpretation. Constitutional interpretation power is vested in the ordinary courts of the country.[47] Accordingly, original jurisdiction on constitutional interpretation is vested in the high court of the country and anyone who is dissatisfied with the decision of the high court can appeal to the court of appeal and still it is possible to appeal to the Supreme Court of the country if one is not satisfied with the decision of the court of appeal.[48] This indicates that *amicus curiae* participation in constitutional interpretation could take place at each level of these three layers of courts.

One example of constitutional interpretation cases in which human rights issue was at stake is the *Federation of Women Lawyers (FIDA-KENYA) and*

[43]Christopher Kerkering and Christopher Mbazira (eds), *Friends of the Court and the 2010 Constitution: The Kenyan Experience and Comparative State Practice* on *Amicus Curiae* (Kenyan Judicial Training Institute 2017); Kenyan Constitution, Art. 22 (3) (e), P32

[44].*Ibid.*

[45]Id., P83

[46]In Albania and South Africa, constitutional interpretation is entrusted to special entities called constitutional courts while this power is entrusted to a separate organ called House of Federation in Ethiopia.

[47] Among others, the high court has a bench called "Constitutional and human rights division"

[48] See cumulatively Arts. 165 (3) (d) 164(3) (a) and 163 (4) (a) of the 2010 Constitution of Kenya.

et al v the Attorney General and et al.[49] The history of the case looks like the following: JMM, an 18 years old girl was raped by an older man in 2014 and got pregnant. She received unsafe abortion from an unqualified "doctor" on 8th December 2014 and consequently suffered from health and financial risk. Her mother and legal representative, PKM (2nd petitioner) and others such as FIDA KENYA (1st petitioner) sued many respondents such as the Ministry of Health. The first respondent is Kenyan Attorney General. The petitioners' arguments involve the following: PKM, the mother of the victim and the second petitioner in the case argued that the government of Kenya, through the Ministry of Health national guidelines on the management of sexual violence in Kenya, second edition (2009 guidelines), made pursuant to section 35(3) of the sexual offenses act of the country, allowed termination of pregnancy occurring as a result of rape. But, no clear information is put as to the manner by which this legal termination of pregnancy could be achieved. They contend that the physical and mental health of many women and adolescent girls would be protected if information was available with regard to the cadre of health professional that can provide services for legal termination of pregnancy. In September 2012, the Ministry of Medical Services issued the 2012 standards and guidelines and the training curriculum. However, argued PMK, the 3rd respondent (Director of Medical Services (which is structurally regulated under the second respondent, the Ministry of Health) has withdrawn the 2012 standards and guidelines for reducing morbidity and mortality from unsafe abortion in Kenya (2012 standards and guidelines), and the national training curriculum for the management of unintended, risky and unplanned pregnancies (the training curriculum) on 3rd December 2013 and 24th February 2014, respectively. In this memo (letter) of 24th Feb 2014, the Director of Medical Services (DMS) directed all medical service workers not to participate in any training on safe abortion and use of medabon (the drug that procures abortion). It stated that anybody attending the trainings or using the drug medabon would be subjected to appropriate legal and professional proceedings. The Director of Medical Services went on to state in the memo that "the 2010 Constitution of Kenya clearly provides that abortion on demand is illegal and as such there was no need to train healthcare

[49] FIDA is Spanish acronym for "International Federation of Women Lawyers" and its full Spanish name is Federation International De Abogadas. FIDA-KENYA is the Kenyan branch of FIDA that works for the rights and interests of women in Kenya.

workers on safe abortion or importation of medicines for medical abortion". PMK claimed that this withdrawal undermines the right to access safe legal abortion services, therefore leading to women and girls in the position of JMM (the victim) to secure unsafe abortion from unqualified and untrained persons such as the doctor who procured her abortion on 8th December 2014. It left a gap and exposed JMM and others in her position to a denial of, *inter alia*, their reproductive health rights. They also said Art. 64(4) of the Constitution exceptionally allows abortion. The petitioners argued the withdrawal (DMS Directives) impose a disproportionate burden on survivors of sexual violence by conditioning permitted abortion services upon finding a trained health professional from already extremely limited pool of providers. As a result, he recklessly endangered JMM's life by creating an environment where she could not realistically access safe abortion services. PMK's position is supported by the third and fourth petitioners.

The first respondent was Kenyan Attorney General and it is sued as the principal legal adviser to the government pursuant to the provisions of Art.156 of the Constitution. The second respondent was the Ministry of Health which is responsible for the development of policies aimed at the provision of high quality and affordable health care for the people of Kenya. The Ministry is also charged with the development of well trained and motivated workforce of health professionals with the ability to adequately respond to any public health related issues and emergencies. As a relief, the petitioners requested that the court declare the action of the government as violations of constitutional rights of JMM to the highest attainable standard of health and to benefit from scientific progress in health, the right to health related information, to pay compensation for JMM and to reinstate these withdrawn guidelines to function.

Three organizations were joined to the petition as *amici curiae.* One was Women's Link Worldwide (WLW) – the organization that works on the advancement of human rights of women and girls. Relying on the Inter-American Court of Human Rights case of *Artavia Murillo et al (in Vitro fertilization v Costa Rica*[50]*, it* argued that the right to life from conception

[50]In this case, the Inter-American Court of Human Rights ordered Costa Rica to lift its unique ban against in vitro fertilization (IVF), rejecting Costa Rica's argument that embryos had personhood and full human rights in pursuance of article 4(1) of the American Convention on

(which is recognized under the Kenyan Constitution) is not absolute and cannot be used to restrict other rights disproportionately, or to discriminate and that the right to life from conception does not give pre-natal life the status of a person. Regarding the right to benefit from scientific progress of sexual and reproductive health, WLW argued that this right is recognized in Art. 11 of the constitution which provides, "The state shall recognize the role of science…in the development of a nation'' and it is also recognized in article 33(1) which provides that "every person has…the right to freedom of scientific research. The 3rd respondent violated this right by restricting access of women and girls in Kenya to scientific progress by banning the safer, affordable, less invasive and up-to-date option (medabon) which has been made available by science and approved within the country as essential.

