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**The Federal Democratic  
Republic of Ethiopia  
Federal Supreme Court**

## **Federal Supreme Court Cassation Bench**

Date: 27/05/2021

Ref. No.: 207036

To: **[National] Electoral Board of Ethiopia**

**Addis Ababa**

Please find attached a certified copy of the judgement (20 pages) rendered by the Federal Supreme Court Cassation Bench on May 27, 2021 on the Elections case between the National Electoral Board of Ethiopia as Applicant and the Harari National Regional State, Harari National Congress as Respondent.

*[Signed]*

Hawaz Taddese Simegn  
Registrar of the Federal Supreme Court

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Federal Supreme Court**

Cassation file no.: 207036

May 27, 2021

Judges: Berhanu Amene  
Teferi Gebru (PhD)  
Etmet Assefa  
Dejene Ayansa  
Birknesh Esubalew

Applicant: National Electoral Board of Ethiopia – represented by Mr. Awdro Taddese, who is present.

Respondent: Harari People’s National Regional State, Harari National Congress – represented by Mr. Selhaddin Tewfiq, who is present.

[The Cassation Bench] has examined the file and rendered the following judgment.

**Judgment**

The cassation application was made by the Applicant under an application dated May 15, 2021 claiming that there was a fundamental error of law in the decision rendered by the Appellate Bench of the Federal Supreme Court under file no. 205809 on 27/04/2021 and requesting that such error be corrected. The case pertains to the election process and started with applications made to the National Electoral Board of Ethiopia by different parties in the Harari Region including the Applicant hereunder.

1. A review of the file shows that, under a letter with reference no. ሐገ/183/4/13 and dated 05/04/2021 the Harari National Congress of the Harari People's Regional State Council, under a letter with reference no. ሐፆ/350/አገ/2/13 and dated 05/04/2021 the Harari People’s Regional State Council Office, under a letter with reference no. 1/9/15/2013 and dated 06/04/2021 the Office of the President of Harari People’s Regional State, and under a letter with reference no. PP/14/H/111/2013 and dated 31/03/2021 the Harari Region Prosperity Party Office have made applications to the National Electoral Board of Ethiopia.
2. In these applications, they have claimed that the House of Peoples’ Representatives of the Provisional Government has passed a decision in its 102<sup>nd</sup> regular meeting held on

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March 15, 1995 granting members of the Harari community living outside the regional state the right to elect members of the Harari National Congress, which is part of the region's council; that members of the Harari community living outside the regional state have voted in all five of [the previous] national elections accordingly; and that the National Electoral Board of Ethiopia should do the same in the 6<sup>th</sup> national election.

3. The Management Board stated that it has examined the matter and the documents submitted as well as the previously held elections in terms of the constitution and gave its decision on April 9, 2021, in which it stated that:

- As per the FDRE Constitution, members of a Congress under the governance structure of a regional state shall be elected by residents of the regional state who are entitled to vote. Otherwise, there is no provision in the constitution which allows members of a minority ethnic group who live outside of a regional state to elect members the regional state council of such regional state, or to apply a special procedure in respect of such ethnic group only.
- It is the Board's understanding that the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995 that members of the Harari National Congress shall be elected by members of the ethnic group living outside the regional state does not cite any provision of the constitution to support such decision.
- Furthermore, the decision which was said to have been passed by the House of Peoples' Representatives in its 102<sup>nd</sup> regular meeting held on March 15, 1995 does not bear the stamp of the House, which is one of the signs indicating that it is not valid.
- On the other hand, although it was claimed that the Board has issued detailed directives to implement in the past five elections this decision passed on March 15, 1995 by the House of Peoples' Representatives, no such directive was found at the Board's office.
- Even if the Electoral Board had allowed members of the Harari National Congress to be elected by members of the ethnic group living outside the regional state in the last 5 elections, the electoral reforms the board has been undertaking are aimed at eliminating such practices which have no basis in the constitution or the electoral law.
- If the Board decides to continue this practice claimed to have been applied in the last 5 elections of allowing members of the Harari National Congress to be elected by members of the ethnic group living outside the regional state despite the fact that it is not supported by the constitution, and if other minority ethnic groups request that members of their community living outside their regional state should also participate

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in elections, and if the Board refuses to grant such request, it can compromise the fairness and impartiality of the Board in the administration of elections.

