



Analysis of the Electoral Legal Framework of the Election of 23 October 2011 of the National Constituent Assembly of the Republic of Tunisia

Denis Petit

February 2012



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I. EXECUTIVE SUMMARY

The Constituent Assembly elections held on 23 October 2011 took place within a new legal framework as the legislature preceding the revolution was discredited, and which according to the Preamble to the Decree-Law N° 35 of 10 May 2011 “did not ensure democratic, plural, transparent and honest elections”. In its 80 articles, the Decree-law N°2011-35 laid the foundations for elections meeting these four requirements, carried out under the responsibility of an independent electoral authority (The Higher Independent Elections Authority / Instance Supérieure Indépendante pour les Elections (hereafter ISIE), established a month earlier by Decree-Law N°2011-27 dated 18 April supplanted by a number of laws including decisions and rules taken by ISIE itself. This body of laws ensured the 23 October elections and hence the election of the National Constituent Assembly as its immediate result and the democratic legitimacy required to pursue the democratic transition launched in 2011.

The elections of the Constituent Assembly represented a sizeable challenge for Tunisia which, because of its former situation, had never known any democratic elections before that date. The 23 October elections were recognized by all the observers as democratic despite the difficulties encountered.

The major factor behind the success of these elections was ISIE which obviously showed great concern with independence, and thus considerably helped to defuse criticism that such or such defect would not have failed to address even if this independence was questioned.

That said, the next elections would not enjoy the same indulgence. It is therefore essential to learn lessons from this experience and develop an “institutional memory” of these first democratic elections for the laws to be applied to the next elections. Developing new laws would be a complex matter that would require time and must be completed sufficiently before the next elections in order to allow citizens as well as social and political players to be consulted; and once the laws are adopted, to familiarize themselves with the new rules and regulations.

The comments and recommendations hereafter are proposed as a contribution to the reflection on the future laws based on international standards and practices in electoral terms. Beyond the details they contain, and the analysis they develop on the different aspects of the legislation, these comments identify the reflection paths, the lines which can be interpreted as an invitation:

- To develop the laws on the limitations of rights to vote and eligibility, inherited from the past, and to re-examine the restrictions related to some individuals’ political past taking into consideration the requirements of the Law-Abiding State (Etat de Droit) namely ensuring that any restriction be subjected to judicial control
- To clarify, precise and complete the laws related to voter registration procedures in order to fill in the lacunae and lack of precision noted during the elections of the Constituent Assembly, namely issues related to registration and suppression of names procedures, posting lists and claims
- To consolidate the provisions related to submitting candidacy in order to set up the conditions for a uniform application of the regulations, to allow useful recourse against eventual rejection of registration, without any excessive formalities, and to strike a balance between equal participation of citizens in public affairs and the proliferation of candidatures some of which do not necessarily provide the required guarantees that they are serious candidates.
- Maintaining , within the framework of a global strategy, a quota system for gender parity on the lists of candidates, but equally at the various scales of the electoral administration
- Unify and ensure the coherence of laws fixing the rules and procedures of the electoral campaign by providing precision where necessary, and ensuring that the campaign is not rigidified beyond what is

required to guarantee the free expression of ideas, equal access to the media and allowing the possibility of submitting claims by both voters and candidates beyond any excessive formalism.

- Defining in the law the structure of the electoral administration at all levels, fixing the calendar for the appointment of the sub-committees, and consolidating the status and the powers of the Central Commission which must : 1) operate according to the collegiality principle, 2) better delegation of tasks for the material organization and logistics to the bodies in charge of supporting them, 3) increasingly acquire the means to play their full role in electoral disputes related to electoral campaigns and the results of the elections ; and finally 4) increase transparency of the works and the electoral process, including a rapid publication of full and detailed provisional results by the polling station
- Avoiding any excessive centralization of the procedures for the establishment and consolidation of provisional results and, as far as disputes are concerned, alleviating formalities and procedures, and recognizing the power to act not only for the heads of lists but also for candidates and voters (of course, within reasonable limits so as to avoid the congection of the Administrative Court).

II. OPENING REMARKS

1. Introductory notes on the objectives, the scope and the limits of this opinion

This opinion is intended to assess the compliance of the legal framework for the election of the National Constituent Assembly with the international standards for the protection of human rights. Its objective is to identify the strengths and weaknesses of the legal texts that framed this election in order to facilitate the recasting of the legal framework for the elections to come. It is about taking advantage of the advances that the legislation governing the election of the National Constituent Assembly achieved while pointing to ways to avoid the pitfalls encountered during its implementation.

Therefore, this opinion is not limited to analyzing the legal texts that governed the election of the National Constituent Assembly but contains recommendations to strengthen their compliance with the relevant international standards. In the following comments, the pre-revolution electoral legislation is taken into consideration. Because it served both as a foil and a starting point for the development of the new electoral texts, it is useful to refer to it. These comments would be of little interest if they were just considering the texts that are no longer topical. This is why many of them are projected from the perspective of the new legislation, yet to come, which will apply to the future elections.

This opinion does not claim in any way to be exhaustive. The analyses it contains are defined by the framework outlined by the interim legislation: the legal texts on themes such as political parties, the freedom of expression, the freedom of media or the freedom of assembly are not subject to a detailed study even though they are key in the context of an electoral process. Some questions that were or are currently subject to separate studies are left aside (including the funding of the electoral campaign) as well as the questions of the choice of the electoral system that are more political than legal; and finally, the comments do not apply to all elections (presidential, parliamentary, local in particular), as each have its own characteristics and require specific provisions.

The analysis below includes comments but also recommendations that aim at contributing to the debate launched by the Tunisian authorities to develop a new electoral law. The recommendations should not be understood as an invitation to endorse a model over another. They take into account international standards as they were defined in the practice of States, including the states in democratic transition and the international organizations. They just represent a contribution to stress issues, give directions and raise discussions about the ones and the others. This opinion has its limits: in addition to those specified in the previous paragraph, there

are those inherent in any analysis that relies on information that might lack critical data or could not have included it as it should be, particularly in terms of the Tunisian law.

This opinion should not be read as a systematic presentation of the legislation. It focuses on the aspects requiring comments and / or recommendations without necessarily returning all of the legal systems that govern them. The opinion does not refer also to the observations contained in the reports of election observers unless they reveal, confirm or clarify the points raised in the analysis.

Only the Arabic version of the texts discussed below – as of any official legal act- is authentic. These comments are based on the French translation of these texts. However, only the texts whose translations are published in the Official Gazette of the Republic of Tunisia (JORT) are official translations¹. Therefore, for all the other texts, that were not translated officially in French or whose translation were not available during the drafting of these comments, the misinterpretation due to their translation could not be excluded.

2. Tunisia's international obligations and the framework of analysis for this opinion

The international obligations of Tunisia regarding free and democratic elections are derived primarily from the Universal Declaration of Human Rights (in particular article 21²), the International Covenant on Civil and Political Rights³ (in particular article 25⁴ as specified by the General Comment No. 25 and the jurisprudence related to it of the United Nations Committee of Human Rights) and the African Charter on Human and Peoples' Rights⁵ (in particular article 13⁶). Tunisia also ratified the International Convention on the Elimination of All Forms of

¹ Every time such translation exists and could have been used for these comments, the first time that the text is mentioned it will be indicated by a footnote.

² UDHR, article 21: «The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. » Strictly speaking, the UDHR is not legally binding but the practice of States (including through references to the UDHR in their constitutions, legislation and jurisprudence) attests to a crystallization of customary international law on human rights which the UDHR is a central element.

³ ICCPR ratified on 18 March 1969.

⁴ ICCPR, Article 25: "Every citizen shall have the right and opportunity [...] a) to take part in the conduct of public affairs, either directly or through freely chosen representatives; b) to vote and to be elected at periodic fair, equal and universal elections, with universal and secret suffrage, guaranteeing the free expression of the will of voters."

⁵ Adopted on 27 June 1981 in Nairobi and entered into force on 21 October 1986, the Charter was ratified by Tunisia on 16 March 1983. On 21 August 2007, Tunisia ratified also the Protocol of the Charter creating an African Court on Human and Peoples' Rights (entered into force on 15 January 2004 after the submission of the 15th ratification instrument). Tunisia, however, is one of the four member states of the African Union that refused to sign the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (called the "Maputo Protocol" adopted by the African Union on 11 July 2003 and entered into force on 25 November 2005).