The second was National Gender and Equality Commission (NGEC) – a constitutional commission established pursuant to Art 59(4 and 5) of the Constitution with the overall mandate of promoting gender equality and freedom from discrimination in accordance with Art. 27 of the same Constitution. It relied on National Gender and Equality Commission of Kenya and UN women Report 'Determining the economic burden of gender-based violence to survivors in Kenya' (2015) and argued that sexual violence imposes both direct and indirect costs on women and girls, their households and the society. The Commission also referred the court to the recent changes in law in other countries in Africa, which now provide guidance on how to ensure access to safe and legal abortion for survivors of sexual violence. The Commission raised that in 2005, Ethiopia reformed its Criminal Code Art.551 to specifically and clearly allow for abortion in case of rape and incest. Furthermore, the Ministry of Health in Ethiopia has provided clarity by providing guidelines in the form of the family health department technical and procedural guidelines for safe abortion services in Ethiopia (2006). The guidelines clarify that women need not provide any documentation concerning rape: their request for abortion and pregnancy results from sexual violence is sufficient to obtain a legal abortion. The guidelines further provide that health

Human Rights. Some organizations such as the Center for Reproductive Rights, the Allard K. Lowenstein International Human Rights Clinic at Yale Law School and the University of Toronto have participated in the case as *amicus curiae* for the claimants. Besides, some organizations such as Human Life International and the University of St. Thomas School of Law participated in this case as *amicus curiae* for the defendant.

providers will not be prosecuted in the event the women's allegation is eventually proven false.

The third was the Kenyan National Commission on Human rights (KNCHR) which is established as per Art. 59 (1) of the Constitution. It has the constitutional mandate to promote, respect, protect and observe human rights and develop a culture of human rights in Kenya. The Commission confined its submissions to analyzing the question whether the lack of a statutory and physical framework to protect, facilitate and implement the right under Art. 26(4) violates women and girls right to life, dignity and freedom from torture and cruel, inhuman or degrading treatment, right to equality and non-discrimination, right to information, right to goods and services of reasonable quality, among others. It was its submission that the phrase "If permitted by any other law" as used in Art. 26 (4) means that besides constitutional exceptions, laws can permit abortion based on other grounds. It noted the provisions of section 35(3) of the sexual offenses act in this regard. It submitted that the 2009 national guidelines, although developed before the 2010 Kenyan Constitution, reflect the spirit of Arts. 26 (4), 28 and 29 (d) and (f) of the Constitution. It submitted that the withdrawal of the 2012 standards and guidelines and the training curriculum have the effect of interfering with the availability, accessibility, acceptability and quality of health care services to women and that they had the further effect of imposing a particular hardship to poor and rural women seeking the same services. It argued that forcing a woman to keep pregnancy resulting from sexual abuse is in contravention of Art. 29 (d) and 25 (1). Further, it was Kenyan National Commission on Human Rights' submission that both Arts. 2(4) and 165(3) (b) give this court the power to invalidate any act or omission that is in contravention of the Constitution. This power of the court is consistent with the obligation of the court to be the final custodian of the Constitution.

On 12th June 2019, the Constitutional and Human Rights Division of the High Court of the country ruled that the withdrawal of the guidelines by the DMS violates Arts. 10 and 47 of the Constitution and it also disabled the efficacy of Art. 26 (4) of the Constitution and rendered it a dead letter and it *ultra vires* the powers of the DMS since those powers are bestowed upon the board. It violated the right to the highest attainable standard of health provided under Art. 43 (1) (a). It also ruled that PMK, who was personal representative of the

JMM during the time the JMM was suffering (and who is representative of JMJ in court proceedings as well (JMM died in the course of the proceeding before decision) must be compensated by the government for the material and emotional harm she suffered by relying on Art. 23 of the Constitution. It fixed the amount of compensation to 3,000,000 (three million) Kenyan shillings. It also indicated in its decision that this compensation is a remedy under public law and it does not exclude or replace a compensation that exists as a remedy under private law in tort actions.

All that could be discerned from the above case is that the role of *amicus curiae* in assisting the adjudicatory organ to arrive at a balanced decision and in upholding human rights is so vital especially when issues of constitutional interpretation are involved and the Kenyan High Court has made use of it.

3.3.PARTICIPATION OF *AMICUS CURIAE* IN THE ALBANIAN CONSTITUTIONAL INTERPRETATION PROCESS AND ITS SIGNIFICANCE IN ASSISTING THE ADJUDICATORY ORGAN AND FOR THE PREVALENCE OF HUMAN RIGHTS

Under the Constitution of Albania, constitutional interpretation is vested in a separate body called constitutional court.[51] The Albanian Constitutional Court is known for admitting *amicus curiae* in the process of the constitutional interpretation it undertakes. One constitutional interpretation case in which *amicus curiae* has participated and which has direct relevance with the issue of the prevalence of human rights in the Albanian Republic is the case in which the constitutionality or otherwise of the provisions of the law made by the Albanian Assembly, that is, Albanian Law no. 84/2016 *"On the Transitional Re-Evaluation of Judges and Prosecutors in the Republic of Albania (Vetting Law)* is brought before the constitutional court of the country for review. It is on October 7, 2016 that the main opposition party of the country requested the constitutional court to declare the vetting law incompatible with the constitution of the country and the European Convention for Human Rights. The constitutional court before which the constitutionality of the provisions of the law is brought for review requested the European Commission for Democracy through Law (the Venice

[51] The 1998 Constitution of the Republic of Albania, Arts. 124 through 134

Commission) to submit an *amicus* brief on the case. Among the issues on which the constitutional court requested for *amicus* brief, two of them are of significant importance in this paper as they relate to human rights issues that arise in the constitutional interpretation process.

The first is that the constitutional court requested the Commission to submit *amicus* brief whether the lack of possibility for judges and prosecutors undergoing the vetting process to challenge the decisions given by the re-evaluation institutions before domestic courts is in breach of Art. 6 (the right to a fair trial) of the European Convention on Human Rights (ECHR).[52] On this point, the Venice Commission opined that the answer to this question depends on the qualification of the Appeal Chamber in the Constitution and the Vetting Law. For the Commission, those legal texts provide sufficient elements in order to conclude that the Appeal Chamber may be considered as a specialized jurisdiction which presents judicial guarantees to the persons affected by the vetting procedure. The rights and safeguards contained in the legislative and constitutional scheme seem extensive.