- The board must only adopt existing practices which are supported by the constitution.
  - Therefore, as the Board cannot grant the request taking into consideration the constitution and the electoral laws and directives it implements, it has decided to reject the application.
4. The current Respondent appealed against such decision to the Federal Supreme Court. The [current] Applicant has also submitted its reply accordingly, under which it has [made a preliminary objection] that the court did not have jurisdiction over the matter, and argued with regard to the merits of the case that its decision should be upheld. The appellate court has heard the arguments of the parties and rendered its decision by framing the issues as: 1) Whether or not the preliminary objection raised by the Respondent (the current Applicant) that because the provisions of article 50(2) of the Harari Regional State Constitution contradicts with the provisions of article 50(3) of the FDRE Constitution, as the matter raises constitutional issues, the court does not have jurisdiction over the matter, is valid; and 2) If it is said that such preliminary objection is not valid, whether or not the decision of the Board rejecting the application made by the Appellant (the current Respondent) is valid.
5. In its decision regarding the first issue, the appellate court has stated that the Appellant (the current Respondent) was able to appeal directly to the Federal Supreme Court by virtue of article 17(1) of National Electoral Board of Ethiopia Establishment Proclamation No. 1113/2019 which provides that final decisions of the Management Board with regard to the electoral process and results may be appealed to the Federal Supreme Court, and claiming that the decision of the Board which is the cause of the appeal pertains to the electoral process. Whereas [the current Applicant] has not raised any [preliminary] objections regarding the appeal being made to the Supreme Court in accordance with this provision, the objection it has raised was that because the provisions of article 50(2) of the Harari Regional State Constitution contradict with the provisions of article 50(3) of the FDRE Constitution, as the matter raises constitutional questions, the matter should be reviewed and decided by the House of Federation and not by the court. However, article 50(3) of the FDRE constitution provides that “the House of Peoples’ Representatives is the highest authority of the Federal Government. The House is responsible to the People. The State Council is the highest organ of State authority. It is responsible to the People of the State”, and article 50(2) of the regional state’s constitution provides that “members of the Harari National Congress shall be elected by members of the Harari ethnic group living in and outside the regional state in other regional states and cities of Ethiopia”. The general principle or spirit of article 50(3) of the FDRE constitution provides that members of the House of Peoples’ Representatives shall

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elected by the Ethiopian people, and members of the State Council shall be elected by the people of the State. When we consider whether or not there can be exceptions to this general principle, article 17 of Electoral, Political Parties Registration and Election's Code of Conduct Proclamation No. 1162/2019 provides such exceptions. Article 17(3), in particular, allows citizens living abroad to vote in elections taking place in country, which shows that there can be exceptions to article 50(3) of the [FDRE] Constitution; the provisions of article 50(2) of the regional state's constitution also provides such an exception in respect of the regional state, and there is no legal basis to claim that it contradicts [with the FDRE Constitution]. The issue of contradiction with the constitution raised by the Board in respect of article 50(2) of the regional state's constitution is not reasonable considering the Board has raised no such issue of contradiction with the constitution in respect of the exceptions provided under article 17(3) of Proclamation No. 1162/2019. Due to all of these reasons, [the court] has decided that the objection raised by the Board that because the provisions of article 50(2) of the Regional State's Constitution contradict with the provisions of article 50(3) of the FDRE Constitution, as the matter raises constitutional issues, the court does not have jurisdiction over the matter, is not acceptable.

6. With regard to the decision [of the court] on the merits of the case, whereas one of the documentary evidences submitted to support the case was the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on 15/03/1995, and whereas the Board also acknowledges that no. 2.1.2.2 of this decision supports the case, the Board has rejected the document claiming that the House did not cite any constitutional provision to support such decision. It is actually true that although it was claimed that the decision was passed after the enactment of the FDRE Constitution, no constitutional provision is cited in the decision. However, as long as no convincing justification is provided by the Board that there is a constitutional provision against the case, the mere fact that no constitutional provision is cited in the decision does not make the decision invalid. Whereas the other document mentioned is the regional state's constitution, the board has not provided any [reasons] in its decision as to why its provisions were rejected. It is not contested by the Board that members of the Harari community living outside the regional state have been electing members of the Harari National Congress in the elections held since the coming into effect of the regional state's previous as well as current constitution. This has been taking place not in the absence of any legal basis, as the Board argues, but on the basis of the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on 15/03/1995, and the regional state's constitution in particular. Throughout this time, there has not been any objection raised or decision made to the contrary with regard to any contradiction between the [FDRE] Constitution and the decision of the House of Peoples' Representatives of the Provisional Government [of Ethiopia] or the regional state's constitution. If the Board claims that the

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decision of the House of Peoples’ Representatives of the Provisional Government of Ethiopia and the regional state’s constitution as well as election processes carried out on the basis of these documents are unconstitutional, it should address the issue by having the matter decided by the appropriate body, and it should not decide on such matter by itself. Therefore, [the court has decided that] the decision of the Board is defective and shall be rectified. Accordingly, [the court] has reversed the Board’s decision and decided that the Board should do as stipulated in the decision of the House of Peoples’ Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on 15/03/1995 and the regional state’s constitution.