⁶ Article 13: "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law "

Discrimination against Women (CEDAW)⁷ and the Convention on the Rights of Persons with Disabilities (CRPD).⁸ In the period immediately following the revolution, the interim government signed new international commitments of major importance in the field of the protection of human rights⁹ and that, even if they do not directly affect the conditions for holding free and democratic elections, are significant of a new context favorable to the pursuit of this objective.¹⁰

These legal texts define minimum standards as an obligation of result that can be filled by different means left, largely, at the discretion of States. That said, during the last twenty years, the international law has evolved considerably over the question of the best way to achieve the goal of free, fair and transparent elections, organized at regular intervals, based on the principles of universal suffrage, secret voting, non-discrimination and equality before the law. Based on the principles defined in the international instruments, a set of criteria based on both international law and the practice of States and international organizations had been gradually identified. The international observation of elections in many countries in democratic transition contributed to this development, resulting in texts of various kinds such as the observation handbooks, the codes of practice, the guidelines, the guidance or policy statements. The judicial or quasi-judicial bodies in charge of the enforcement of treaties or of the conventions protecting human rights contributed also to the formulation of principles that strengthened the aforementioned developments. To reflect the current state of jurisprudence and practice at the national and international level concerning the interpretation of the elections international law, we can mention the following sources which, although not directly binding on Tunisia, are significant of this development and deserve, as such, to be taken into consideration (among others):

- The jurisprudence of the European Court of Human Rights (and that of the former Commission) in cases where complainants allege especially the breach of article 3 of the Protocol No. 1 of the European Convention of Human Rights;

⁷ The Convention was ratified in July 1985 but this ratification was subject to reservations to articles 9, 15, 16 and 29 of the Convention as well as to the general statement. On 16 August, the Council of Ministers approved a draft decree law removing the reservations but preserving the general statement. Tunisia is now the only country of the African Union not having reservations to this Convention. The Additional Protocol, which allows individuals to file complaints before the Committee in charge of the control of the implementation of the Convention, was ratified in 2008. (see Section VII).

⁸ The CRPD and its Optional Protocol, which allows the Committee on the Rights of Persons with Disabilities to receive and consider communications submitted to it by individuals or groups of individuals, was ratified by Tunisia on 2 April 2008.

⁹ On 29 June 2011, Tunisia ratified the Optional Protocol to the ICCPR and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading treatments as well as the International Convention for the Protection of All Persons against Enforced Disappearance (which was signed on 6 February 2007). Tunisia is thus the first country in North Africa that ratified the International Convention for the Protection of All Persons against Enforced Disappearance. Moreover, Tunisia joined on 28 June 2011 the Rome Statute, becoming the first country in North Africa to be part of the International Criminal Court.

¹⁰ Regarding the direct applicability of the international standards in the Tunisian law, it should be noted that under Article 32 of the 1959 Constitution, "*treaties ratified by the President of the Republic and approved by the members of the parliament shall have higher authority than laws.*" The approach is restrictive in two ways: first, it is question of „treaties” and not of international law in general. On the other hand their rule applies only in respect to law, not to the constitution or to the constitutional laws. Regarding the direct effect of the international law before the national courts, if we stick to the Arabic version of the Constitution - which is the authentic one - it seems that the national court is has a priori the obligation to exclude the application of the domestic law in case of conflict with the international law standards subscribed by Tunisia.

- Document of the Copenhagen Meeting of the Conference on the Human Dimension¹¹ of the Conference on Security and Cooperation in Europe (CSCE. Copenhagen, June 29, 1999), particularly section 7;
- The guidelines and the codes of good practice developed by different international organizations such as the European Commission for Democracy through Law (or "Venice Commission") – of which Tunisia is member since 1 April 2010 – the Council of Europe, the Inter-Parliamentary Union (IPU) and the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE)¹²
- The opinions on the electoral legislation of a number of countries of the Venice Commission and/or the ODIHR/OSCE¹³
- The declarations on international observation¹⁴ and the election observation handbooks¹⁵ as well as the election observation reports of the United Nations, the European Union, the ODIHR of the OSCE and the Council of Europe
- Other international documents, including texts in gestation or recently entered into force and which could in the future have an authority over democratic elections.¹⁶

¹¹ June 29, 1990: 29 I.L.M. 1305 (1990). Although regional in scope and not universal (politically binding for the 56 countries participating in the Organization for Security and Cooperation in Europe - OSCE - namely all member states of the European Union, the United States, Canada and the countries of the former Yugoslavia and the former Soviet Union, including the Russian Federation), this document is now considered as one of the most comprehensive texts on international standards relating to democracy and especially to the right to free and democratic elections. This is the basis on which election observers are invited in the participating countries. These standards influenced and continue to influence greatly the development of the international standards system on electoral issues.

¹² Among these texts are: the Code of Good Practice in Electoral Matters adopted by the Venice Commission at its 52nd session (CDL (2002) 23, Venice, 18-19 October 2002) including an Arabic version available online ([http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-ar.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-ar.pdf)), the Declaration on criteria for free and Fair Elections unanimously adopted by the Inter Parliamentary Union of the Council at its 154th session (Paris, March 26, 1994) and of which the United Nations General Assembly took note in its resolution 49/190 1994; the guidelines on the regulation of political parties, 2010, joint document of the OSCE / ODIHR and the Venice Commission (Venice, 15-16 October 2010, CDL-AD (2010) 024); the Guidelines for Reviewing a Legal Framework for Elections, Warsaw, OSCE / ODIHR, 2001, the Code of good conduct in political parties matters adopted by the Venice Commission at its 77th session (CDL-AD(2009)002; Venice, 12-13 December 2008); the Guidelines on prohibition and dissolution of political parties and analogous measures adopted by the Venice Commission at its 41st plenary session (CDL-INF (2000) 001, Venice, 10-11 December 1999) the Guidelines and report on the funding of political parties adopted by the Venice Commission at its 46th plenary meeting (CDL-INF (2001) 008, Venice, 9-10 March 2001) the Guidelines and explanatory report about the legislation on political Parties: some specific issues, adopted by the Venice Commission at its 58th plenary Session (CDL-AD (2004) 007rev, Venice, 12-13 March 2004) The opinion on the prohibition of financial contributions to political parties from foreign sources adopted by the Venice Commission at its 66th plenary Session (CDL-AD (2006) 014, Venice, 17-18 March 2006) the Report on the participation of political parties in elections adopted by the Venice Commission at its 67th plenary Session (CDL-AD (2006) 025, Venice, 9-10 June 2006).

¹³ This is the legislation of countries among the 56 OSCE member States and the 58 member States (many of whom are also members of the OSCE) of the Agreement establishing the Venice Commission (States member of the Council of Europe but also countries of every continent such as Morocco and Algeria since 2007, Israel since 2008, Peru and Brazil since 2009, Tunisia and Mexico since 2010).

¹⁴ For example, the Declaration of Principles for International Election Observation, underwritten by a large number of intergovernmental and non-governmental organizations.

¹⁵ Elections Observation Handbook, OSCE / ODIHR, 2005, fifth edition (a sixth edition was published in 2010 but is not available in French).

III. LEGAL FRAMEWORK AND ELECTORAL REFORM

1. Legal framework of the elections of the National Constituent Assembly

The legal framework for the elections of the National Constituent Assembly (NCA) is composed of the decree law of 10 May 2011 on the election of a National Constituent Assembly¹⁷ (hereinafter "EDL" for "elections decree law"), as amended and completed by the decree law of 3 August, and three other decree laws,¹⁸ first and foremost the decree law No. 27 of 18 April 2011 establishing an Independent High Commission for Elections¹⁹ and 5 decrees.²⁰

Even though it repeals the Electoral Code of 1969²¹ which it substitutes, the elections decree law is largely inspired by it in terms of its structure and its substantive provisions. At the time of its drafting, it was not considered as achieving a reform, which would have been unrealistic given the extremely tight schedule, but as performing a work of "reconstruction". And indeed, because it was a transitional text, intended to be applied only to one election in an exceptional context marked by the suspension on 3 March of the Constitution, all the efforts of the persons in charge of its drafting were focused on building a legal framework based on the relevant provisions of the Code by purging them of what was problematic in terms of the specific requirements of the organization of free and democratic elections and by amending them with measures that meet these requirements, including the establishment of an independent electoral commission.

In addition to the actual electoral aspects, the legislator reshuffled also the legal framework governing the conditions for the freedom of the expression of opinion given its importance as part of an electoral campaign. Thus, the legislation on political parties and the rights of associations was liberalized and recast

¹⁶ Such as the African Union Declaration on Principles Governing the Democratic Elections in Africa (2002) and the African Charter on Democracy, Elections and Governance, effective since February 15, 2012 (not ratified by Tunisia). We may also mention the Draft Convention on Election Standards, Electoral Rights and Freedoms of Central and Eastern Europe Election Officials (2002).

¹⁷ Decree law No. 35 of 10 May 2011 (published in the Official Gazette of the Republic of Tunisia n° 33 of 10 May 2011, except the amendments made by the decree law No. 72 of 3 August 2011).

¹⁸ In addition to the decree law No. 27, there are the following decree laws: decree law No. 91 of 29 September 2011 on the procedures and methods of control by the Court of Auditors over the election campaign funding for the NCA, decree law No. 109 of 22 October on providing exceptional leave to public employees candidates to the election of the NCA.

¹⁹ Members of the Central Committee were appointed by decree n°546 of 20 May 2011.

