



African Court
on Human and Peoples' Rights

Arusha, Tanzania
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PRESS RELEASE
ADVISORY OPINION SUMMARY

**REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE PAN AFRICAN
LAWYERS UNION (PALU)**

REQUEST No. 001/2020

OPINION

JULY 16, 2021

**ADVISORY OPINION OF THE AFRICAN COURT ON HUMAN AND PEOPLES'
RIGHTS**

Date of Press Release: July 16 2021

Arusha, 16 July 2021: The African Court on Human and Peoples' Rights (the Court) has issued an Advisory Opinion in the Request submitted by the Pan African Lawyers' Union (PALU).

This request for an Advisory Opinion ("the Request") is made by the Pan African Lawyers Union ("the Applicant"), based in Arusha, United Republic of Tanzania. The Pan African Lawyers Union is recognized by the African Union ("AU").



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The Requestor notes that "the Covid-19 crisis poses unprecedented challenges to democratic governance and the rule of law in Africa" and that, "in response to the Covid-19 pandemic, and with a view to guaranteeing the right to life, AU member states have, for the most part, taken measures with the practical effect of restricting certain rights such as the freedoms of movement, assembly, association and information, as well as the right of citizens to participate effectively in the conduct of public affairs of their various countries, especially through regular, free and fair elections.

The Requestor argues that "due to the Covid-19 crisis, all African countries that will be holding elections next year will face simultaneous public health, fiscal stress, political stability and legitimacy of government crises. In countries with weak institutional controls, the consequences could be unpredictable for Africa's citizens, countries, regions, and partners.

Before making a pronouncement on a request for an Advisory Opinion, the Court must ensure that it has jurisdiction. However, since the facts in advisory matters cannot be contested, the Court considered that there was no need to ascertain its territorial or temporal jurisdiction.

With regard to personal jurisdiction, the Court holds that the conditions for its exercise were met since the Applicant is an African organization within the meaning of Article 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), a capacity established by virtue of the Memorandum of Understanding it has signed with the AU.

As for its material jurisdiction, the Court holds that under Article 4(1) of the Protocol, it is empowered to give an advisory opinion on "any legal matter relating to the Charter or any other relevant human rights instruments...".



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With regard to the legal nature of the issues brought before it, the Court considers that it was asked to give its opinion on points of law, in light of the African Charter on Human and Peoples' Rights (the Charter) and the African Charter on Democracy, Elections and Governance (ACDEG), which are both human rights protection instruments.

On the admissibility of the Request, the Court finds that the Applicant was correctly identified, that the Request does not relate to any case pending before the Commission, and that the circumstances of the Request are well specified.

On the merits of the Request, the Court found it appropriate to summarize the issues before it in three points relating to:

- i. Whether or not to hold an election in the context of a public health emergency or pandemic, such as Covid.19
- ii. On the obligations of States Parties to ensure effective protection of the right of citizens to participate freely in the conduct of public affairs of their country in the context of an election held during a public health emergency or pandemic, such as the Covid-19 crisis;
- iii. On the obligations of state parties that decide to postpone elections due to a public health emergency or pandemic, such as the Covid-19 crisis.

On the first point, the Court considers that one of the principles of democracy is the holding of regular, transparent, free and fair elections, in accordance with articles 2(3), aimed at creating conditions that are conducive to democratic handover of power and, at the same time, are aimed at giving the electorate the opportunity to regularly evaluate



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and politically sanction the performance of elected officials, through universal suffrage¹. The Court concluded that states parties may decide to hold elections within the time frame provided by law, notwithstanding the situation of the Covid-19 pandemic, if they deem it possible.

With regard to the decision to postpone elections, the Court noted that by leaving it to domestic law to set the conditions under which citizens exercise the right to participate freely in the conduct of the public affairs of their country, Article 13 of the Charter, supplemented by Articles 2 and 3 of the ACEDG, gives the competent organs of each State the power to decide to postpone elections, in accordance with domestic law. Indeed, the Court found that those who can schedule elections must also be able to postpone them if the conditions for their proper conduct are not met due to an emergency situation, as is the case with the Covid-19 pandemic. The Court is of the opinion that in any case, it is necessary that political actors consult with health authorities and representatives of civil society in order to ensure that the process is inclusive. According to the Court, the said consultations will focus on the decision to hold elections as well as on the measures necessary to ensure that they are conducted in a transparent, free and fair manner.

On the second point, the Court was of the view that the conduct of elections in an emergency situation, such as the Covid-19 pandemic, a disease that is easily transmissible, especially through human-to-human and human-to-object contact transmission, requires that measures be taken to prevent transmission, without undermining the integrity of the electoral process.