7. The cassation appeal was made because the Applicant was aggrieved by this decision. The Applicant has stated in its appeal dated 10/05/2021 that it had stated in its reply that the Federal Supreme Court did not have jurisdiction over the matter by explaining the detailed provisions of article 17(1) of the Proclamation, which is not related to the Respondent’s request and which is a provision that authorizes the Board to set up special polling stations for the purpose of enfranchising military who live in camps, civil servants and their family members, citizens attending higher learning institutions, internally displaced citizens, incarcerated citizens whose voting rights have not been stripped off; that whereas the Board has proved this in its reply, the court has inappropriately overlooked the same claiming that the issue has not been not contested [by the Board]; that the other argument raised [by the Board], which was regarding the court’s jurisdiction, was that article 50(3) of the FDRE Constitution provides that “...the State Council is the highest organ of State authority and it is answerable to the People of the State”, that the provisions of article 50(2) of the regional state’s constitution completely contradict with such provision, and that the power to review and address such violations is that of the House of Federation and not the Federal Supreme Court; that the court’s attempt to reconcile such provisions, which constitutes constitutional interpretation and which is beyond its jurisdiction, and its rejection of [the Board’s] argument is a fundamental error of law; that a regional state cannot enact a constitution which in any way contradicts with the clear provisions of the FDRE Constitution; and that whereas, as per article 50(3) of the FDRE Constitution, members of both Congresses of the Harari Regional State Council shall be elected by the people of the regional state, the regional state’s constitution, contrary to such provision, provides that members of one of these Congresses shall be elected by the people of the state and members of the other Congress shall be elected by members of the ethnic group living outside the regional state as well, and the court has violated the law by hearing the matter and interpreting such provisions outside of its jurisdiction. Furthermore, although we had argued in detail that the FDRE Constitution follows the territorial instead of non-territorial principle in providing that members of the Regional State Council shall be elected by residents of the regional state, the court has simply overlooked the arguments we have raised in this regard. Whereas article 51(15) of the FDRE Constitution provides that only the federal government shall

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have the power to issue laws governing elections, article 55(1)(d) provides that the House of Peoples' Representatives shall have the power to issue laws governing elections, and whereas, with regard to the explicit powers of Regional State Councils to issue laws governing elections, article 13(2) of Proclamation No. 1162/2019 grants such powers in respect of local elections, the said article of the regional state's constitution, which is beyond such constitution's scope and encroaches upon the powers of the House of Peoples' Representatives of the federal government, constitutes a serious error of law. In general, as the arguments [the Board] has raised in respect of the Federal Supreme Court's lack of jurisdiction on the matter in light of article 17(1) of Proclamation No. 1133/2019; and [the Board's] legal argument that article 50(2) of the regional state's constitution contradicts with article 50(3) of the FDRE Constitution, that the applicability of the provisions of the regional state's constitution shall be reviewed and decided by the Council of Constitutional Inquiry and the House of Federation, and therefore that the Federal Supreme Court does not have jurisdiction over the matter, was inappropriately rejected, such decision has error of law and should be overturned. Although [the Board] has provided detailed proof that the FDRE Constitution follows the territorial and not the non-territorial principle in providing protection to minorities, as the court has overlooked the arguments raised by the Board in this regard, the Board requests that the Cassation Bench should examine the matter and overturn the decision accordingly. Furthermore, whereas only the federal government and the House of Peoples' Representatives have the authority to issue laws governing elections, as the Board's argument that regional state councils only have the power to determine the number (of seats) of *Woreda*, city, sub-city, and *Kebele* councils was overlooked inappropriately, the Board has requested that the Cassation Bench should accept the Board's argument, acknowledge that the constitution issued by the regional state encroaches upon the powers of another government organ and is issued ultra-vires, overturn the decision of the lower court, acknowledge that the decision given (passed) by the Applicant was lawful and based on accurate interpretation of the constitution, and the [Cassation] Bench should overturn the decision rendered by the lower court to the contrary.