²⁰ Decree No. 1086 of 3 August 2011 on calling voters to elect the members of the NCA; Decree No. 1087 of 3 August 2011 which fixes a ceiling for election expenses and the way of disbursing the allowances to finance the NCA election campaign (NOT); Decree No. 1088 of 3 August 2011 which delineates the constituencies and sets the number of seats reserved for them for the election of the members of the NCA (NOT); Decree No. 1089 of 3 August 2011 which determines the responsibilities within the organs of the former Democratic Constitutional Rally, in accordance with Article 15 of the decree law No. 2011-35 of 10 May 2011 on the election of a NCA (NOT); Decree No. 2472 completing decree No. 1087.

²¹ Law No. 69-25 of 8 April 1969 on the Electoral Code (Official Gazette of the Republic of Tunisia n° 14 of April 14, 1969, page 460 and following), amended on numerous occasions since 1969, including in 1979, 1980, 1988, 1993, 2003 and recently in 2009. Note that article 28 of the Constitution required that the electoral law takes the form of an organic law.

in two new texts: decree law No. 87 and decree law No. 88, both passed on 24 September 2011²² and both on the organization of political parties and the rules governing the associations.²³

All the texts mentioned above were not adopted once but over a period of time from April to October. In the absence of elected bodies, a consensus enabled the creation of the "High Commission for the Realization of Revolution Objectives, Political Reforms and Democratic Transition"²⁴ (known as the "Ben Achour" Commission, named after its Chairman) that played a key role in the drafting of the EDL and of decree law No. 27 of 18 April 2011 on the creation of an independent high commission for elections.

The development of the texts was done in a hurry, on a tight schedule and until 3 June, it was expected that elections would be held on 24 July, three months before the date on which they finally occurred. In these circumstances it was inevitable that gaps would come out. To fill these gaps, the actions of the legislator through decree laws and decrees were combined with those of the Central Commission of the Independent High Commission for Elections through decisions and decrees made until a few days of the election day. The Central Commission adopted eight decisions between 25 June and 19 October. Some of them were of its responsibility under the provisions of the election decree law; others were, however, dictated to it by the need to fill the gaps or correct the inaccuracies of the legal framework of the election, including the electoral campaign, media coverage and the processes of voting, counting and the aggregation of results.

Note that during this transitional period when interim authorities legislated through decree law and decrees, as the Constitution was suspended²⁵, among the laws and regulations prior to the revolution, those that were not enforced anymore were those that were substituted²⁶. As for the absence of a Constitution, it was partially and temporarily - only on questions related to the organization of public authorities - overcome by decree law No. 14 of 23 March 2011 on the provisional organization of public authorities.²⁷ Under this decree, and until the passing of a new organization for the public authorities by the National Constituent Assembly, all legislative and executive powers were in the hands of the Interim President of the Republic.

²² They were both published in the Official Gazette of the Republic of Tunisia n°74 on 30 September 2011

²³ Decree law No. 88 of 24 September on the organization of associations, substituting Law No. 59-154 of 7 November 1959 as amended by the Organic Law No. 92-25 of 2 April 1992 and n° 88-90 of 2 August 1988, which subjected the creation of any association to a system of prior authorization given by the Ministry of Interior. The changes introduced in 1988 and 1992 substituted this system of prior authorization procedure by a simple statement, but in practice, the authorization regime kept being applied and the associations remained tightly controlled by the Ministry of Interior that could oppose the creation of an association or suspend its activities by invoking its non compliance with the law without having to explain its decision. (see section VIII.1a)

²⁴ Its term ended on 13 October 2011.

²⁵ The suspension was decided and established retroactively on 3 March by the decree law No.2011-14 of 23 March 2011 on the organization of public authorities and validated by the Constituent Law No. 2011-6 of 16 December 2011 on the provisional organization of public authorities, which repealed the decree law No. 2011-14.

²⁶ As illustrated in the preambles of the various decree laws, including the EDL, that cover a number of texts, some enforced before the revolution.

²⁷ Official Gazette of the Republic of Tunisia of 25 March 2011, p. 363. Note that a new law passed by the the Constituent Assembly on 10 December 2011 (published in the Official Gazette of the Republic of Tunisia on 23 December) took over from the decree law of 23 March 2011. It gave a new provisional constitutional organization to Tunisia which will continue to be enforced until the entry into force of a new Constitution.

2. Electoral reform

Any electoral reform is above all a political process that involves political choices, primarily, that of the electoral system. On a technical level, any electoral reform, that is not confined to the amendment of the former texts but that seeks to recast them entirely, requires that choices be made about the form it should take, the method to be used to accomplish it and the consultations to be conducted for its formatting to ensure the broadest support possible at all stages of the process, even before the beginning of drafting. The political process does not mean the monopolization of the debate by the political sphere. It should mean, on the contrary, the possibility for everyone to express themselves, to be consulted, to be part of the process. With this in mind, the following considerations may be useful to the thinking related to the electoral reform in which Tunisia has embarked.

a. Formatting the reform

In terms of formatting, the following three principles should be considered:

Harmonization of the electoral law

In many countries, there is a tendency to aggregate the key aspects of the electoral legislation in a single electoral code. In contrast to this approach, some countries have maintained or continue to adopt a fragmented legal framework with many electoral laws and many organs to designate. These countries but also the countries that opted for a standardized law for different types of elections may have separate laws to deal with specific aspects of the electoral administration process (for example, a law on the central election authority or a law on the voter lists).

To reduce the number of redundant provisions and to improve the consistency and the clarity of the electoral legislation, it is generally preferable to have a single electoral text describing, as it was the case in Tunisia, the general aspects of the elections (general or common provisions) and the particularities of each election in separate parts of the same text. The biggest advantage of this approach is that it allows the electorate, the political actors, the various organs of the electoral authority and the courts in charge of electoral disputes to better understand the electoral issues. This approach also helps ensure a uniform application of the electoral provisions.

The fact remains that as global or holistic the chosen approach is, the question of the compatibility of the electoral legislation with the requirements contained in other laws will continue to arise. The Electoral legislation is not intended to cover matters relating to the organization of political parties or those relating to the exercise of freedom of expression, freedom of press and media or the freedom of assembly. All matters related to criminal, civil and administrative law affecting the electoral legislation are not addressed even though the elections generate disputes which aspects (power to impose sanctions, penalties and procedures) are not specific or "special" but in the respect of the general principles governing these issues (especially the administrative disputes).

Simplification of the electoral law

In many countries, the electoral legislation is subject to criticism relating to its exceptional length, its complexity and the redundancies arising from it and sometimes causing internal inconsistencies. Some electoral laws are overly detailed and duplicate other texts instead of referring to them. This over regulation is often the result of political disputes and of a climate of distrust between the parties involved in negotiating the texts. The politicization of the process makes the arrangements or technical adjustments needed for the texts, once the negotiation is complete, impossible to take place. The texts are adopted as they are, without or barely with some reconstruction, and are structured so that their understanding requires constant back and forth between different chapters, sections and articles.

It is crucial that the electoral law is accurate, unambiguous, clear and easy to understand by the electoral officials, the candidates and the voters. A section of the reform must be devoted to the simplification of the texts while simplicity, consistency and readability should remain present throughout the discussions. Simplifying the complex should be a leitmotif to the discussion so that the text is, wherever possible, understandable to the largest number and facilitates the voter education and the training of electoral officials.

There should be a balance between the law and the power of the election administration to interpret and enforce the texts. Through too many details, the law may prevent the adjustments that are necessary in practice and may cause blockages. On the contrary, a law that is not precise enough or that is flawed confers the electoral authority with a responsibility that exceeds what the texts confer to it and lead it to take decisions that will be criticized for that very reason, even though reasonable and justified. It is therefore essential, at the time of drafting, to seek a balance between these two extremes, leaving to the electoral authority some discretion in terms of adaptation and interpretation of the electoral law, ensuring it is given the means to exercise this responsibility and it enjoys the confidence of the election's stakeholders.

Stabilization of the electoral law

"Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy.²⁸" Different considerations are taken into consideration to support this requirement. First, "In general any reform of electoral legislation to be applied during an election should occur early enough for it to be really applicable to the election."²⁹ Second, the late amendments to the legislation or the decisions taken at the last minute by the election authority can complicate the correct and standardized application of election laws during the elections. Finally, late or hasty changes can also create a belief among voters that the electoral law is an instrument manipulated by those in power in their favour.

In principle, the need to ensure stability essentially concerns the rules on politically sensitive issues -such as the composition of the electoral committees, the electoral system and the delineation of constituencies - considered as decisive factors in the election results so that their frequent changes, or just before a vote could be a manipulation or appear as such. The changing of the voting system is not at stake as its frequent revision or just revision before the election. The Code of Good Practice in Electoral Matters of the Venice

²⁸ Venice Commission, Code of Good Practice in Electoral Matters, Explanatory Report, paragraph 63. See also Handbook for European Union Elections Observation, European Commission, Second edition 2008, page 47: "Certainty and transparency in an electoral process is strengthened when the legal framework is established well ahead of an election date being announced. Late changes in legislation, or delays in adopting regulations on key issues, can undermine an electoral process"

²⁹ Venice Commission, Interpretative Declaration on the Stability of the Electoral Law (CDL-AD(2005) 043, paragraph 5).

Commission states that the fundamental elements of electoral law should not be changed less than a year before an election³⁰.