The second is whether the provisions of the law concerning the background assessment are contrary to Art.8 (the right to respect for private and family life) of the ECHR. The background assessment has the purpose to verify the declarations of the judges and prosecutors being assessed with a view to determining whether they had inappropriate contacts with persons involved in organized crime. In this respect, the Commission held the view that this is a legitimate aim in view of the second paragraph of Art.8 of the ECHR (interests of national security, public safety, the prevention of disorder or crime, or the protection of the rights and freedoms of others). For the Commission, the essential consideration is that the working group which has the main role in the background assessment and is composed primarily of security personnel, functions under the supervision and control of the re-evaluation bodies and that all the relevant material before the working group should be available to them. The Commission is of the opinion that while the background assessment is undoubtedly obtrusive, it may not necessarily be seen as an unjustifiable

[52]European Commission for Democracy Through Rule of Law (Venice Commission) amicus brief to the Constitutional Court of Albania on the law on the transitional re-evaluation of judges and prosecutors (the vetting law), at its 109th Plenary Session at Venice, 9-10 December 2016

interference with the private or family life of judges and prosecutors contrary to Art. 8 ECHR.[53] This case indicates how important *amicus curiae* institution is in explicating the issues of human rights and freedoms in the constitutional adjudication process.

At this juncture, it is worthwhile to briefly state the lessons that could be drawn for Ethiopia from the practices of the participation of *amicus curiae in constitutional interpretation process* in the three countries discussed earlier. The practices of South Africa and Kenya give us the lesson that an *ex ante* enactment of the rules that regulate the participation of *amicus curiae* is essential to benefit from such participation. Besides, the practices of all the three countries teaches us that the participation of *amicus curiae* is crucial especially in constitutional interpretation cases in which human rights issues are at the center. Moreover, the South African practice enlightens us on the role that university research centers, especially, those working on legal research issues could play as *amicus curiae*. This gives us an insight that the legal research centers existing at federal and regional level in Ethiopia and the law schools in the country might play similar role if the forum is available to them.

4. PARTICIPATION OF *AMICUS CURIAE* IN THE ETHIOPIAN CONSTITUTIONAL INTERPRETATION PROCESS: EXAMINING ITS CONSTITUTIONAL-LEGAL BASIS AND PRACTICAL RAMIFICATIONS

As indicated in the introductory section, the present section undertakes a two tier evaluation of the participation of *amicus curiae* in the election postponement case at hand. At the first stage, it evaluates the constitutional-legal basis and theoretical usefulness of admitting *amicus curiae* in constitutional interpretation process under the Ethiopian constitutional order. I will call this first stage evaluation a *"constitutional-legal basis and theoretical underpinning"* test. At the second stage, the article critically evaluates two issues. The first issue is whether the participation of *amicus curiae* in the election postponement case at hand has adequately served to safeguard human rights, mainly, the electoral rights of citizens and the collective right to self-determination of Nations, Nationalities and Peoples that

[53] *Ibid.*

is characterized as the defining feature of the Ethiopian federation. The second issue is whether the participation of *amicus curiae* has been undertaken in a way that takes into account the constitutional scale of the federal-regional-balance. I will generally call the second stage evaluation a *"human rights and federal-regional-balance"* test.

Thus, this section is confined to a single recent case in which constitutional interpretation is requested regarding election postponement and the constitutional-legal dimensions thereof.[54] This is simply because of the fact that it is for the first time in the constitutional interpretation history of the country that such thing called *amicus* brief was publicly requested by the CCI and it was only in this case that a public hearing was made by the CCI by making different *amici* the participants of the hearing. For context and clarity, it is worthwhile to reproduce the history of the case as follows.

On April 30, 2020, the HPR approved the postponement of the sixth general election based on the report of the National Electoral Board of Ethiopia (NEBE) which made clear that due to COVID-19 related restrictions, it was unable to implement the planned pre-election activities such as training the election officers, voter registration and education, and dissemination of electoral materials. On May 5, 2020 the HPR decided to request the HoF for constitutional interpretation on the issue of how best to govern the country amid COVID-19 and the manner of postponing the election. The HPR then submitted its request to the HoF through the instrumentality of the CCI. After receiving the request of the HPR for constitutional interpretation, the CCI made a public call for professionals to submit *amicus* briefs on the matter. Accordingly, it received some *amicus* briefs from different individuals and professional organizations. The CCI has even gone further than receiving *amicus* briefs and it conducted a series of public hearings on which *amici curiae* have orally presented their arguments on the case. In the interest of space, it is not worthwhile to reproduce here all the *amicus* briefs submitted to the CCI and the contents of the professional oral opinions given by the *amici*

[54]As to the general analysis of the relevance and status of amicus curiae under the Ethiopian legal system, see Getachew Abera, *'Amicus Curiae*: Its Relevance to Ethiopia'. Indeed, Getachew's article is, to the knowledge of the writer, the only literature one can find in relation to amicus curiae under the Ethiopian legal system.

during the public hearing. It is sufficient to put those submissions only in brief and by a way of categorization.

The *amicus* briefs submitted to the CCI could be generally categorized into two. The first are the ones that support constitutional interpretation as a preferable solution to the constitutional lacuna brought about by the overlap of election season with the outbreak of COVID-19 borne state of emergency.[55] The second categories are those opposing to the need for the constitutional interpretation and the postponement of the election.[56] On 29th May 2020, the CCI submitted its recommendations to the HoF. In its recommendations, the CCI suggested the extension of the power of the two federal houses- the HPR and the HoF and the power of the regional states councils, and the power of the executive organs at both federal and state levels for the period of time that the COVID-19 pandemic continues to be a threat to public health and until the country's COVID-19 State of emergency remains in place, until such future time when new election is held and power transfer is effected." It also recommended for election to be held between nine and twelve months' time following announcement by the Ministry of Health (MOH), by the Ethiopian Public Health Institute (EPHI) and by the members of the scientific community that the COVID-19 pandemic is no longer a threat to public health and after this announcement is approved or endorsed by the HPR. On June, 2020, the "HoF" confirmed the recommendations of the CCI.[57]

[55] In the first category of submissions, see, for instance, Zemelak and others, 'Joint submission to the Constitutional Council of Inquiry of the Federal Democratic Republic of Ethiopia on the matter of the House of Peoples' Representative request for constitutional interpretation, My 15, 2020.

[56] In the second category of submissions, see the International Oromo Lawyers Association (IOLA), Brief of amici to CCI on the sixth national election postponement case, May 15/2020. See also the submission of Abraha Messele and others, 'Amicus curiae on Election, COVID19, and Constitutional Interpretation in Ethiopia, May 15, 2020. It has to be noted that the CCI totally ignored the submissions of IOLA as out of time submission.

