Partially dissenting opinion

of Judge Rafaâ Ben Achour

1. I agree with almost all of the Court's reasoning and findings in the above Judgement (*Bob Chacha Wangwe and Legal and Human Rights Centre v. United Republic of Tanzania,* Application No. 011/2020). However, and with all due respect for the Court, I regret to partially dissent on two points, namely: paragraphs (vi) and (vii) of the operative part, which read as follows:

> vi. Holds that the Respondent State has not violated Article 3 of the Charter by virtue of the fact that Section 6(1) of the NEA restricts the appointment of the Director of Elections to candidates from the public service only;
> *vii. Holds* that the Respondent State has not violated Articles 13(1) and 3 of the Charter because Section 7(1), (2) and (3) of the NEA restricts the appointment of returning officers to civil servants only;

I. Violation of Article 3 of the Charter by Section 6(1) of the National Elections Act reserving the appointment of the Director of Elections only to candidates from the public service

2. Section 6(1) of the *National Election Act* (hereinafter referred to as "NEA") provides that:

> "There shall be a Director of Elections who shall be appointed by the President from amongst civil servants of the United Republic recommended by the Commission".

3. For the Applicants, such provisions violate the right to equality before the law and equal protection of the law guaranteed by Article 3 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").[1] According to them,

[1] "1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law".

> "Only persons belonging to the public service of the United Republic of Tanzania may be appointed to the office of Director of Elections. As a result, other members and citizens who are not part of the public service and who also have the right to participate in the electoral processes of the State, including by being appointed to various positions in electoral bodies, are excluded".

4. The Respondent State argues that

> "The right to participate in the conduct of business is not absolute, insofar as it may be legitimately restricted by law". Relying on Article 27(2) of the Charter and the decision of the Court in *Tanganyika Law Society and Legal and Human Rights Centre*, *Reverend Christopher Mtikila v. Tanzania*, the Respondent State argues that "the restrictions on persons eligible for appointment to the position of Director of Elections are reasonable and justifiable. The appointment of a civil servant to the position of Director of Elections is in the public interest, as it is easy to verify his or her ethical, professional and academic background, since the public service is governed by a well-established legal framework".

5. The Respondent State's reasoning found favour with the majority of the Court, which found that

> "Section 6(1) of the NEA is not in violation of the Charter insofar as it restricts the appointment of the Director of Elections only to candidates from the public service".[2]

6. It is this finding, and the reasoning behind it, that I disagree with. Indeed, I believe that reserving the position of Director of Elections only to public servants openly violates the principle of equality of all before the law.[3] It is exclusive and discriminatory and cannot be justified on any objective basis.

[2] § 93 of the Judgement.
[3] Principle proclaimed by Article 7 of the Universal Declaration of Human Rights of 10 December 1948: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination", and reiterated in Article 26 of the International Covenant

7. Being a “civil servant” does not confer any particular skill that is decisive for the position of Director of Elections, a task that can be performed by any citizen with a sufficient level of education and exercising a liberal profession or from civil society. Admittedly, as the Court quite rightly points out, the principle of equality “does not necessarily require equal treatment in all cases and may permit differentiated treatment of individuals in different situations”,[4] but such is not the case here. Differentiated treatment that may be acceptable must have a legitimate purpose based on the principles that normally apply in a democratic society. In the absence of a reasonable relationship of proportionality between the means employed and the aim pursued, differentiation becomes discrimination. For an idea of the concept of discrimination, we refer to Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination[5], which stipulates that

> “‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Similarly, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women[6] provides that the term

> “‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

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on Civil and Political Rights of 1966: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”.

[4] § 90 of the Judgement.

[5] Adopted 7 March 1966. Entered into force on January 4, 1969.

[6] Adopted December 18, 1979. Entered into force on 3 September 1981.

These instruments, of course, concern only some cases of discrimination on specific grounds. The Human Rights Committee considers that the term "discrimination", as used in the Covenant,

> "should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[7]

8. Moreover, the Court emphasizes that States have, "within permissible limits, are allowed latitude to configure their electoral management bodies to satisfy their peculiar local needs".[8] Inasmuch as this is true, there is no "particular internal need" in the present case to explain the restriction imposed by the NEA. Without any demonstration, "the Court considers that the fact of reserving the appointment of the Director of Elections solely to civil servants is not a violation of the Charter" and added, while it has already decided, an argument with no bearing on the recruitment of the Director of Elections, but general to the recruitment system in the public service, "that no irregularity was found in the system of recruitment of civil servants of the Respondent State, among whom the Director of Elections is then appointed", as if it were requested to rule on the regularity of the recruitment system in the public service of the Respondent State.

9. Moreover, with respect to violation of Article 2 of the Charter on non-discrimination, the Court reiterates the same reasoning, holding that **"**limiting the selection of the Director of Elections and the returning officers from the civil service is not a violation of Article 2 of the Charter**"**.[9] I will not resume the discussion in this respect, as I have already demonstrated the existence of discrimination as a result of violation of the principle of equality before the law.

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[7]Human Rights Committee, Thirty-seventh Session, 10 November 1989, General Comment No. 18: Non-discrimination.
[8]§ 92 of the judgment.
[9]§ 124 of the Judgement.

10. In addition, reserving the office of Director of Elections to persons from the public service suggests that the Director of Elections is subservient to the executive. Everywhere, civil servants are subject to the hierarchical power of the head of the department to which they belong, namely the minister, and everywhere they are bound not only by an obligation of obedience, but also by an obligation of reserve which significantly restricts their freedom.