One of the most effective ways to stabilize the electoral law is to define in the Constitution or in a text greater than the ordinary law (and whose passing requires a broad political consensus that includes the opposition or a significant part of the opposition) its most sensitive elements. Otherwise, the electoral law should have a legislative rank and though the technical rules and details may be regulatory, it is important that it represents standards of execution and that it is not possible to assign essential elements of the electoral system by regulation.

b. Public consultations

In terms of consultation, electoral reform is a process that should be open, transparent and inclusive. Public consultations are part of the transparency requirements inherent in any legal reform whatsoever. For electoral purposes, they are crucial, giving the legitimacy needed to the legislation to be accepted and then applied, creating the conditions for a consensus and defusing potential misunderstandings or blocking points as soon as possible – benefiting the reform of the experience and expertise of all the election stakeholders but not limiting it to politics in the narrow sense.

³⁰ Venice Commission, Code of Good Practice in Electoral Matters, II. 2.b: "The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law."

IV. RIGHTS OF SUFFRAGE

1. Right to vote

a. Age limit

Under Article 2 of the EDL, all Tunisians "aged 18 the day before the elections" have the right to vote. The right to vote at 18 was acquired prior to the revolution since it is an organic law that established it in April 2009³¹ after the Constitution itself was amended accordingly by the Constitutional law No. 2008 -52 of 28 July 2008. Curiously, in the Constitution, the principle of universal suffrage is included in the chapter relating to the legislature which could - wrongly - suggest that it applies only to legislative elections.

b. Loss or suspension of the right to vote for convicted and imprisoned persons

The universal suffrage is the foundation of any democratic regime. Any limitation is likely to undermine the democratic legitimacy of the elected candidates and, consequently, the laws enacted on their behalf. That said, the principle of universal suffrage is not absolute. In the electoral decree law, other disqualifying capacities are added to those related to age and citizenship, as it was the case in the previous legislation. Three types of limitations are provided for in Article 5 of the EDL. Are prevented from their right to vote: first, the *"Persons who are sentenced to more than 6 months of imprisonment for committing honour related felonies or misdemeanours and have not yet regained their civil and political rights."* Second, the persons held in custody and third, those whose assets were confiscated after January 14, 2011.

Regarding the limitation related to a criminal conviction, the international law protects the right of all citizens to vote without any kind of distinctions, including those related to race, colour, sex, language, religion, political opinion, national or social origin, property, birth, but also to "any other status"³². That said, distinctions, thus the limitations or conditions, are possible provided they are prescribed by law, that they are based on objective and reasonable criteria, that they pursue a legitimate aim and that they are proportionate to the latter. In practice, such as for example aggregated and synthesized by the Venice Commission³³, the element of proportionality condenses in the assessment of the severity of the offence or the sentence.³⁴ There is no mathematical threshold beyond which an offence would automatically and universally be described as "serious". It is important that the severity of a crime is assessed through the use of objective and reasonable criteria, for example by referring to the scale of penalties in a particular jurisdiction. But "objective and reasonable" means that any assessment should also assume that the right to

³¹ This is Law No. 2009-19 of 13 April 2009. The standardization of the age of majority was made in 2010 by Law No. 2010-39 of 26 July 2010, on the standardization of the majority age.

³² United Nations Committee of Human Rights, General Comment No. 25 (July 12, 1996), paragraph 3

³³ Through the examination of these practices, the Venice Commission published a Code of Good Conduct in Electoral Matters (adopted at its 52nd session on 18-19 October 2002 -CDL-AD (2002) 23 rev) that contains guidelines and an explanatory report.

³⁴ In its General Comment No. 25, the Committee of Human Rights merely states that "the period of such suspension should be proportionate to the offence and the sentence" (paragraph 14), the proportionality criteria is applied here only to the length of the suspension and not to the measure itself. Six years later, the Venice Commission changes its vision stating that a disqualification from the right to vote should be motivated by "(...) criminal convictions for serious offences."

vote is not a privilege nor a reward but a right³⁵ so that any restriction or suspension should not result in depriving of this right a wide proportion of those imprisoned in the abstract and should not be undifferentiated and indeterminate in duration.

The threshold of six months of imprisonment as enacted by section 5 would not in itself be problematic with regard to the practice in many countries³⁶ if the qualification ("infamous") was explicitly defined in the EDL or in the Penal Code. The term infamous does not have in itself a definite meaning; it is a doctrinal idea. Because the Penal Code does not use it, it tends to encompass an indeterminate number of offences³⁷ and whatever it may be assumed here that the term means, or that it limits on the contrary the number of offences that are likely to result in a deprivation of the right to vote ("infamous" offences as opposed to all other offences, including those punishable by more than six months of imprisonment), it would be preferable, for reasons of legal certainty, to clarify the scope of this measure. Note, however that this limitation was not used during the elections of the Constituent Assembly.

Paragraph 1 of Article 5 should be reviewed in the light of the new approaches encouraged by the international law which do not make of the suspension of civil rights - thus the rights to vote in particular - an automatic effect of an imprisonment, regardless of its severity. The recent jurisprudence of the European Court of Human Rights³⁸ gives evidence to this as it is critical of the national legislations providing for a criminal conviction that can be regarded as automatically accompanied by a suspension of the rights to vote, regardless of the nature of

³⁵ Note in this regard, the argument used by the Supreme Court of Canada in its judgement to *Sauvé vs. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519, 31 October 2002: "The act of depriving prisoners of their right to vote is more likely to send messages that undermine the respect for the rule of law and democracy than messages that promote these values. The legitimacy of the law and the obligation to obey it result directly from the right of every citizen to vote. Denying prisoners their right to vote is losing an important means of teaching them democratic values and the sense of social responsibility. The new political theory of the government that would allow elected officials to deprive a portion of the population from the right to vote has no place in a democracy based on the principles of inclusion, equality and the citizen participation."

³⁶ In its judgment of 6 October 2005 concerning the case *Hirst vs. the United Kingdom* (No. 2), the European Court of Human Rights found that among the countries member of the Council of Europe, in eighteen countries (Albania, Germany, Azerbaijan, Croatia, Denmark, ex-Yugoslav Republic of Macedonia, Finland, Iceland, Lithuania, Moldova, Montenegro, Netherlands, Portugal, Czech Republic, Slovenia, Sweden, Switzerland, Ukraine) prisoners are allowed to vote without any restriction; in (Armenia, Bulgaria, Cyprus, Estonia, Georgia, Hungary, Ireland, UK, Russia, Serbia, Slovakia, Turkey) all prisoners are banned to vote or unable to do so, and in eleven countries (Austria, Belgium, Bosnia-Herzegovina, Spain, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Romania) the right of prisoners to vote may be limited in other ways. In Austria, Norway, Belgium, Italy, Greece and Romania, for example, the loss of the right to vote depends on the nature of the committed crime or the length of the sentence. In Romania, the detainees might not be allowed to vote if the primary sentence exceeds two years of imprisonment.

³⁷ Etymologically, infamy is a decision, act or omission that undermines the reputation of a person, taints his honor, and strikes it with ignominy. Most often, we find fraud or public corruption of justice or public administration under crimes involving infamy. This type of sanction is designed specifically to meet the people who care about their honor and reputation, especially those holding public office. This concept has however disappeared from the Penal Code in many countries that prefer referring to deprivation or suspension of rights sanctions.

³⁸ See also Code of Good Practice in Electoral Matters, guidelines, I 1.1 d, v: "the withdrawal of political rights may only be imposed by express decision of a court of law. However, in the event of withdrawal on grounds of mental incapacity, such express decision may concern the incapacity and entail ipso jure deprivation of civic right."

the offence and the severity of the sentence³⁹. The Court tends, instead, to encourage repressive systems, predicting that the suspension of the right to vote is granted by the judge, case by case, as an additional penalty⁴⁰, and not by the legislature as an accessory penalty, and depending on a threshold of the severity of the principal penalty.⁴¹

It would also be appropriate to specify that the duration of a suspension of voting rights should be specified and shall in no case exceed the duration of the sentence⁴².

In addition, the EDL does not provide adequate measures to allow convicted persons for "infamous" offences punished by imprisonment of less than six months and persons in remand to vote. These detainees are deprived of their right. As stated in the General Comment No. 25 of the United Nations Committee of Human Rights, article 25 of the ICCPR "requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects."

Recommendations

- The suspension of the right to vote should be, in theory, delivered by a judge, on a case by case basis, as an additional penalty, and not by the legislator as an accessory penalty, based on a threshold of the severity of the principal penalty. It is desirable that the future legislation provides that the persons deprived of voting rights get the suspension as a result of an additional judgement delivered by a judge case-by-case;
- Accordingly, paragraph 1 of article 5 should be reviewed so that the suspension of civil rights - thus the rights to vote in particular – is not the automatic effect of an imprisonment, regardless of its severity;
- In the texts, the duration of a suspension on voting should be specified and in no case should exceed the duration of the sentence;
- The qualification of "infamous offence" should either be removed from the text or be clarified taking into account the above recommendations 1, 2 and 3;
- Adequate measures should be taken to make the right to vote of persons sentenced to imprisonment for less than six months and to persons in remand effective.