8. After reviewing the matter, the Cassation Bench has decided to hear the case and ordered the Respondent to reply because it was necessary to examine, in light of article 155(4) of Proclamation No. 1162/2011, the legal grounds under which an appeal was made to the Federal Supreme Court in respect of the decision given by the Board although the request which was made to the current Applicant was not related to voting and vote counting but a different issue; and to examine in light of articles 9 and 50 of the [FDRE] Constitution the legal grounds under which the decision which was said to have been passed by the House of Peoples' Representatives of the Provisional Government [of Ethiopia] before the Constitution came into effect was applied after the constitution came into effect, as well as other related issues of legality.

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9. The Respondent has stated, in its response dated 17/05/2021, that the provisions of article 17(1) of Proclamation No. 1133/2019 gives the lower court jurisdiction over the matter, and the issue which is the subject of the lawsuit between the parties meets the requirements of such provision as well. As voter registration and issuing of cards are part of the electoral process, and as the proclamation clearly provides that final decisions of the board with regard to these matters may be appealed to the Federal Supreme Court, it was appropriate that the matter was heard and decided by the lower Federal Supreme Court. Whereas the Applicant should have administered the elections taking place in the regional state impartially, by making it seem like it was requested to set up a special polling station and mixing up and confusing different proclamations which have different objectives, as it has claimed that the matter should be considered in accordance with article 17 of Proclamation No. 1162/2019 instead of article 17 of Proclamation No. 1133/2019; and although it has claimed that the matter falls within the jurisdiction of the Board and not the court, as it has not provided any arguments to support such claim before the lower court; the Federal Supreme Court's comment that, with respect to material jurisdiction, the Board has not provided any arguments supporting its claim that the matter is not one that is related to the election process, was appropriate. Although the Applicant has raised an objection with regard to material jurisdiction over the matter, as per article 17(1) of Proclamation No. 1133/2019, that does not prevent the Federal Supreme Court from hearing appeals on final decisions of the Board with regard to the electoral process. Furthermore, as the issue of contention here, which is voter registration and issuing of cards to members of the Harari ethnic group living outside of the regional state for the purpose of electing their federal representatives as well as members of the Harari National Congress, pertains to electoral processes which precede the processes of voting and vote counting, and as this is not a proceeding regarding voting and vote counting as per the provisions of article 155(4) of Proclamation No. 1162/2019, such provision is not relevant to the matter. Accordingly, as the proceeding pertains to the electoral processes of voter registration and issuing of cards by the Board to members of the Harari community in order to enable them to elect their federal representatives as well as members of the Harari National Congress at polling stations set up for the 6<sup>th</sup> national elections in appropriate cities of Ethiopia as per the decision passed by the House of Peoples' Representatives on Marh 15, 1995 and as per the provisions of articles 49 and 50(2) of the constitution of the regional state, and as this process of national elections has currently not reached at the voting stage, and as vote counting and results are not relevant to the matter, the decision rendered by the lower court was appropriate. On the other hand, clear provisions of the constitution do not require interpretation, and implementing such provisions is a constitutional duty and it is not constitutional interpretation. The provisions of article 50(2) of the constitution of the Harari Regional State provides for the election of members of the Harari National Congress, which is one of the two Congresses constituting the regional state council, and article 50(3) of the FDRE

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Constitution stipulates whom Regional State Councils are answerable to. Therefore, as these provisions refer to two different bodies and cover two different issues, as they are not related, as they are clear, non-contradictory, unequivocal, and do not require interpretation, it was appropriate to reject the Applicant's objection. The decision passed by the House of Peoples' Representatives and the Constitution of the Regional State are based on the FDRE constitution. The fact that the decision of the House of Peoples' Representatives is consistent with the [FDRE] Constitution and is enacted as part of the constitution of the regional state shows that it is supported by the federal as well as the regional state's constitutions. The arguments raised by the Applicant to make it seem like the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995 was passed before the constitution was officially enacted into law on August 21, 1995, which are intended to cast doubt on the applicability of such decision, have no legal basis. This is because [the Constitution] was deliberated on and approved by the Constitutional Council on December 8, 1987 before the decision was passed, and the House passed the decision in accordance with the provisions of the constitution, and it also continued to carry out its activities in accordance with the constitution after the constitution was approved and came into effect until it handed over to the new House established in 1996. The rights exercised by members of the ethnic group living outside the regional state to elect their federal representatives as well as members of the Harari National Congress is a positive measure taken in accordance with the FDRE Constitution to effectively ensure their constitutional right to self rule. Whereas the experiences of the countries studied by the committee assigned to carry out a study and make recommendations to the House of Peoples' Representatives with regard to the internal democratic system governing the structure and representation of the Harari Regional State Council are considered as the foundations of minority group and community rights; and whereas the international instruments that Ethiopia has ratified in this regard, which are part of the country's law, support the rights of minority groups; and whereas the decision of the House of Peoples' Representatives as well as articles 49 and 50(2) of the constitution of the regional state are consistent with the FDRE Constitution; the Board's failure to recognize these facts and its assumption that the [request] is not supported by the FDRE constitution is a fundamental error of law. The board has indicated that it understands the provisions of article 50(3) of the FDRE Constitution as "members of the regional state council shall only be elected by people living in the regional state". This provision, which was cited by the Board, is unequivocal and clear and does not require interpretation, and the claim made by the Board under the guise of interpretation, which is contrary to the meaning of the provision and which is based on the unconstitutional and erroneous understanding that the provision, which talks about whom the Regional State Council is answerable to, actually talks about the election of members of the regional state council, and the argument made by the board citing a provision which is not relevant or related to the