[57]According to the International Institute for Democracy and Electoral Assistance (International IDEA), as of 11th June 2020 at least 66 countries and territories across the globe had decided to postpone national or subnational elections due to COVID-19, whereas at least 33 had decided to hold elections as originally planned. See Romain Rambaud, Holding or Postponing Elections during a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France (International IDEA 2020). So, Ethiopia is not an exception for doing so. It is also not unreasonable to solve constitutional lacuna through constitutional interpretation than trying constitutional discussion which might end up in deadlock. As George notes, the most important function of the judiciary is the resolution of constitutional

Even though the issue of *amicus curiae* is not explicitly regulated under the Constitution of the Federal Democratic Republic of Ethiopia (hereafter the FDRE Constitution) and the subsidiary laws of the country that are directly relevant to constitutional interpretation, it could be implied from some of the constitutional provisions and from the holistic reading of the constitutional document, and from the relevant subsidiary laws themselves. For instance, the FDRE Constitution is committed to democracy and public participation.[58] As the literatures on *amicus curiae* indicate, this practice is believed to enhance democratic values and public participation. Explaining the importance of admitting *amicus curiae* before courts, Anderson wrote, "*amicus curiae* participation is defended as democratic input into what is otherwise not a democratic branch of government"[59]. Obonye also wrote that the democratic argument supports the involvement of civil society actors in the resolution of cases.[60] It is believed that the democratic legitimacy of the judicial decision-making process is enhanced by the introduction of a plurality of voices in the process.[61] He also adds the increased use of *amicus* briefs comports with the reasoning of constitutional writers that constitutional law should strive to reflect the will of the people. This reasoning correlates with the theory of 'active liberty' developed by a former judge of the US Supreme Court, Stephen Breyer who also envisages an active participation of citizens in their government, which includes participation in constitutional litigation and interpretation.[62] The commitment of the FDRE Constitution to fundamental

disputes, that is, disputes regarding the interpretation and application of the constitution. Thus, solving constitutional disputes through certain adjudicatory organ rather than bringing to open public decision especially at critical moments such as the time of COVID-19 pandemic is plausible. As James Madison is also quoted to have saying, *"If every constitutional question were to be decided by public political bargaining, the constitution would be reduced to a battle ground of competing factions, political passion and partisan spirit".* The problem lies in the underlying political turmoil in the country that is brought about by an unpredictable government reform process which resulted in popular hopelessness.

[58]See the preamble of the constitution which talks about democracy and. It should also be noted that since the constitution is general law that stipulates only fundamental issues ad as details are always left to subsidiary regulations, it also not as such expected to have direct stipulation on *amicus curiae*. Indeed, as it has been discussed in this article, only the constitution of one country in the world – the Kenyan constitution of 2010 explicitly address the issue of *amicus curiae* participation in the adjudication process.

[59]Helen A. Anderson, *Frenemies of the Court: The many Faces of Amicus Curiae* 49 University of Richmond Law Review (2015), Vol.49, P361

[60] Jonas Obonye, *Supra* note 24.

[61]*Ibid.*

[62] *Ibid.*

rights and freedoms and the increasing role that *amicus curiae* is receiving in international, regional and national human rights related forums also reinforces the claim for the implied recognition of *amicus curiae* in the constitution.[63] In addition to and apart from the implications that could be drawn from the constitution, the provisions of the subsidiary laws that establish and define the powers and functions of the HoF and the CCI have, at least implicitly, a room for *amicus curiae.* Art. 9 of the CCI proclamation is a relevant provision to the issue of *amicus curiae*. This particular article is entitled *"gathering professional opinions"* and the sub-provisions read as follows:

> 1. The Council may, before it gives decision or submits its recommendation to the HoF on cases submitted to it for *constitutional interpretation*, call upon pertinent institutions or professionals, to appear before it and give opinions.
> 2. When it deems necessary for investigating constitutional cases, the Council may require the presentation of any evidence or professional and examine same.

It is not difficult to understand from the above provision that even though the term *amicus curiae* is not stipulated in black and white, it is easily discernable that the cumulative reading of the title of the article which talks about the gathering of *professional opinions* and the operative sub-provisions of the same article which stipulate about the possibilities of gathering *professional opinions* implicate an *amicus curiae.*

With similar connotation, Art. 10 of the HoF proclamation[64], which is entitled "*gathering professional opinions,* stipulates as follows:

> 'The House may, before it passes a final decision on constitutional interpretations, call up on pertinent

[63] Chapter three of the FDRE constitution, that is, Articles 13-44 are devoted to human rights issues.

[64] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001

> institutions, professionals, and contending parties to give their opinions'.[65]

Thus, if we concur with the above line of argument, the admission of *amicus curiae* by the CCI and the HoF is both constitutionally and legally defendable. Such participation is also theoretically defensible as *amicus curiae* has the benefits of serving the interest of justice by assisting the CCI and the HoF as it does in other jurisdictions mentioned earlier. Thus, arguably, it fulfills the *"constitutional-legal basis and theoretical underpinning*" test. More importantly, the CCI has put the *amicus* procedure into practice by admitting *amicus curiae* during the process of collecting professional opinions in the process of preparing recommendations to the constitutional interpretation case brought before it by the HPR regarding the issue of the postponement of the sixth national election. As such, the CCI has received *amicus* briefs from different *amici curiae* and it has also conducted a series of public hearings on which a handful of *amici curiae* have orally presented their opinions.

I argue that both virtuous and vicious lessons could be drawn from the participation of *amicus curiae* that was made in the constitutional interpretation process. These strong lessons are, in fact, not utterly unique to the case at hand, but rooted in the time tested positive roles of *amicus curiae* in the justice process as a whole. According to Gomez, one of the merits of admitting *amicus curiae* in litigation process is the enhancement of transparency of the litigation process.[66] Transparency of the conduct and affairs of the government is recognized as one of the fundamental principles of the Constitution.[67] As Art.12 of the Constitution is found under chapter two of the Constitution that stipulates general fundamental principles that binds the activities of the whole institutions that are envisaged under the constitution so that it is relevant to the activities of the CCI and the HoF. Thus, the admission of *amicus curiae* by the CCI and making the constitutional interpretation process open to professional opinion and conducting public hearing in which *amici curiae* participated is crucial in enhancing the

[65] The writer argues that since the CCI itself is established as expert body to help the HoF as the CoC which is itself to serve as expert organ is allowed to collect professional opinion, it is superfluous to entitle the HoF to gather additional opinions as it is believed to have got one through the CCI

[66] Katia Fack Gomez, supra note 6.