³⁹ See European Court of Human Rights, *Hirst (2) against the United Kingdom*, judgment of 6 October 2005, request no. 74025/01, particularly paragraph 82.

⁴⁰ See European Court of Human Rights, *Hirst (2) against the United Kingdom*, judgment of 6 October 2005, request no. 74025/01; *Frodl against Austria*, judgment of 8 April 2010, request No. 20201/04, paragraph 25; *Greens and MT against United Kingdom*, judgment of 23 November 2010, requests. 60041/08 and 60054/08. See also Code of Good Practice in Electoral Matters, Guidelines, I 1.1 d.

⁴¹ Note the recent developments in France where, since 1994, the suspension of civil rights is no longer automatic, but in one exception: persons holding public functions that were convicted for passive bribery, traffic of influence, favoritism or illegal taking of interest. In this case, the suspension of civil rights can not exceed five years. Otherwise, the judge should decide to impose a penalty of suspension of civil rights, that shall not exceed ten years for a crime and five years for an offence.

⁴² General Comment No. 25, (57), United Nations Committee on Human Rights, adopted at the 1510th meeting (57th session), July 12, 1996, paragraph 14.

c. Suspension of voting rights for the persons whose assets were confiscated after January 14, 2011

The universal suffrage is a basic principle so essential to democracy that any interference with the exercise of voting rights should be subject to the strictest proportionality control. The provision to suspend the voting of the persons whose assets were confiscated after January 14, 2011 was obviously dictated by exceptional circumstances. It is based on a decree law of 14 March 2011 governing the seizure of ill-gotten gains and amended by the decree No. 47 of 31 May 2011⁴³. Attached to this decree law there is a list of the names of 112 persons referred to by the law to which is added the ousted president and his wife named in the text. But this text also provides the possibility of extending the seizure to any other person concerned with ill-gotten gains.

In the international practice, some principles emerged regarding the legitimacy of the seizure measures. Among these principles, there is the need for public authorities resorting to such measures to rely on a legal basis and public interest and ensure the proportionality of the measures considered for this purpose. With regard to the highlighting of a public interest which may involve social, economic and political considerations, the states have wide discretion. In the case of decree law No. 47, the legitimacy of its measures is not objectionable as long as it is solely incumbent on the Tunisian authorities to judge it within the limits of the "clearly reasonable."

Two aspects are worth noting regarding the requirement for a legal basis: first, this requirement is not limited to the observation of the existence of a legislation supporting the actions but carries also the requirement to ensure that the text in question is sufficiently clear to enable citizens to know the effects and thus exclude any arbitrary. The decree law satisfies this condition as it names the persons concerned by the measures it enacts. However, in providing for the possibility to extend the seizure to other persons, it introduces an element of uncertainty which, if the future electoral law would reiterate the same suspension of voting as an additional penalty to seizure measures, would create the risk of arbitrariness in the application of this provision. Indeed, since the persons whose assets may be seized would not be named in the decree law - or if sufficiently precise criteria for their identification are not defined - there would be a risk of arbitrariness since each seizure operated on this basis would result in an automatic suspension of voting. Second, in order to proceed with the seizures governed by decree law No. 47, the intervention of the judiciary is not expected at any time. Without prejudice to the Tunisian law in this field which deserves a separate consideration (including the question of the retroactivity of seizure), it is important to note that the seizure leads on the rebound to the automatic suspension of the voting rights and this latter would necessarily be decided in the absence of any trial with all the guarantees relevant to it (standards of a fair trial, including the right of defense). This provision is inconsistent with the requirements of international law.⁴⁴

Any seizure should be balanced in its principle and its effects. In other words, it should be proportionate to the pursued aim. Regardless of seizure, the suspension of the voting right that it automatically leads to, should

⁴³ The Operations of assets and values seizure are also governed by decree law No. 15 dated 26 March 2011 on the creation of a national commission to seize ill-gotten properties and assets.

⁴⁴ Venice Commission, Code of Conduct, Guidelines, " the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law " Declaration on Criteria for Free and Fair Elections, adopted by the IPU Council at its 154th session (Paris, March 26, 1994): Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively."and "No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law."

itself be proportionate to the pursued aim. In terms of purpose, the object of seizure is not to punish the individuals for their inappropriate behaviour under the old regime but to redress in the form of refunds to the state. However, the suspension of the voting right is a punishment that can be understood as that induced by the notion of "infamous offences" used in this article of the EDL, so that the suspension of civil rights extends but does not derive directly from the intention on which is based the decree law on seizure. The proportionality of restitution does not raise the same questions as the proportionality of a punishment. And indeed, if there was a punishment, there was no conviction which makes the fact that the punishment may be imposed without any time limit more questionable⁴⁵. As the EDL is itself limited in time, the question did not necessarily arise. It will however arise in the electoral legislation to come.

Recommendations

- Any measure of suspension of the voting right should be limited in time and it would be necessary to remove the ban on voting contained in article 5, third paragraph, for the next elections;
- In the upcoming election legislation, there should be a provision for any person deprived of the right to vote or to register as a voter to have an effective remedy allowing him/her to appeal against such decision before the competent court.

d. Voting ban for conscripts, military and internal security forces officers

In many countries and until recently, the voting right was not recognized to the army staff, the main reason being the desire to keep the army away from the divisions inherent in domestic policy debates and exclusively devoted, according to the principles that are the foundation of the military organization, to serving the country. In some countries, the experience of military coups or coups supported by the army made the neutrality requirement imposed on the army even more pressing: it is about keeping the army away not only from politics but also from power.

That said, since the end of World War II and in an accelerated manner over the last fifteen years, a large majority of countries has evolved on the issue, recognizing the right to vote for the military. Even though there are no international standards explicitly denying any legitimacy to the prohibition of voting for the military, it became increasingly clear to the legislator in many countries that the margin of discretion available to the states to determine the conditions of the voting right was not so broad as to allow a right as essential to democracy as the right to vote to be deprived of its substance by depriving a whole fraction of the population for reasons that are less than the ones attached to the considered right. In any event, the logistical challenges that could imply the organization of elections in barracks and other relevant locations can not be a convincing justification for denying them the right to vote⁴⁶. This is something that should be reviewed in the light of the developments observed on the international scene, as part of the recast of the electoral legislation.

⁴⁵ United Nations Committee of Human Rights, General Comment No. 25: "If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence."

⁴⁶ Concerning the organizational questions that the military right to vote might raise, see the guidelines in this field of the Venice Commission in its Code of Good Practice in Electoral Matters, paragraph 41: "Where servicemen cannot return home on polling day, they should preferably be registered at polling stations near their barracks. Details of the servicemen concerned are sent by the local command to the municipal authorities who then enter the names in the electoral list. The one exception to this rule is when the barracks are too far from the nearest polling station. Within the military units, special commissions should be set up to supervise the preelection period, in order to prevent the risk of superior officers' imposing or ordering certain political choices

The same exclusion is even more difficult to justify vis-à-vis the conscripts who obviously did not choose a military career and therefore are deprived of a right as fundamental as the right to vote even though their enlistment is not based on a voluntary decision - provided the voluntary nature of the approach can serve as a criterion which is in itself questionable, but remains a commonly used argument.

Finally, the internal security forces officers - which include "the National Security Officers, the National Police, the National Guard, the Civil Defense and prisons and rehabilitation officers"⁴⁷ - are also deprived of the right to vote. This restriction as the previous two is inherited from the Electoral Code of 1969. Like the previous two, it does not have a convincing justification. The criteria on which is based the deprivation of the right to vote for the members of the internal police services is unclear and is not based on an "objective and reasonable"⁴⁸ criteria.

Recommendations

- Within the framework of the recasting of the electoral legislation, the ban on voting for military officials, conscripts and internal security forces officers should be reviewed in the light of the developments observed in many countries. In any case, such a ban should not be extended to conscripts.

e. The right to vote for the Tunisians residing abroad

The Electoral Code of 1969 recognized the right to vote for Tunisians residing abroad only for the presidential elections (article 68), they could not exercise this right without showing a registration card distributed by the diplomatic or consular missions (article 7). The EDL as amended on 3 August 2011 explicitly gave them the right to vote while easing the conditions of its exercise since they were allowed to vote simply by using their passports and their consular cards (new article 3, EDL). This innovation is welcome. It should be resumed as it is in the future legislation.

Recommendation

- In the future legislation, Tunisian citizens residing abroad should be allowed to vote in national elections.

f. Voting rights of disabled persons

It is difficult to accurately estimate the number of disabled persons in Tunisia. The official figures are of 5% of the population⁴⁹ but the international experts, including the World Health Organization, agree to estimate that, on average, the proportion of disabled persons in any country is around 15% of the population.

⁴⁷ Article 4 of the law n°82-70 of 6 August 1982 on the general status of the Internal Security Forces.

⁴⁸ These are the terms used in paragraph 14 of the General Comment No. 25 of the United Nations Committee of Human Rights in reference to the reasons behind the deprivation of voting rights that may be invoked by a State party in its reports to the Committee.