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matter, has serious error of law. The Board's citing of the constitutional provision which refers to whom the regional state council is answerable to as referring to the election of members of the regional state council, and its interpretation that elections in Ethiopia are territorial instead of non-territorial, is wrong. Deciding on the structure and representation of the Regional State Council as well as the number of its members does not constitute issuing electoral laws, and the arguments raised by the Board in this regard is an abdication of its duty, which is unacceptable. As the decision given by the board ultra-vires was not consistent with the law, the lower court's overturning of such decision of the Board was appropriate. Whereas the decision passed by the House of Peoples' Representatives in its 102<sup>nd</sup> regular meeting held on March 15, 1995 has not been superseded or annulled by any authority having equivalent authority or in any legal manner otherwise, the Board's refusal to implement the decision despite its lack of authority to correct such decision by a superior body is a violation of the rule of law. As there must be respect between regional states and the federal government; as the failure of the Board, which is one of the executive organs of the federal government, to lead the election process in accordance with the constitution of the regional state is a violation of article 50(8) of the FDRE Constitution, which provides that the Federal Government shall respect the powers of the States; as the Respondent's request is related to fundamental rights under the law which cannot be violated in the name of reform or restricted by a random decision claiming that they have no constitutional basis; the decision rendered by the lower court overturning the Board's decision was appropriate. Furthermore, the fact that members of the Harari ethnic group living outside the regional state have elected their federal representatives as well as members of the Harari National Congress in the previous five consecutive elections was not something that was done without any legal basis but in accordance with the decision passed by the House of Peoples' Representatives and on the basis of the Constitution. However, in the absence of a contrary decision or law changing such decision or causing change thereof, the Electoral Board's interpretation beyond its powers and in its own discretion that there is contradiction where there is none is an encroachment upon the functions of the House of Federation, and the decision of the lower court ordering the Board to discharge its duties in this regard is appropriate. In general, the Respondent has argued that the Applicant's appeal should be rejected the decision rendered by the Federal Supreme Court shall be upheld. The Applicant has also submitted a counter reply on May 19, 2021 to supplement its case.

10. Whereas the background of the case and the written arguments of the parties is as stated above, this Bench has heard the oral arguments of the parties. Their oral arguments have also been copied from the recording device and included in the file. To help decide on the matter, [the Bench] has ordered and examined the minutes of the 102<sup>nd</sup> regular meeting of the House of Peoples' Representatives of the Provisional Government of Ethiopia and

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the Harari National Congress Elections Directive. It has also examined the case in general in terms of the decision appealed against and the appropriate provisions of the law.