[67] FDRE Constitution, Art.12.

transparency of the activities of the institution. It is undeniable that transparent government process is more human rights friendly than the opposite.

Admission of *amicus curiae* is also useful for advancing public interest (public policy).[68] As it has been discussed earlier, *amicus curiae* participates in a given adjudicatory process not for advancing his or her personal interest, but to advance public interest. This argument also holds true for the participation of *amicus curiae* in the constitutional interpretation case to which the CCI had to offer a recommendation. It is true that the individual legal professionals and the associations that submitted *amicus briefs* to the CCI and those who participated on the series of public hearing that was conducted by the council has no direct personal interest in the case. They engaged in it to make sure that public interest is appropriately addressed in the constitutional interpretation process. No doubt that as the constitutional interpretation issue under consideration is related with the postponement of election and as the issue of election is connected with the governance of the public amid COVID-19 and the manner of handling the fundamental rights and freedoms of individuals and groups during this duration, it has a more profound public interest dimension than many other constitutional issues.

The other noteworthy benefit of *amicus curiae* and indeed the one that is inextricably linked with the origin of the *amicus curiae* institution itself is keeping the adjudicatory organ from committing an error in the process of conducting adjudication. Of course, whether a given adjudicatory organ is really prevented from committing an error in its judgment on a given case at a given time largely depends on the subjective evaluation that one might give to such judgment. The same logic holds true in relation to the constitutional interpretation recommendation that is undertaken by the CCI in the election postponement case. It is not unwise to argue that one of the reasons why the laws governing constitutional interpretation in Ethiopia allows, though implicitly, the admission of *amicus curiae* is to prevent the adjudicatory organ from rendering erroneous decisions that transgress the rights and freedoms of

[68]. Katia Fack Gomez, supra note 6; Eric de Brabandere, 'NGOs and the Public Interest: The Legality and Rationale of *Amicus Curiae* Interventions in International Economic and Investment Disputes, (2011) 12 Chicago Journal of International Law 85

individuals and nations and nationalities and presumably this is one of the reasons why the CCI made a call for *amicus* submission.

Last but not the least, the admission of *amicus curiae* into the constitutional interpretation process in the election postponement case opened a new chapter in the Ethiopian constitutional interpretation jurisprudence. As such, it serves as a stepping stone for the future constitutional development of the country by indicting the possibility of receiving the assistance of *amicus curiae* especially in novel constitutional cases or in hard cases (to use Dworkin's expression). Indeed, the role of *amicus curiae* in the development of the legal order is strongly felt even in centuries-old democracies that have well-developed legal systems such as the United States of America let alone in Ethiopia where democratic culture is less entrenched. Appreciating the role of *amicus curiae* in the American legal order, Allison Lucas wrote that:

> 'There is little doubt that *amicus* briefs have shaped the law. The most visible court to be influenced by *amici* has been the Supreme Court, and one of the most influential *amicus curiae* has been the American Civil Liberties Union' ("ACLU").[69]

In short, the above quote indicates the significance of amicus curiae in assisting the adjudicatory organs in reaching at a reasoned decision and the Ethiopian case cannot be an exception to this. However, the article also argues that the introduction of amicus curiae in the constitutional interpretation issue at hand was not without observable defects. Accordingly, the defects that were observed in relation to the participation of *amicus curiae* in this case could be summarized into seven major points.

The first is that, even though the constitutional provisions and other subsidiary legislations implicitly recognize the possibility of admitting *amicus curiae* during the constitutional interpretation process, the procedural rules for its admission are yet not well developed and the practice is at its rudimentary stage. Indeed, the CCI appears to have created and used temporary rules for the *amicus* procedure in the case at hand as there were no pre-existing and publicly known rules of *amicus* procedure adopted by the CCI itself or by the

[69]. Allison Lucas, *supra* note 6.

HoF or by any other organ[70]. Indeed, as *amicus* procedure is not known in the court system of the country, there is even no clear procedure which the CCI could have emulated. By extension, the fact that there was no well- developed prior jurisprudence of *amicus* practice in the Ethiopian legal order in general and on the part of the CCI in particular might have an impact on how to better use the system. For instance, whether the CCI sought to use the *amici* as an impartial advisor alone or whether it also used it as litigating *amici* who also reflect the interest of third parties (any special interest group that could be affected by its recommendations) was not clear. This appears to have created a problem as to the criteria of admitting or rejecting a given *amicus curiae* and the manner of reaching at such decisions.

Second, as the CCI is an advisory body to the essentially political organ (the HoF) and as it is not a final decision making judicial organ on constitutional interpretation, it inevitably makes political calculations of the recommendations it offers to the HoF more than the professional opinions of the *amicus curiae*. Thus, the fact that many members of the CCI are legal professionals cannot be a guarantee to save its decisions from political influence as the CCI undoubtedly makes calculations of the likelihood of rejection or admission of its recommendations by the HoF before giving one. Given that the HoF is an inherently political organ, it is hardly possible to expect a politically neutral decision on the constitutional interpretation issues which it entertains. In other words, it is not in the nature of a political organ to render politically neutral decision irrespective of the quality of the *amicus* submissions it received. A closely related problem is that as the HoF is itself a political body that is elected every five years and as the issue of election also puts the very term of office of the very house in question, it is in violation of a long cherished legal maxim – *nemo judeax in causea sua* (Latin for one cannot be a judge in his/her own case), to allow the HoF to decide on the issue of election postponement. This appears to make the *amicus* process less appealing as the organ that renders decision in its own case is more likely to consider its own fate than the professional arguments of the *amici curiae*.

[70]It has to be noted that under article 16 (6) of Council of Constitutional Inquiry proclamation no 378/2013, the CCI is mandated to prepare its rules of procedure and submit to the House of the Federation, and implement same upon approval. However, the rule is yet inexistent

Third, the one sided nature of the case (absence of direct respondent to the House of Peoples' Representatives request for constitutional interpretation) is at odds with the conventional practice of *amicus* procedure where there are always identifiable litigating parties (plaintiff and defendant).[71] The point is that had there been an identified respondent to the constitutional interpretation question presented by the HPR, we inevitably expect the participation of two kinds of *amici* – those who support the plaintiff side and those who support the defendant side. Had the case involve two parties, the thesis (*amici* argument on the side of the plaintiff) and antithesis (*amici* argument on the side of the defendant) might have enabled the CCI to come up with a good synthesis in its recommendations to the HoF. Unfortunately, this was not the case in the election postponement case at hand as there was no direct respondent to the request of the HPR.