⁴⁹ In the initial report of Tunisia submitted pursuant to Article 35 of the above mentioned Convention (July 1, 2010, CRPD/C/TUN/1), a total of 151,423 disabled persons is advanced for the year 2003, thus, 1.5% of the population but this is the number of persons holding a handicap card. In the light of estimates or projections made on another hand, it is likely that a majority of persons meeting the definition of disability as mentioned in the decrees of November 2005 and as repeated in Article 1 of the aforesaid decree, do not have handicap cards.

The new article 61 of the EDL calls the Independent High Commission for Elections to take specific measures for persons with disabilities to enable them to vote "in suitable conditions". Before it was amended by the decree law of 3 August, this article was subject to controversy as its initial formulation was considered by some as not offering sufficient guarantees to exclude the possibility of manipulation. Recalling the principles of personal voting and the secrecy of voting, the Independent High Commission for Elections decree of 4 October 2011, which fixes the measures to facilitate the exercise of disabled persons of their right to vote⁵⁰, provides for this purpose three types of facilities : priority access to the polling centre for voters with disabilities, the provision of polling booths that are adapted to disabled voters in wheelchairs, and finally the opportunity for blind voters and voters with mild mental disabilities or suffering of motor impairment preventing them from writing, to be assisted by an attendant they choose or a person they request the president of the polling centre to choose among the voters in the polling centre and who can not be asked to attend to more than one disabled person. When voting, international and domestic observers - even those who had expressed concern about this matter at the time of the drafting of the legislation - did not identify any manipulation but they observed difficulties in terms of accessibility of polling centres.⁵¹ These problems would require measures of "reasonable accommodation" under Article 2⁵² of the Convention on the Rights of Persons with Disabilities⁵³ as it was implemented in the Tunisian legislation⁵⁴.

⁵⁰ NOT reproduced from the official website of the Independent High Commission for Elections.

⁵¹ See Report of IFES Experts Mission on the Election of October 23 of the National Constituent Assembly of the Republic of Tunisia, page 27.

⁵² " *necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms* "

⁵³ Tunisia is among the first countries to ratify – on February 11, 2008 - the Convention and the Optional Protocol thereto. This convention does not create new rights but identifies the implications of the existing rights of the persons with disabilities. Article 29 deals with the involvement in politics and public life:

" States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
 - i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;
- b. Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:
 - i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
 - ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels."

⁵⁴ See in this respect the initial report submitted by Tunisia under Article 35 of the above mentioned Convention (July 1, 2010, CRPD/C/TUN/1), particularly paragraphs 24 to 26 which refer in particular to article 3 of the decree No. 2006-1467 of 30 May

Concerning the issue of assistance, the legal texts are not free of ambiguity. The decree states that the special measures it enacts in favour of disabled persons benefit "any voter with a handicap card." However, with regard to assistance which the disabled person may enjoy during the Election Day, the same text restricts the benefit to the three aforementioned types of disabilities. A memorandum of the Central Committee clarified this point for the staff of polling centres to avoid confusion during the vote.

In the forthcoming election legislation, the provisions contained in the decree should be incorporated into the main text.

Recommendations

- In the forthcoming election legislation, the provisions contained in the decree of the independent High Commission for Elections of October 4, should be incorporated into the main text;
- Measures of "reasonable accommodation" under Article 2 of the Convention on the Rights of Persons with Disabilities⁵⁵ as it was implemented in the Tunisian legislation could be considered.

2. Right of eligibility

a. Persons denied the right of eligibility because of their political past

Article 15 of the EDL recognizes to any voter who is at least 23 on the day of the submission of his candidacy to be candidate to the National Constituent Assembly. However, are not able to be candidate *"Whoever took office in the outgoing government of the former president except for those who were not part of the Constitutional Democratic Rally and all those who were entrusted with a position within the Constitutional Democratic Rally in the former president's government."* The same article expressly states that *"The relevant positions shall be determined upon the suggestion of the High Commission for the Realization of the Goals of the Revolution,*

2006 fixing the technical standards of accessibility for easy mobility of the persons with disabilities inside public spaces, community facilities, housing complexes and private buildings open to the public.

⁵⁵ Tunisia is among the first countries to ratify – on February 11, 2008 - the Convention and the Optional Protocol thereto. This convention does not create new rights but identifies the implications of the existing rights of the persons with disabilities. Article 29 deals with the involvement in politics and public life:

" States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

- c. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
 - i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;"

On the issue of electoral rights of disabled persons, see the document of IFES and International IDEA, "Bill of Electoral Rights for Citizens with Disabilities" (September 2002).

Political Reform and Democratic Transition.” Are also denied the right to be elected to the Constituent Assembly the persons who *“implored the former president to run for a new presidential term in 2014”*. Again, it is expressly provided that a list of persons concerned by this exclusion will be established for this purpose by the same commission. Three categories of ineligible persons can be distinguished: former RCD officials (Constitutional Democratic Rally, former ruling party), members of the government under Ben Ali regime that belonged to the RCD and the persons who implored President Ben Ali to run for the election in 2014 (described in Arabic as “Munashidun”⁵⁶).

The enforcement decree under article 15 of the EDL was finally adopted on August 3⁵⁷. Article 15 stipulated that it should clarify the concerned responsibilities with the causes of ineligibility attached to the first two categories. However, the decree of 3 August is only focused on the first category, stating in its article 2 *“is ineligible whoever served as President or member of the RCD, who belonged to its central committee or who held political office within its central administration”*⁵⁸.

Discussions on Article 15 were the main cause of the delay in the passing of the EDL. These discussions took place between supporters of a broad approach to the scope of eligibility exclusion and those in favor of a restrictive approach to it so that article 15 had, in the weeks preceding the passing of the EDL, different versions. An early version dated April 11 declared ineligible for the constituent assembly all the RCD officials who worked for the last 23 years of Ben Ali's presidency. Another version evoked a period of 10 years. The final version, a compromise sealed on 3 May, finally removed the duration of the participation of officials in the former RCD organs as a criterion for determining their ineligibility to the constituent assembly.

Then arose the question of which method to use to build the lists of names of those who held senior positions within the organs of the former RCD and those who urged the former President Ben Ali to run for the presidential election of 2014. Article 15 entrusts the ISIE with the proposal of the first list and the one concerning the persons who were members of the RCD and who held responsibilities in the government under Ben Ali's regime. These lists had to be submitted to the government that could review it before its passing by decree. Regarding the list concerning the persons who implored the former president Ben Ali to run for the elections of 2014, under article 15 of the EDL, the High Commission for the Realization of the Goals of the Revolution, Political Reforms and Democratic Transition (ISROR) would only be in charge of it. On May 31, the ISROR established two subcommittees, one was designated as “Committee 17” - because it was composed of 17

⁵⁶ The word means „implores”.

⁵⁷ Decree No. 2011-1089 of August 3, 2011, determines the responsibilities within the organs of the former Constitutional Democratic Rally, in accordance with Article 15 of decree law No. 2011-35 of 10 May 2011 on the election of a National Constituent Assembly (NOT).

⁵⁸ According to the decree:

- Permanent secretaries.
- Assistant secretaries.
- Chief of staff.
- Secretary General of the Tunisian Union of Youth Organizations.
- Director of the Centre of Studies and Training.
- Presidents of districts / constituencies
- Affiliation to the National Bureau of Students of the RCD,
- Member in coordination committees,
- Member in universities / territorial and professional federations
- Presidency of territorial and professional committees.

members - and was entrusted with the task of preparing the text of the decree for the implementation of article 15 of the EDL.

The main difficulty encountered to establish the list of former RCD officials was to aggregate evidence that will allow the identification of these officials and the authentication of their responsibilities within the party's organs. The archives of the former RCD were partially destroyed and the falsification of the available records could not be excluded, which made it equally difficult to identify the persons who held responsibilities under the Ben Ali regime, without being member of the RCD⁵⁹. Concerning the persons who implored the former President Ben Ali to run for the presidential elections of 2014, the challenge was to identify conclusive sources of evidence, the archives of the Presidency or those of media were also solicited by the Commission 17. It soon became clear that a number of people signed the petition for fear of reprisals from the authorities of the former regime or had their names on the petition without their knowledge.

It seems that after this process, a list containing 8100⁶⁰ names covering the three causes of ineligibility was established. It is not clear however how this list was used and especially, how and when the concerned individuals were notified of the existence of their names on this list. It seems that some people on the list were informed of that tardily, in some cases, after the period for the submission of candidacies was closed.

Widely recognized by the main instruments protecting human rights⁶¹, the right to be candidate for an election is not an absolute right. It has limitations in the form of eligibility exclusions that should be surrounded by sufficient guarantees⁶² to be considered legitimate although derogating from the principles of equality and non-discrimination in the access to public service⁶³. First, any cause of ineligibility should be prescribed by law which implies not only that it should be mentioned in it, but also that it should be defined with sufficient clarity and precision so that the concerned persons can reliably identify themselves as this and that any possibility of arbitrary application of the relevant provisions is resolved. The cause of ineligibility should also

⁵⁹ In its observation report, The Carter Center points out that the Independent High Commission for Elections was directly involved in the preparation of these lists (persons who held political responsibilities within the organs of the RCD and persons who held responsibilities within the Government under Ben Ali's regime but without belonging to the RCD) for this purpose it resorted to newspaper clippings from the National Archives and to the Official Gazette of the Republic of Tunisia (Official Journal).