11. As per [the Bench's] examination, the appeal submitted by the Applicant as well as the issues framed by the Cassation Bench mainly revolve around the objection raised that the Appellate Bench of the Federal Supreme Court has no jurisdiction over the matter. This argument pertaining to the jurisdiction of the court was made in two ways. The first cites article 17(1) of Proclamation 1133/2019 and claims that the Federal Supreme Court has no jurisdiction over the matter, and that as the request made to the current Applicant, which was mentioned by the [Appeals] Review Bench, is not related to voting and vote counting but a different issue, the legal grounds under which an appeal was made to the Federal Supreme Court with regard to the decision of the Board should be examined in terms of article 155(4) of Proclamation No. 1162/2019. The second line of argument related to jurisdiction is based on constitutional interpretation, and claims that as article 50(2) of the constitution of the regional state contradicts with article 50(3) of the FDRE Constitution, the matter should be decided by the Council of Constitutional Inquiry and decided by the House of Federation, and the Federal Supreme Court has no jurisdiction over the matter.
12. In order to decide on the abovementioned arguments related to jurisdiction, it would be appropriate to look at provisions of electoral proclamations pertaining to the manner in which the decisions of the Electoral Board may be appealed to courts; the powers of courts in proceedings related to the constitution; the presumption of constitutionality; and the system and the legal framework in place in our country to determine the need for constitutional interpretation with regard to cases in the process of being heard in court.
13. The manner in which the final decision of the Electoral Board may be appealed to courts and applications may be made to have such decisions overturned is provided under the law. Article 17 of National Electoral Board of Ethiopia Establishment Proclamation No. 1133/2019 provides for appellate jurisdiction, and sub-article 1 of the same article provides that final administrative decisions of the Management Board may be appealed to the Federal High Court, and final decisions with regard to electoral process and results may be appealed to the Federal Supreme Court. Similarly, Electoral, Political Parties Registration and Election's Code of Conduct Proclamation No. 1162/2019 provides separately for the manners in which the administrative decisions of the board on ethical violations and its decisions with regard to disputes related to vote counting and results may be appealed. Article 49 [of the Proclamation] provides that a party aggrieved by the Board's decision on ethical violations may apply to the Federal High Court; and article 155(4) provides that any party aggrieved by the Board's decision on vote counting and results may appeal to the Federal Supreme Court. These provisions enable courts to ensure that the Board achieves the purpose for which it is established and disposes of

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matters in accordance with the law. They also indicate what kind of matters should be brought to the Federal High Court and what kind of matters shall be brought to the Federal Supreme Court. In the case at hand, the issue of contention which the Board has given a decision on pertains to a request that the necessary electoral processes should be carried out by the Board to enable members of the Harari ethnic group living outside the regional state to elect members of the Harari National Congress. This is not an administrative decision on ethical violation of elections. It is also not a dispute pertaining to the processes of voting and vote counting referred to in article 155(4) of Proclamation No. 1162/2019. Instead, it can be considered as a final decision with regard to the electoral process and falls under article 17(1) of Proclamation No. 1133/2019. As such, this decision may only be appealed to the Federal Supreme Court.

14. On the other hand, let us look at the legal framework with regard to deciding on electoral disputes and determining the need for constitutional interpretation. The Federal Courts Proclamation No. 25/1996 has been replaced by the Federal Courts Proclamation No. 1234/2021 which came into effect starting from January 20, 2021. Under both proclamations, courts have the power to decide on constitutional issues. (See articles 3(1) and 3(1)a of the Proclamations respectively). Article 3(2) of the new Federal Courts Proclamation No. 1234/2021, in particular, provides that federal courts shall observe the provisions of the Constitution pursuant to article 9(2) of the Constitution in adjudicating cases. Therefore, there is no legal ground for claiming that courts cannot adjudicate constitutional cases which do not require constitutional interpretation.
15. In addition, articles 3(2)(a) and 4(1) of Council of Constitutional Inquiry Proclamation No. 798/2013 provide that if an issue of constitutional interpretation is raised in respect of a matter being heard by a court, such issue may be submitted by the court hearing the case to the Council of Constitutional Inquiry. However, article 4(2) of the same proclamation clearly provides that the court hearing the case shall submit an issue of constitutional interpretation to the Council of Constitutional Inquiry when it believes that the interpretation of the constitution is necessary to decide the case. Therefore, it is apparent from the provisions of the abovementioned legislations that it should be the function of courts to decide on constitutional cases based on clear provisions of the constitution and decide on whether the interpretation of the constitution is necessary to decide the case.
16. Therefore, [the Cassation Bench] has decided to reject the arguments raised by the Applicant, by citing electoral proclamations and claiming there is a need for constitutional interpretation, that the Federal Supreme Court has no jurisdiction to hear the case, because it is not consistent with the provisions of the law as we have seen in detail above.
17. With regard to the merits of the case, the Applicant has argued that the protection provided to minority ethnic groups under the FDRE Constitution is based on the territorial instead of the non-territorial principle; only the Federal Government and the House of