Fourth, the manner and the criteria under which the *amicus* briefs were received and the corresponding public hearing conducted by the ICC did not seem to adequately take into account the federal nature of the Ethiopian state that is rooted in the fundamental right to self-determination of Nations, Nationalities and Peoples of the country. As Arun Saga clearly notes, a body that adjudicates constitutional interpretation issues in a given federal country is always expected to make sure that the decision it renders does not distort the constitutional balance between the federal (central) and the sub-national governments.[72] In our case, as the sixth national election involves the elections that are undertaken both at federal and regional levels, that is, both for the federal house of peoples representatives and for state councils, all the regions that constitute the Ethiopian federation should have been invited by the CCI to appear as an *amici* and offer their opinions. Of course, it is understandable that the state of emergency is declared countrywide and it affects the activities that are undertaken in every state of the federation. Even so, every activity that is undertaken in normal time or during emergency time should not undermine the hall mark of the constitution of the country, that is, the federal arrangement. Any constitutional recommendation of CCI and any decision of

[71] Of course, the case that is entertained by the Albanian Constitutional court also does not involve direct respondent to the case even though the Albanian Assembly might be presumed as an implicit respondent.

[72]Arun Sagar, 'Constitutional Interpretations in Federations and its Impact on the Federal Balance', Perspectives on Federalism (2011), Vol.3, No.1,

the HoF on constitutional interpretation issue must not undermine the rights of Nations, Nationalities and Peoples of Ethiopia and this right is rooted in the firm federal principles as stipulated in the very constitution itself and this matter could have been better reflected had the regional states were directly invited as *amicus curiae*. Indeed, the close reading of the non-derogable rights clause of Art. 93 of the constitution itself support this line of argument. As this point is of a paramount importance, the relevant part of the Art., that is, Art. 93 (4) (c) is reproduced as follows:

> 'In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Articles 1, 18, 25, and sub-Articles 1 and 2 of Article 39 of this Constitution'.

As the above quoted article cannot be fully understandable unless it is read with the full wording of Arts.1, 18, 25 and 39 (1) and 39 (2) to which it makes cross-reference, it is worthwhile to reproduce the relevant part of these provisions and sub-provisions to which cross-reference is made:

> Art.1: This Constitution establishes a Federal and Democratic State structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia.
>
> Art. 39 (1): Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.

As clearly understood from the above citations, the cumulative reading of Arts. 1 and 93 (4) (c) of the constitution envisages that Ethiopian state should always remain federal even when the country is in state of emergency. The cause of the state of emergency is immaterial whether it is health catastrophe like the COVID-19 or other. Making Art.39 (1) which stipulates unconditional self-determination right (including and up to secession) rights of Nations, Nationalities and People non-derogable is, therefore, inextricably linked to the strict emphasis given to the federal arrangement under Art.1 of the FDRE Constitution. This self-determination right, which is protected as the building block of the federation and which defines the essence of the constitution could

not be realized unless Nations, Nationalities and Peoples are able to exercise the right to elect their representatives in a timeframe set by the Constitution. In other words, election and the timeframe for election are inextricably linked with the exercise of the right to self-determination set under Art. 39 (1) and this in turn is meant to make the federal arrangement intact all the time. Specially, in regional elections where the right to self-determination of the Nations, Nationalities and Peoples is more at stake, the CCI must have heard the views of the regional states as *amicus curiae* in order to prepare a more legitimate recommendation. Regrettably, the CCI failed to ensure the participation of regional government organs as *amicus curiae*. It is true that in any adjudicatory process the fairness or justice of the matter is evaluated against both the procedure by which the decision is arrived at and by the outcome of the case as well. In short, deciding on the postponement of election without considering the views of Nations, Nationalities and Peoples collectively at least through the instrumentality of the respective regional government in which they reside as *amicus curiae* at least in relation to regional elections (elections to the state councils[73]) is in violation of the non-derogable rights clause of Art.93 of the FDRE Constitution itself. Even though their points of argument are directly not from the perspective of the CCI's failure of engaging regional states as *amici* in the election postponement case, Teklemichael Abebe and Endalkachew Geremew brilliantly rebuked the decision that is directly given by the HoF in confirmation of the CCI's recommendation on the fate of regional state councils and regional executive organs in their newsletter wrote to the Ethiopian Insight.[74] Once again, I want to make a caveat. That is, as I have repeatedly indicated earlier, my point of

[73]Under the Ethiopian federal system, State Councils refers to the legislative organs of the regional states that make up the federation (See generally article 47 cum article 50 of the FDRE Constitution)

[74]Teklemichael Abebe and Endalkachew Geremew, 'Council of Constitutional Inquiry Verdict: Because I said So! *Ethiopia insight* (Washington, DC, June 22, 2020). In this piece, they wrote that he CCI held that the mandate of the regional councils and executive bodies shall also be extended as that of the federal parliament and government because elections matters are federal issues. The CCI enmeshed the decision to postpone elections with the decision regarding the terms of the regional council and governments. The former is a federal matter, while the latter is undoubtedly a matter left to the regional constitution... therefore, it will be unreasonable for the CCI to make such determination that has serious implication on the powers of the regional governments without giving them the opportunity to present their cases". As it is understood from this quote, the recommendation of the CCI and the decision of the HoF on the fate of regional elections and the term of office of the state councils and state executives encroached upon jurisdiction of regional governments.

contention under the fourth defect does not pertain to whether the CCI and the HoF have the power to entertain the fate of regional election amid COVID-19 or on the quality of the recommendation offered by the CCI and the decision rendered by the HoF in this regard. It is only related to the failure of the CCI to ensure the participation of the regional governments as *amici curiae* in the light of the special significance the constitution attaches to federalism.