¹ ACDEG, Article 2: The objectives of this Charter are “ 3. ... the holding of regular free and fair elections ...”



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The Court notes that these measures include restrictions on rights during the election period, including the right of movement of candidates and voters, the right to register, the right to obtain documents necessary for the submission of candidacies, the right to participate in election-related meetings, the right to access information related to the electoral process, as well as the right of domestic and international election observers to observe elections.

The Court recalls that following the declaration of the state of pandemic, various domestic and international institutions, including the World Health Organization itself, the relevant organs of the AU, the Regional Economic Communities (RECs) and some civil society organizations have issued instructions or guidelines on measures to be taken to mitigate the spread of the disease, including in elections.

The Court considers that as a judicial body, it is not its role to set guidelines for states on how to hold elections during health emergencies, particularly in light of the Covid-19 pandemic. This role falls primarily to the entities that promote human rights at the domestic and continental levels, which they have been doing since the outbreak of the pandemic, as noted above.

Relying on Articles 2 and 27(2) of the Charter and 4(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), the Court reiterated its position that measures restricting rights must be backed by law and be proportionate², or must not affect the essence of the rights³, or derogate from the rights provided for in Articles 6, 7, 8(1) and (2), 11, 15, 16, and 18 of the Covenant⁴ or constitute a form of discrimination against persons.

² *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v. Tanzania* (Merits), § 107.1.

³ *Ibidem*.

⁴ AfCHPR, Communication 275/03, Article 19 v. Eretria (30 May 2007, § 98).



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The Court found that the essence of the right of citizens to participate freely in the governance of their country through elections has several aspects⁵⁵. These are especially election campaign, fair and equitable access to state-controlled media, monitoring of the electoral process by candidates, political parties and public institutions competent to register voters, secrecy of the ballot, posting of lists of candidates and declaration of election results, as well as the possibility of contesting results before competent administrative and judicial bodies.

The Court holds that these aspects of the right of citizens to participate freely in the conduct of their country's public affairs cannot be taken away, even in an emergency situation such as the Covid-19 pandemic, without undermining the integrity of the electoral process.

With respect to the postponement of elections, the Court notes that, unlike the holding of elections in the event of a public health emergency or pandemic, a situation that justifies the restriction of rights to protect the right to health and the right to life of persons, postponing elections results in the suspension of the right of citizens to participate freely in the conduct of the public affairs of their country through elections, as provided for in Articles 13(1) of the Charter and 2(3) and 3(4) of the CADEG. In the Court's view, the conditions for postponing elections, namely, the specific requirements for postponement

⁵⁵ AfCHPR, Communication 320/06 - Pierre Mamboundou v. Gabon (25 July 2013), § 48-49. Also see Article 17 of ACDEG: State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall 1. establish and strengthen independent and impartial national electoral bodies responsible for the management of elections. 2. Establish and strengthen national mechanisms that redress election-related disputes in a timely manner. 3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections. 4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.



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and the applicable regime in the event the term of office of elected officials has expired without the elections not having been held is a matter for domestic law.

After analyzing the relevant legal provisions, the Court holds that postponing an election due to a public health emergency or pandemic, such as Covid-19, must comply with Article 27(2) of the Charter and Article 4(1) of the Covenant. Accordingly, any state that invokes an emergency to postpone elections must declare it by law. The postponement must be for the purpose of protecting the health and life of citizens and creating the necessary conditions for holding transparent, free and fair elections. On the other hand, the postponement of an election cannot absolve elected officials from the obligation of submitting to the electorate for legitimacy, such that the postponement of elections become a means of unduly extending the terms of office of elected bodies.

The Court holds that in the event of the expiration of the term of office of elected officials, domestic law must determine the applicable legal norm, including replacement by interim, extension of the term of office with full powers, or the framework for an interim arrangement. If there is no appropriate legislation at the time of a public health emergency or pandemic, a law may be adopted by the competent bodies, subject to prior consultation with political actors, including representatives of civil society.

Further information

Further information on this case, including the full text of the African Court's judgment, is available at: <https://www.african-court.org/cpmt/details-case/0202019>

For any other enquiries, please contact the Registry by email at: registrar@african-court.org



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The African Court on Human and Peoples' Rights is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa. The Court has jurisdiction over all cases and disputes brought before it concerning the interpretation and application of the African Charter on Human and Peoples' Rights and any other relevant human rights instrument ratified by the States concerned. For more information, please visit our website www.africancourt.org