

Legal and Procedural Considerations for Pandemic Elections

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Since the start of the COVID-19 pandemic, we have witnessed a wave of election postponements across the globe. Behind this wave, questions have arisen in some countries around the legality of such postponements. Because ‘periodic’ elections underpin the legitimacy of democratic governments, these postponements should not be seen as inconsequential. Rather, the closer you look at the issues, the more challenging they may be. Election postponements may not be clearly provided for or even contemplated in the law, making the decision to delay or cancel an election complex.

In addition, once countries reschedule elections, election management bodies will have to grapple with how to modify election procedures to minimize the risk for COVID-19 transmission. This includes modifications to many parts of the election process – such as voter registration, candidate nomination, and campaigning – not just Election Day itself. Again, these decisions may be necessary to both preserve democratic rights and public health. However, they are not simple.

Hence, it is important to ask: how can democratic rights and electoral integrity be safeguarded when elections are postponed or altered during a crisis like COVID-19? The [International Foundation for Electoral Systems](#) (IFES) has produced a [COVID-19 Briefing Series](#) that examines – and provides solutions – to a range of challenges facing elections and democracy as a result of the pandemic. This includes a paper on [Safeguarding Health and Elections](#) (available in multiple languages), a paper on [Preserving Electoral Integrity During an Infodemic](#), a paper on [Inclusion and meaningful Political Participation](#), and a paper on [Preventing Public Corruption in Crises](#).

It also includes a paper on the [Legal Considerations when Delaying or Adapting Elections](#), which is the topic of this article. International principles may allow for temporary election postponements in emergency situations, but such postponements may not be

contemplated in national legal frameworks and may therefore be seen as undermining the right to “periodic” elections. Gaps in legal frameworks present challenges as electoral processes and emergency powers collide. In some situations, there may be no legal basis for an election postponement, and new legislation will be required.

The responsibility for making these difficult decisions varies by country and can become fraught, especially where the legal basis for postponement or modifications is not entirely clear. Additional constitutional interpretation may be needed by the courts or whichever body has the authority to determine constitutional questions. It is inevitable in some contexts that decisions to postpone or modify elections will become politicized and heavily contested. Partisan actors are likely to challenge these decisions in the

The timing of an election postponement is also important to consider. Postponement that happens in the midst of the electoral process may bring additional complexities, including with respect to enfranchisement, or there may be a need to, for example, suspend campaigning during the postponement.

It is an important principle of international law that any postponement of elections be temporary. Determining a new election date can also be complex, however, especially if the health crisis is still evolving. In Liberia in 2014, a case before the Supreme Court focused on the validity of the executive’s decision to reschedule elections, given the fact that Ebola was still present in that country.

In some situations, such as the United States, any postponement will be legally or politically impossible, and focus must be instead on modifications to electoral processes and frameworks to protect public health and elections move forward. Then, question becomes: What modifications might be needed to hold elections during a pandemic?

When procedural changes are being considered, careful consideration must be given to the legal framework. In many cases election laws set out specific processes and timelines, not only for polling but also other parts of the electoral process. In some cases, only simple modifications may be required: for example to the calendar for elections or to

basic procedural aspects such as queue control. However, more complex alterations to the electoral process may necessitate a variety of legal amendments. Where modifications are being considered, careful thought must therefore be given to the electoral legal framework underpinning elections, and the integrity of the entire process — both real and perceived.

Amendments in a crisis situation present both risks and opportunities. Governments wield significant power during a state of emergency, and the potential for this power to be abused for political gain cannot be overstated. Conversely, it is possible that some operational modifications to election processes may actually bolster enfranchisement, particularly of vulnerable or marginalized groups. Regardless, when considering changes or modifications to election processes, it is important to protect and advance the fundamental principles underlying democratic elections, such as fairness, competitiveness and secrecy of the vote.

While the introduction of new polling systems may be rare, likely minor modifications to electoral processes are going to be necessary. It is important to start thinking now about what these modifications might be, and what legal or regulatory amendments they might require. As amendments are being made, important to ensure fundamental electoral principles are preserved and that integrity vulnerabilities are not introduced.

Public outreach, communication and education will be critical, not only because new rules and procedures need to be conveyed to stakeholders, but also because of the potential deterrent effect the pandemic may have on turnout and participation. For example in Mali, which went ahead with parliamentary runoff elections on April 19th, 2020 despite the pandemic, voter turnout in the capital city of Bamako was historically low — at a reported 7.5 percent. All stakeholders must understand the election procedures and health measures being put in place, so they can have the confidence to cast their vote in the midst of the pandemic.