The fifth defect that could be discerned in the process of *amicus curiae* participation in the election postponement case is what I would like to call *"dual presence"* defect. As pointed out earlier, there were four legal professionals (here after called the four professionals) who proposed to the incumbent Ethiopian government (as constitutional experts) the four possible options to solve the so called "constitutional crisis" that was brought about by the overlap of the country's sixth general election with the outbreak of COVID-19 pandemic and the resultant state of emergency decree. One of their suggestions was to ask the HOF to render constitutional interpretation on the issue.[75] In this sense, the four professionals were prominent presence in the background of the subject that led to constitutional interpretation. Unwarrantedly, these four professionals were among some professionals who latter submitted *amicus* briefs to the CCI and who also appeared before the CCI as *amici curie* when the CCI collected professional opinions through a televised public hearing. This is what I mean *dual presence*. At first stage, these four professionals acted under the auspice of the executive, especially under the auspice of the Federal Attorney General and the Office of the Prime Minister and they suggested four alternatives to solve the constitutional lacuna. At the second stage, they acted as *amicus curiae* and submitted *amicus* briefs to the CCI and also participated as *amicus curiae* while the CCI conducted public hearing to collect professional opinions. Thus, while it is easy to imagine the great influence the opinions of these four professionals have had on the CCI, it is reasonable to doubt the neutrality of these four professionals' participation as *amici curiae* in the case viewed from the perspective of the qualities of *amicus curiae*.[76] As observed earlier regarding the qualities that the *amicus curiae* need to have to be allowed to participate

[75]As to the profile of the four professionals and their suggestions on the election postponement case at hand, see Yonatatan T. Fissha and others,'Making sense of Ethiopia's Constitutional Moment' *Ethiopian Standard* (Addis Ababa, May 14,2020)
[76]Kerkering and Mbazira (eds), supra note 43.

in a given proceeding, rule 54 of the Kenyan Supreme Court Rules requires the court to take into account the expertise, independence and impartiality of the persons in question. In the case at hand, as the four professionals were the ones arguing on the side of the government from the start suggesting the alternative ways of postponing the sixth general election, one can plausibly doubt their independence and impartiality while they appear as *amici* before the CCI.[77] From this point of view, one can safely argue that an *amicus* procedure was used by the CCI as procedural opportunity to advance government's version of the argument rather than seeking the assistance of an impartial shepherdizer.[78] Of course, as discussed before, this defect could be seen as the result of the absence of clear and publicly known *ex ante* procedural rules that guide the CCI on *amicus* participation, but it could have been avoided had the CCI by taking an insight from comparative practice of other jurisdictions.

The sixth defect that could be discerned from the process of the *amicus* process and indeed, the one that is nearer to defect in the outcome than mere process defect is the inability, or perhaps, the unwillingness of the CCI to make use of the points obtained from some *amicus submissions* and from the opinions forwarded by some *amicus curiae* during the public hearing on the matter. In this respect, Teklemichael Abebe Sahlemariam and Endalkachew Geremew noted in their newsletter to Addis Standard that:

> The CCI has missed an historic opportunity in Ethiopia's constitutional experiment. This is particularly frustrating knowing that the Council called for *amicus curie* from experts in the field and held a hearing. The irony is that the Council never tried to make use of the constitutional jurisprudences provided from the submissions, which was

[77] As to the profile of the four professionals and their suggestions on the election postponement case at hand, see Yonatatan T., Fissha and others,'Making sense of Ethiopia's Constitutional Moment' *Ethiopian Standard* (Addis Ababa, May 14,2020)

[78] One of its problems is partisan element. Some even tend to call *amicus curiae* a frenemy (frienemy). Even though the original idea and practice of *amicus curiae* institution was serving as friend of the court and as disinterested party, it is now shifting, it is argued, from neutral friendship to positive advocacy and partisanship. One of the reasons for this shift is the growth of interest group politics. It is even further argued, of course in the American context, that amici are often compared to lobbysts. See Helen A. Anderson, supra note 54; Kerkering and Mbazira (eds), *supra note 43.*

> supposed to add value to its reasoning, methodology, quality and persuasiveness of the decision. The CCI is supposed to produce precedent-setting and respectable reasons as its counterparts in other countries do. However, the CCI has proved that it merely is an instrument for conferring legitimacy on the incumbent government and, hence, is an untrustworthy institution. ….. The CCI's total disregard of these submissions is regrettable. The CCI neither acknowledged these submissions nor provided reasons for choosing the interpretation route. Hence, this choice was merely arbitrary. The CCI should have explained the circumstances that require amendment or interpretation. The CCI failed to make that delineation. The CCI should have seized this opportunity to provide guidance on how constitutional silence should be addressed.[79]

Thus, even though publicly introducing *amicus curiae* in constitutional interpretation in an unprecedented manner makes the case truly historic and precedent setter, the defects that were discussed above could lead one to reasonably hold the view that the *amicus* procedure was used merely as a procedural mask for political-legal opportunism the incumbent government and the governing party made use of it.[80] Owing to the profoundly catchy-style of expression they have used, I will wrap up the sixth defect with Teklemichael and Endalkachew's passage that goes to say "the legal professionals who shared their expertise (as *amicus curiae*) with the CCI deserve accolade. Their able submissions deprived the CCI of any excuse. They have tested Abiy's administration promise of judiciary reform—and it has been found wanting".[81]

The seventh and the last defect which the author identified is the failure of the CCI to make an exceptional call for "human rights institutions" such as the

[79]Teklemichael Abebe Sahlemariam, Endalkachew Geremew, 'Council of Constitutional Inquiry Verdict: Because I said So! *Ethiopia insight* (Washington, DC, June 22, 2020). Here, the gist of the heir comment is not on the quality of the CCI's decision such, but on the failure of the CCI to make the utmost use of the arguments forwarded by *amicus curiae*.

[80]By "opportunism" it is meant the act of taking advantage of the moment to press a self-interested case (See Kim Lane Scheppele, 'The opportunism of populists and the defense of constitutional liberalism' German Law Journal (2019) Vol.20, p 314

[81]Teklemichael Abebe Sahlemariam, Endalkachew Geremew, 'Council of Constitutional Inquiry Verdict: Because I said So! Ethiopia insight (Washington, DC, June 22, 2020).