⁶⁰ 5000 names of persons who implored the President Ben Ali to run for presidency in 2014; 3100 names of persons belonging to the two other exclusion categories.

⁶¹ Universal Declaration of Human Rights, Article 21.2, International Covenant on Civil and Political Rights, art. 25, African Charter on Human and Peoples' Rights, Article 13; Arab Charter on Human Rights, art. 24.

⁶² See Case *Melnichenko vs. Ukraine*, 19 October 2004, Judgement, 30 March 2005, Final Judgment, para 59: " While States have a wide margin of appreciation when establishing eligibility conditions, the procedure must contain sufficient safeguards to prevent arbitrary decisions"

⁶³ Before the United Nations Committee of Human Rights (UNCHR), in *Silva and Others vs. Uruguay*, the plaintiffs argued that their rights under article 25 were breached, since they were deprived by law, and for fifteen years, from the right to engage in political activities, including the right to vote, because they were the candidates of political parties that were subsequently declared illegal. Although the Government argued that they breached the relevant articles, it did not provide information proving the existence of an emergency. The CHR considered that this denial of all rights was not justified. In the absence of necessity, the principle of proportionality brought out a breach of article 25, and Uruguay was forced to allow the claimants to participate again in politics (Annual Report, 1981: UN document A/36/40).

be based on objective and reasonable criteria and should be proportionate to the pursued aim. The period of application of an eligibility exclusion represents one of the factors to be taken into account in assessing its proportionality⁶⁴. On the particular case of ineligibilities for political reasons (past or present opinion or political affiliation), the instruments of protection of human rights believe that in theory, political affiliation is not in itself a reasonable cause to deprive persons who, in all other respects, would be eligible to run for election⁶⁵.

In addition, people declared ineligible should have an effective remedy before a judicial or administrative authority, separate and independent from the one that decided the measure of ineligibility. In the light of good practice in electoral matters observed in different states, the possibility of judicial remedies should be privileged. It would, indeed, be preferable that the exclusion is imposed by a court on an individual basis or, at least, in a specific decision⁶⁶. This guarantee is important because it enables the persons to have access to the evidence against them to validate a measure of ineligibility and to make their points during a fair trial.

In many respects, the system provided for by Article 15 and the method used to implement it do not meet these requirements:

- Article 15 does not establish the precise scope of the exclusion for the three causes of ineligibility and returns for the first two, in a later decree, which, though providing details, does not fully satisfy the principles of legality and legal certainty, as indicated by the difficulties encountered later for its implementation.
- The process of listing did not happen in a transparent manner: first, it was not governed by any law or regulation, the EDL was silent on the issue and no text came eventually to fill this legal vacuum, the procedure was subject to ad hoc decisions, thereby infringing both the principle of legality and the principles of legal certainty and transparency; secondly, the procedure did not happen transparently as the work of the organs in charge of establishing the lists was held in closed doors and there was no subsequent mechanism, separate and independent from these organs and from the government for the control of the lists, which would have excluded or reduced the risk of arbitrariness or that the process is perceived as such; third, the lists that were established were not made public and if the reasons are understandable, it still remains difficult to justify the use of "blacklists", especially accompanied by notification procedures for the concerned persons that were themselves very little transparent.
- Although some persons initially covered by the measure of ineligibility had the opportunity to correct the list (this was the case mainly for the persons falling in the third category of exclusion), there is a serious reason to believe that the persons on the lists did not have an effective remedy⁶⁷ against the decisions of

⁶⁴ In *Silva and Others vs. Uruguay*, before the United Nations Committee of Human Rights, the plaintiffs argued that their rights under Article 25 were breached, since they were deprived by law, and for fifteen years, from the right to engage in political activities, including the right to vote, because they were the candidates of political parties that were subsequently declared illegal. Although the Government argued that they breached the relevant articles, it did not provide information proving the existence of an emergency. The CHR considered that this denial of all rights was not justified. In the absence of necessity, the principle of proportionality was considered disproportionate.

⁶⁵ ICCPR, Articles 2.1 and 25, see also General Comment No. 25, paragraph 15.

⁶⁶ Venice Commission, Code of Good Practice in Electoral Matters, Guidelines, I.1.1.d.iii.

⁶⁷ International Covenant on Civil and Political Rights, art. 2 (3), United Nations, "Human Rights and Elections: A handbook on the legal, technical and human aspects of elections," para. 114: "Anyone alleging a denial of their ... political rights must have access to independent review and redress."

their ineligibility; since the lists were not made public and the notifications occurred very late in some cases, sometimes beyond the deadlines for the submission of candidacies, these persons had little opportunity to challenge these decisions in good time before a judicial or administrative authority.

It is clear that these measures intervened in an exceptional political context and that their motivations are not only understandable but also legitimate under the country's recent past⁶⁸. There is also the urgency with which they were developed and the fact that the difficulties that arose thereafter were significantly underestimated legally, practically and politically which led to seek further compromise rather than the ideal solution and to be pragmatic and improvise ad hoc solutions. Assuming it is intended to extend these measures for exclusion to the upcoming election, their legal basis should be changed and clarified concerning the procedural and control aspects and in respect of the guarantees offered to the concerned persons to challenge these measures. In particular, the persons concerned by these measures should have the opportunity to challenge them in a timely and effective manner with a fair and transparent procedure that avoids any risk of arbitrariness. Finally, these exclusions should be temporary.

Recommendation

- Assuming it is intended to extend these measures for exclusion to the next election, their legal basis should be changed and clarified concerning the procedure, control and legal aspects as well as the guarantees offered to the concerned persons to challenge these measures. In particular, the persons concerned by these measures should have the opportunity to challenge them in a timely and effective manner through a fair and transparent procedure that avoids any risk of arbitrariness. Finally, these exclusions should be temporary.

b. Other causes of ineligibility

Article 17 states that candidates to the Constituent Assembly can not be heads of missions, of embassies and consulates, governors, judges, first delegates, general secretaries of governorates, delegates and heads of sectors except if they resign from their positions or be in standby and run in a constituency where they did not hold office.

In practice, it is generally accepted that "the eligibility exclusion" might "be subject to less severe conditions than the right to vote."⁶⁹ This however can not be interpreted as relieving the legislator from asking the question not only of the merits but also of the proportionality of any exclusion measure. This is confirmed by the Committee of Human Rights which states that "*If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b).*"

⁶⁸ Rare are the cases where an international court had to decide on issues of this order. However, we can mention the case *Rios Montt vs. Guatemala*, where the Inter-American Court of Human Rights supported "the constitutional ineligibility of the leaders of the movement in power as they undermined the constitutional order". Report No. 30/93, Case 10,804, October 12, 1993.

⁶⁹ Venice Commission Council of Europe Code of Good Practice in Electoral Matters, Guidelines, I.1.d. iii.

Recommendation

- If there are reasonable motivations for considering certain elective offices as incompatible with certain positions, a less rigid approach of conflicts of interest should be considered for the support of such bans.

V. VOTERS REGISTRATION

In a large majority of countries, the right to vote is subject to the condition that the voter is registered prior to the election in an electoral registry. This registration establishes her/his right to vote. The operation that comprises the registration of eligible voters that meet the age condition and the other conditions to exercise the right to vote is one of the most expensive, the longest and the most complex electoral process. If it is properly handled, it contributes greatly to the legitimacy of the election. Otherwise, the legitimacy of the electoral process can be questioned.

Regarding these issues, that can be highly technical, the international texts leave to the States a wide discretion concerning the measures they deem appropriate to allow the citizens that are eligible voters to exercise their right to vote. States have the responsibility to take "effective measures" to make this right effective. However, the practice has gradually clarified what measures were best able to achieve this goal.

Because it applied to only one election, in an exceptional context, the EDL was not intended to address all the substantive issues raised concerning the choice of a given system of voter registration. The EDL gives the details of certain provisions of the former Electoral Code but fundamentally changes the letter and spirit by introducing three fundamental reforms:

- *The repeal of voter cards*: the electoral legislation prior to 2011 provided that the exercise of voting rights is not only subject to registration but also to the presentation, on Election Day, of a voter card. This card was given to each voter by local authorities⁷⁰. On expiry of the delivery times, it was sent by post. The abuses to which the distribution of these cards led in the past motivated their abandonment.
- *The establishment of the voter lists through the national identity cards database*: the Election Code of 1969 provides for permanent voter lists established according to the passive registration system and reviewed annually during two periods of two weeks (15-29 June and 15-30 December) and upon which, since the organic law of 2002,⁷¹ a voter could request at any time his/her registration⁷². Because the reliability of these lists is questionable, the EDL planned to establish them from the national database of the national identity cards, set up by the law n° 93-27 of 22 March 1993 and generally considered as reliable.⁷³

⁷⁰ Rf. Articles 23 to 25 of the Electoral Code of 1969.