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Peoples' Representatives have the power to issue electoral laws; that the constitution issued by the regional state encroaches upon the powers of the federal legislative organ and is ultra-vires and, as such, the decision rendered by the Appellate Bench should be overturned, and the decision given (passed) by the Board should be upheld. In addition to these arguments, [the Cassation Bench] was able to understand from the decision given by the Board that the Board has ruled that the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995 that members of the Harari National Congress may be elected by members of the ethnic group living outside the regional state is not constitutional and should not be implemented; although, during the past 5 elections, the National Electoral Board may have issued directives under which it has allowed members of the Harari National Congress to be elected by members of the ethnic group living outside the regional state, the electoral reforms that the board has been undertaking are aimed at eliminating such practices; and the board should not be forced to continue this practice in the last 5 elections of allowing members of the ethnic group living outside the regional state to elect members of the Harari National Congress based on the decision passed by the House of Peoples' Representatives and the constitution of the regional state. In order to decide the validity of these arguments and this decision, it is important to consider it in terms of the arguments raised by the parties, the decision of the House of Peoples' Representatives, and the presumption of constitutionality that regional states should enjoy; and the legal framework under which unconstitutionality and inapplicability may be determined.

18. The Harari People's Regional State Council is the supreme legislative organ of the Harari Regional State, and it is provided under article 46(1) of the constitution of the Regional State that it shall be answerable to the people [of the regional state]. Article 49(1) of the same constitution provides that the Regional State Council shall have two Congresses; i.e. Peoples' Representatives Congress and the Harari National Congress. It is also understood that this structure stems from the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995, which has become part of the constitution of the regional state. Article 50 of the constitution [of the regional state] indicates that whereas members of the Peoples' Representatives Congress shall be elected by all the people of the regional state including members of the Harari community, members of the Harari National Congress shall be elected by members of the Harari community only. The Regional State Council, which is structured accordingly, has 36 members, 22 of which are members of the Peoples' Representatives Congress, and 14 of which are members of the Harari National Congress. In addition, the powers and duties of the Peoples' Representatives Congress and the Harari National Congress are also outlined in the constitution. As it can be understood from the deliberations and decision of the House of Peoples' Representatives of the Provisional Government in its 102<sup>nd</sup> regular meeting and the

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provisions of article 59 of the constitution of the regional state, the powers and duties of the Harari National Congress are primarily related to the preservation of language, culture, heritages and identity of the Harari [community] to ensure its continued existence as an ethnic group. It can also be understood that the fundamental reason why it has been decided that only members of the Harari community living outside the Regional State shall participate in electing the 14 members of the Harari National Congress is to enable members of the Harari community living outside the Regional State to strengthen and ensure their relationship with their regional state and ethnic identity, and to ensure that the Harari National Congress achieves the responsibilities assigned to it.

19. [The Cassation Bench] was able to understand from the minutes of the House that the decision passed by the House of Peoples' Representatives of the Provisional Government in its 102<sup>nd</sup> regular meeting as mentioned above was also effective after the constitution came into effect, and it was passed in accordance with the principles of such constitution. This was also why the same was provided in the constitution of the regional state which was enacted in accordance with the Federal Constitution. This decision of the House of Peoples' Representatives, which was passed after the FDRE Constitution was accepted and approved by the Council, and its principles which are included in the clear provisions of the constitution of the regional state, are based on the principles enshrined under the Federal Constitution. Articles 5(1), 3, 39(2), 91(1) and (2) of the Federal Constitution protect languages, cultures, heritages and identities to ensure the continued existence and identity of Nations, Nationalities and Peoples. It is important to understand here that the FDRE Constitution particularly provides protection to minorities to ensure that the language, culture and heritages which are expressions of their identity are preserved. This is also acknowledged in the preambles of the International Covenant on Civil and Political Rights as well as the International Covenant on Social, Cultural and Economic Rights, which Ethiopia has ratified. In particular, articles 1 and 27 of the International Covenant on Civil and Political Rights as well as United Nations General Assembly resolution No. 47/135 of 18 December 1992 on the rights of persons belonging to national or ethnic, religious and linguistic minorities, and the established experiences of democratic and developed countries show that these rights should be protected. Whereas the Harari ethnic group enjoys these protections, it would be constitutional for other minority groups as well to receive similar protections with regard to their language, culture and heritages, which are expressions of their identity. The special structure of the Harari Regional State Council under the law and the establishment of the Harari National Congress, as well as the special manner in which its members are elected, are all intended to implement these protections.
20. [The Cassation Bench] was able to understand from the Board' decision and the arguments it has raised so far until this Bench that the National Electoral Board of Ethiopia

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acknowledges that the decision passed by the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995 and the provisions of the constitution of the regional state support the Respondent's case. However, as mentioned above, [the Board] has decided that the decision of the House should not be implemented because it is not constitutional; although it had allowed members of the Harari National Congress to be elected by members of the ethnic group living outside the regional state before, such practices need to be eliminated; the board cannot be forced to continue similar practices. It is important to examine this decision in terms of the procedures of constitutional interpretation as follows.