II. Violation of Articles 13(1) and 3 of the Charter insofar as Section 7(1), (2) and (3) of the NEA restricts the appointment of returning officers to civil servants only

11. Section 7(1) of the NEA entitles some office holders, namely city directors, municipal directors, town directors and district executive directors, to act as returning officers.

12. Section 7(2) and (3) confers on the Election Commission the discretion to appoint returning officers from among all civil servants.

13. The Applicants challenge the manner in which returning officers are appointed under Section 7(1), (2) and (3) of the NEA. For them, these provisions are at variance with the Charter insofar as they

> "prevent the holding of a free and fair election by admitting election officers who are appointed by the President, who is also the chairperson of the ruling party and a potential candidate with a direct interest in the electoral process".

14. The Applicants also contend that the provisions do not contain criteria, qualifications or guiding principles on the appointment process, which leaves "room for the President to abuse the power to appoint persons to this position". To buttress their allegations, the Applicants submitted a list of persons who they claimed were members of the ruling party *Chama cha Mapinduzi* when they were appointed returning officers.

15. The Respondent State argues that its laws provide sufficient guarantees for Section 7(1) of the NEA to be “applied in accordance with the right to participate freely in the conduct of public affairs, enshrined in the Charter and Article 74(14) of the Constitution”. It also points out that "Upon their appointment, returning officers do not automatically take office as in that capacity. Before taking office, they must meet the requirements of Section 7(5) of the Act and Regulation 16(1)(a) and (b) of the National Elections (presidential and parliamentary elections) Regulations”. According to the Respondent State, Regulation 7(5) of the Regulations provides that

> “Every returning officer and assistant returning officer shall, before embarking on the functions of that office, take and subscribe to an oath of secrecy in the prescribed form before a magistrate and undertake to abide by it, before taking up their duties on this body. Similarly, Regulation 16(1) of the Regulations requires each regional election coordinator, returning officer and assistant returning officer to take an oath of secrecy before a magistrate before assuming office. The same provision makes it compulsory for civil servants to declare before a magistrate or a commissioner for oaths that they are not members of any political party or that they have withdrawn their membership of a political party”.

16. In their Reply, the Applicants aver that the swearing in of an appointed official “is a mere formality which does little to render the appointed person independent. It is in no way a guarantee against the lack of impartiality”.

17. Faced with these two positions, the Court begins by emphasizing that “the use of civil servants in the operations of an electoral body does not in itself constitute an obstacle to the independence, autonomy and accountability of that body”. This, in my view, is questionable insofar as, as noted above, civil servants are employees of the executive power subject to the duty of obedience and the hierarchical power of their boss, the Minister. Consequently, the use of civil servants, to the exclusion of all other citizens, raises suspicion of dependence on the executive power in the electoral process. The fact that civil servants are appointed by the President of the Republic – head of the executive - without limitation of his power to appoint, is an

additional element of suspicion of dependence. Indeed, the President appoints directors of elections on the mere "recommendation" of the Electoral Commission. Therefore, his margin of appreciation is very wide. If this were assent, the situation would have been different. Moreover, the Applicants did not fail to note that "the President receives recommendations from the Commission to appoint the Director of Elections whereas the Commission itself was first appointed by the same President, who is also a potential candidate in the elections". As such, and contrary to what the Court asserts, it is not established that

> "given the various methods for constituting electoral management bodies in use in Africa, the Court holds that there is no violation of Article 13(1) of the Charter by the mere fact that the Director of Elections is appointed by the President. It also holds that Article 13(1) of the Charter is not violated simply by reason of the fact that the President appoints the Director of Elections based on recommendation(s) by the Electoral Commission".[10]

18. This argument is reiterated when the Court further asserts that "a lack of impartiality on the part of particular officer bearers cannot be deduced simply from the fact that a person is appointed by the President"[11] and that Section 7(1) of the NEA does not violate Article 13 of the Charter.

19. Concerning the taking of oaths by the Director of Elections before assuming office, the Court considers that "the oath [is] an essential guarantee of independence and impartiality".[12] When a litigant alleges that taking an oath does not guarantee independence and impartiality, it is incumbent upon them to provide cogent evidence of violation of the oath by persons to whom it was administered.[13] In the present case, the Applicants produced a list of persons appointed as returning officers and affiliated with the ruling *Chama cha Mapinduzi* party at the time of their appointment. The Court did not bother to check the veracity of this allegation. It merely noted that "this issue was also in contention between the Parties during the

[10] § 78 of the Judgement.
[11] § 105 of the Judgement.
[12] *Suy bi Gohore v. Côte d'Ivoire,* § 179.
[13] § 109 of the Judgement.

litigation at domestic level. Specifically, the Court of Appeal dealt with this matter in its judgment from pages 50 to 53. It considered that the evidence adduced by the Applicants ""fell short of reliability …" and dismissed the Applicant's claims". Given this clear finding on an evidential matter by the Court of Appeal, the Court is constrained in **interfering with** the same. This is because it, ordinarily, does not engage in exhaustive factual analyses which are best conducted by domestic courts".[14] [15] In the present case, and given the importance of the issue, the Court could have carried out this "exhaustive factual analysis" before concluding that Section 7(1) of the NEA is not a violation of Article 13(1) of the Charter.

20. Such are my main reservations with regard to the above Judgement. Otherwise, I fully share the Court's findings, particularly those relating to the fact that Section 7(2) and (3) violate the Charter, in the sense that these provisions do not include any indication as to the rank of civil servants who may be appointed to the position of returning officer, or even the qualifications they must have prior to being appointed to that position.

Judge Rafaâ Ben Achour

[14] *Oscar Josiah v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 83, §§ 52-53.
[15] § 110 of the Judgement.