Ethiopian Human Rights Commission to submit an *amicus* brief since the issue of the constitutional interpretation at hand is concerned with election postponement and election postponement entails the issue of voting rights which is essentially a human right.[82] Stressing on the relevance of the participation of *amicus curiae* in election related issues and in other areas of human rights, Christopher Kerkering and Christopher Mbazira wrote that "although amicus participation may occur in any number of disputes, it may be most helpful in less traditional litigation, such as challenges involving fundamental rights and freedoms, economic and social rights, gender discrimination, or election disputes. These cases are multivariable and almost always require information that lies beyond a judge's experience and training. Moreover, reaching the right decision is never more important than in these cases since the impact will be felt throughout many communities and for years to come".[83] The participation of the Kenyan National Commission on Human Rights in the case of FIDA and et al as discussed earlier is an example of constitutional interpretation in which human rights are at stake and in which national human rights institution's participation as an *amicus curiae* is so important. It is also theoretically grounded in, for instance, Dworkin's Interpretative Theory of Law which attaches special significance to human rights in the legal interpretation process.

One may argue that the seven defects mentioned earlier could be the result of the inexperience of the CCI and the HoF in relation to the manner of handling the participation of *amicus curiae*. At the first glance, this argument appears appealing. However, given the rich of experience of *amicus* practice existing in other countries as mentioned in this piece, the CCI or the HoF should or could have taken note of such experiences by consulting different literatures in order to avoid such defects. In short, they were not unavoidable defects.

[82]See article 38 of the 1995 Constitution of the Federal Democratic Republic of Ethiopia and article 25 (b) of the 1966 International Covenant on Civil and Political Rights (ICCPR). These articles tell us that voting and being elected is a human right.
[83]Kerkering and Mbazira (eds), supra note 43.

5. CONCLUSIONS

The admission of *amicus curiae* in the case at hand is constitutionally and legally justifiable at least from the implied provisions of the constitution and relevant legislations. It also has theoretical underpinning as its ultimate aim is to serve the interest of justice by assisting the CCI and the HoF by divulging all the possible arguments and by enhancing the transparency of the case. The beginning of using *amicus* curiae in this case had set a groundbreaking constitutional norm for future development of the constitutional order of the country in general and for the protection of fundamental rights and freedoms and to collect opinions that maintain federal-regional power balance. It has great significance in assisting the CCI and the HoF in order not to make errors when they decide on key constitutional interpretation cases. Thus, the trend of using an *amicus* procedure in election postponement cases better be repeated in the process of settling other constitutional cases, especially, the ones in which human rights and the issue of federal-regional power balance are profoundly at stake.

However, the article has also identified that the introduction of *amicus curiae* in the constitutional interpretation issue at hand was not without observable defects. First, as the *amicus* procedure was hitherto unknown in the country and as the rules of the game were not enacted a *priori,* the rules were not time tested ones and they did not capitalize on the centrality of human rights. Second, as the CCI is an advisory body to the inherently political organ (the HoF) than being an independent decision making judicial body, it has inevitably made political calculations of the recommendations it offered to the HoF than relying on the qualities of the opinions of the *amicus curiae*. A closely related problem is that as the HoF is itself a political body that is elected each five year and as the election case at hand also puts the continuation of the term of office of the very house in question, it is in violation of a long cherished legal maxim – *nemo judeax in causa sua* (Latin for one cannot be a judge in his/her own case) to allow the HoF to decide in this particular case even if it has a mandate to interpret the constitution. As an institution that entertains an issue in which it has direct stake, it gives weight to those opinions of the *amicus curiae* that safeguard its interest than the opposite. In this sense, the *amicus* submissions were inclined to one side from the start and elements of partisan justice were observable. This appears to

make the *amicus* briefs less appealing in protecting electoral rights of individuals and the rights to self-determination of Nations, Nationalities and Peoples and federal-regional power balance. Third, the one sided nature of the case (absence of direct respondent to the House Peoples Representative's request for constitutional interpretation) is at odds with the conventional practice of *amicus* procedure where there are always defined litigating parties (plaintiff and defendant). Fourth, the manner and the criteria under which the *amicus* briefs were received and the corresponding public hearing conducted by the ICC does not seem to offer the federal nature of the Ethiopian state and the existence of diverging ethno-national interests. Fifth, the dual presence of the four professionals in the case is against the neutrality and impartiality criteria of *amicus curiae*. Sixth, the *amicus* procure in the case did not give proper emphasis to the federal-regional power balance. Finally, the fact that there is no well- developed prior jurisprudence of *amicus* practice in the Ethiopian legal order in general and on the part of the CCI in particular have had an impact on the manner of using the procedure. For instance, whether the CCI sought to use the *amici* as an impartial advisor alone or whether it also used it as litigating *amici* who also reflect the interest of third parties (any group that could be affected by its recommendation (if not decision) was not clear.

6. RECOMMENDATIONS

1. It is advisable for the CCI to adopt clear rules of procedure which, *a priori*, regulate the admission of *amicus curiae* in issues involving constitutional interpretation. Among others, it is better if the prospective rules encourage *amicus curiae* participation in constitutional interpretation issues that entail election issues, other human rights as well as federal and regional power-balance dispute. By the same logic, it is also advisable for the HoF to adopt clear rules that govern the admission of *amicus curiae* while it entertains issues of constitutional interpretation. The lessons that we derive from South Africa, Kenya and Albania also guide us to come up with clear rules that regulate *amicus* participation in the constitutional interpretation process of our country. It is advisable for the prospective rules to seriously take into account the fact that Ethiopia is a federal country that the rights of Nations, Nationalities and Peoples is the hallmark of the federation that the admission of *amicus curiae* in grand constitutional issues be undertaken in such a way that ensures

balanced participation of the building blocks of the federation in order to avoid grievances that disturb the peace and prosperity of the country.

2. It is advisable that the practice of *amicus* participation which is boldly observed in the election postponement case be practically repeated in other constitutional interpretation issues especially in relation to the settlement of post-election disputes and in issues in which human rights and freedoms are highly at stake.

3. Based on the lessons drawn from South African Practice, it is advisable to encourage legal research and training centers existing both at federal and regional level and the university law schools of the country to participate as *amicus curiae* in grand constitutional interpretation issues as they are in a better position to conduct research and to suggest the likely solution to complex or hard cases (to use Dworkin's expression).

4. This article examined only the issue of the participation of *amicus curiae* in constitutional interpretation cases and it did not address the participation of *amicus curiae* before the ordinary courts and quasi-judicial organs of the country. Therefore, the author recommends that interested individuals and institutions better conduct further study and provide recommendation whether *amicus curiae* participation is necessary or not before ordinary courts and quasi-judicial organs of the country.

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