21. Article 9 of Consolidation of the House of Federation and the Definition of its Powers and Responsibilities Proclamation No. 251/2001 clearly provides that the enacted law is presumed to be constitutional unless otherwise proved to the contrary. It is also provided under article 4(1) and article 62(1) of the Federal Constitution that the House shall have the power to review and interpret the constitution. Accordingly, with regard to the case at hand, the decision passed by the National Electoral Board in its own discretion that the decision of the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995 that members of the Harari National Congress shall be elected by members of the Harari ethnic group living outside the regional state, and corresponding provisions of the constitution of the regional state, are not based on the Federal Constitution; that they are not supported by the Constitution; that it will put an end to such practices; is unacceptable because it is not consistent with the abovementioned legal provisions. The decision passed by the House and the constitution of the regional state are presumed to be constitutional unless otherwise decided to the contrary by the appropriate body.
22. Therefore, the decision rendered by the appellate court that if the current Applicant believes that the decision of the House of Peoples' Representatives of the Provisional Government of Ethiopia and the constitution of the regional state as well as election processes carried out on the basis of these documents are unconstitutional, instead of deciding on the matter by itself, it should address the matter by bringing the matter before the appropriate body and having it decided accordingly, was appropriate. [The Cassation Bench] believes that the decision [of the Appellate Court] was based on the law and the Bench has not found any error of law in it.
23. In conclusion, as articles 49(3) and 50(2) of the constitution of the regional state provide that the Harari National Congress shall have 14 members comprised of members of the Harari ethnic group, and that such members of the Congress shall be elected by members of the Harari ethnic group living inside and outside the regional state in other regional states and cities of Ethiopia; as such practice is supported by the decision of the House of People's Representatives; as no objection has been brought with regard to the applicability or constitutionality of the constitution of the regional state or the decision

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of the House of Peoples' Representatives before the appropriate body with powers to interpret the constitution; and as, considering the ethnic group's minority status and the protection it needs, the election of members of the Harari National Congress by members of the Harari ethnic group living outside the regional state is an established legal practice; [The Cassation Bench] hereby rules that the decision of the National Electoral Board of Ethiopia rejecting the request made to it is unlawful. We also hereby rule that the appellate courts reversal of such decision was appropriate. Therefore, the following decision is hereby rendered.

### **Decision**

1. As the decision rendered by the Appellate Bench of the Federal Supreme Court under file no. 205809 on 27/04/2021 does not have any fundamental error of law, the cassation appeal of the Applicant is hereby rejected, and the decision [of the Appellate Bench] is hereby upheld.
2. It is hereby decided that the decision of the Appellate Bench overturning the decision given by the National Electoral Board of Ethiopia rejecting the request made to it by the government bodies of the regional state to implement in accordance with the legal procedures already in place the right of members of the Harari ethnic group living outside the regional state in other regional states and city administrations to elect members of the Harari National Congress, which is one of the two Congresses of the Regional State Council and which is comprised of members of the Harari ethnic group, was appropriate.
3. It is hereby decided that the 6<sup>th</sup> national elections shall be carried out in accordance with the provisions of the constitution of the regional state and the decision passed by the National Electoral Board in its own discretion that the decision of the House of Peoples' Representatives of the Provisional Government of Ethiopia in its 102<sup>nd</sup> regular meeting held on March 15, 1995. The Board is hereby ordered to execute the same accordingly.
4. The injunction order given by the Cassation Review Bench under this file on May 12, 2021 to suspend the enforcement of the decision given by the Federal Supreme Court is hereby lifted. The same shall be communicated accordingly.
5. A copy of this decision shall be provided to the National Electoral Board of Ethiopia for execution as well as to all parties who have made applications in this case starting from the lower [court].
6. The costs and expenses of the cassation proceeding shall be borne by the respective parties.

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7. The minutes of the decision of the 102<sup>nd</sup> regular meeting of the House of Peoples' Representatives of the Provisional Government of Ethiopia provided by the House of Peoples' Representatives shall be returned to the House in the same way it was received.
8. The decision has been read out on the hearing held on this day of My 27, 2021.

The file is hereby closed and shall be returned to archives.

Bears the signatures of five judges.

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