⁷¹ Organic Law No. 2002-97 of 25 November 2002 on the preparation for the permanent review of voter lists regime.

⁷² Article 8 of the Electoral Code of 1969. Up to three days before the election and upon presentation of the "necessary documents" for the categories of voter listed in Article 11 of the Electoral Code.

⁷³ View the poll released by IFES in May 2011, "Tunisia Voter Registration & Voter Confidence Assessment Survey" page 9: 77% of the respondents believe that all citizens of voting age have an identity card; 21% that much of them have an identity card, only 1% of the respondents have no confidence in the system.

- *Voter registration and disputes relating thereto placed under the responsibility of the Independent High Commission for Elections:* under the previous legislation, voter lists were the joint responsibility of the local authorities, the presidents of municipalities and the heads of sectors, or abroad, the heads of diplomatic or consular missions, and the Ministry of Interior or the Ministry of Foreign Affairs for voters living abroad.⁷⁴ In addition, two types of ad hoc administrative committees were established: those responsible for the reviewing at the first instance of claims related to the registration or the removal (review committees⁷⁵) and those in charge of reviewing the requests submitted by the legally registered voters who did not receive their registration cards at the expiration of the distribution⁷⁶. The composition of these committees did not make them independent from the organs of the local or national government⁷⁷. Breaking with this system, article 6 of the EDL establishes the principle of responsibility of an independent electoral commission, the Independent High Commission for Elections - which includes a central committee and regional sub-committees - for setting and displaying the voter lists, for the enactment of the procedures for voter registration on these lists, for informing the public about it as well as for the electoral disputes relating thereto⁷⁸. The ad hoc administrative committees under the previous legislation were repealed: the committees dealing with voter registration cards had no reason to be due to the removal of these cards while the review committees were replaced by the regional sub-committees whose decisions can be appealed against before the territorially competent Court of First Instance.

The system set up by the EDL, in theory, meets the standards of international law that, in particular, requires that there are no "unreasonable barriers to registration."⁷⁹ However, the provisions which define the rules lacked clarity and precision which caused confusion and delay and, ultimately, hampered greatly the conduct of a process whose objective was not clear, at least initially, for its local protagonists and for the voters.

Registration must be a mere formality that every citizen should be able to perform without difficulty and for a reasonably long period of time⁸⁰. The legal framework may require that the voter is not automatically registered, but only at their request. Indeed, two methods are possible: either the voter should register on the lists (active registration), or the state departments or another body, independent from the government, should identify voters to register them on the lists (passive registration).

⁷⁴ Voters living abroad were allowed to vote only for presidential elections.

⁷⁵ Articles 13 to 22 from the Electoral Code.

⁷⁶ Ibid. Article 25

⁷⁷ See articles 14 and 25.

⁷⁸ Among the tasks of the ISIE, as defined in Article 4 of the decree law No. 27 of 18 April, "the preparation of the voter lists" and Article 3 of the EDL as amended on 3 August specifies that the ISIE: "shall establish the registration procedures for exercising the said right and ensure the publishing thereof. "

⁷⁹ UN Committee of Human Rights, General Comment 25 on "The right to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service." para. 11: "Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed."

⁸⁰ Ibid. "If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote."

Both methods can be combined or completed by the systematic use of data from the registry office. However, on the one hand the EDL provides for an automatic registration through the national database of the national identity cards (article 6) and on the other hand evokes the registration procedures that the ISIE should establish (article 3) and pursuant to which voters should make "their request for voluntary registration" (article 6).

1. Automatic registration

In theory, any citizen holding a national identity card and fulfilling the age requirement and the other conditions for exercising the right to vote should not be required to perform a voluntary registration process⁸¹ since she/he is automatically registered by the mere fact that she/he has an identity card⁸². However, such measure may enable voters to select the polling centre of their choice on the basis of their residence address shown on their identity cards but also to ensure the accuracy of the data included on the voter lists and taken from their identity cards. This check can be crucial. Indeed, on the Election Day, if their names as they appear on their identity cards and / or the numbers of these identity cards do not match with the names or the identity numbers listed on the voter list, they would not be able to vote.

That said, the choice of using the database of national identity cards to establish the voter lists is not without drawbacks.

First, as noted above, this database has only existed since 1993 and therefore the citizens with identity cards issued before 1993 are not included in it. The National Institute of Statistics estimates that about 400,000 persons are in this situation. This corresponds to more than 5% of the potential voters living in Tunisia.

In addition, the database is not directly connected to the civil registers; which means that it is not automatically updated when deaths are registered. This adds to the task of the regional sub-committees, in charge of removing deceased persons from the voter lists (under article 10 of the EDL). It is hardly possible, however, to assess to what extent the accuracy of the voter lists is affected by the absence of connection between the voter lists and the civil registers.

Finally, the addresses referenced in the database do not allow a reliable allocation of voters to the polling centres. On the one hand, they are often incomplete or inconsistent. On the other hand, the holders of national identity cards may indeed have changed residence since their card was issued.

Considering these difficulties, that the electoral authorities were aware of, ultimately a joint registration system was chosen, combining the automatic registration with an "active" registration system that encourages but does not require voters to choose their polling centres.

2. Voluntary registration

Article 6 of the EDL provides that voters are divided on voter lists based on the home address they stated in their request for voluntary registration. For those who were automatically registered, it is the address on their identity card that was used for allocating the appropriate polling centre. If the card expired, it is their

⁸¹ Article 3 of the EDL provides that "the voter shall exercise his voting right using his identity card."

⁸² Note that the national identity card is compulsory for every citizen over the age of 18 (Article 1 of the Law No. 93-27 of 22 March 1993). The validity of the national identity card is unlimited in time. The holder of the NIC should request its replacement within 30 days, especially in case of change of residence (article 4).

responsibility to require a voluntary registration to be reallocated to the polling centre that is the closest to their new address.

After reading all the provisions listed under article 2 of the EDL and also because of their practical implementation in the months preceding the election, it appears that the voluntary registration was primarily meant to address the deficiencies or inaccuracies of the database of the national identity cards. In particular, it allowed:

- the potential voter holding a national identity card issued before 1993 or the voter who for one reason or another, was not on the database of the national identity cards to register on the voter lists;
- a voter to register on a list other than the one on which she/he was previously registered after being removed from the latter (article 10, EDL);
- a voter belonging to the categories of voters declined in article 9 to request a registration as a voter – something she/he could do, as any other voter, from the date of the enactment of the decree of calling for elections until 14 August and beyond exceptionally, up to 10 days before the election (article 9).⁸³

3. Implementation of the voluntary registration system

The voluntary registration was not necessary except for allocating voters on the voter lists based on their residential address. However, when voter registration was launched (July 11) for an initial period of three weeks - extended, given the unsatisfactory results, until August 14⁸⁴ - this point was not clear. The legislation itself was ambiguous, the outreach campaign was too - more or less deliberately, it seems. In addition to being launched late, the appointment of the members of the sub-committees of the ISIE was late, centrepieces of this process, and they themselves were inadequately prepared for the task incumbent on them.

Given the small number of voters that went in for the registration during the two "registration periods"⁸⁵, a new "registration period", requalified "period for choosing polling centres" was opened between 4 and 20 September in a limited number of places but it was then clearly explained that the active registration was not required to vote but was only to allow voters to update their data and choose their polling centres according to the address listed on their identity cards. However, at this stage of the process, voters were only able to choose a polling centre in the constituency where they were already registered which not only singularly limited the scope of the exercise but did not conform to article 6 of the EDL⁸⁶. The operation did

⁸³ Article 9 allows the registration after the deadline for the military and for the internal security forces officers, for the persons meeting the age requirements after the registration deadlines, for the persons whose ban was lifted beyond the deadlines for registration, for the persons for whom a final decision was ordering their registration on the voter lists and for the Tunisians resident abroad who are on the national territory during the election period. This article, inserted in August 2011, is a replica of article 11 of the old code except that it does not include the officials and their spouses and allows registration up to three days before the election.

⁸⁴ About 1,000 registration centers - including mobile teams - operated under the supervision of the Central Committee and the regional sub-committees of the ISIE in the 27 constituencies in the country. Tunisians living abroad were able to register in the diplomatic and consular missions until 28 August.

⁸⁵ According to the statistics of the ISIE, after these two initial periods of registration, 3,882,727 persons registered in Tunisia, which represented approximately 55% of the estimated voting population. This means that about 3 million potential voters did not at that time, update their data or choose their polling centre.

⁸⁶ This article merely stipulates that "Voters shall be distributed according to the address of residence indicated in the voluntary application for registration on the voter register." The article certainly entrusts the ISIE with the task of establishing the procedure for making such requests but this can hardly be interpreted as allowing it to restrict the scope of discretion of the principle enacted by the law.

not significantly increase the number of voters who carried out this update; this is why it was extended twice until 30 September and until 10 October.

On 15 October the Central Committee of the ISIE announced that 4,439,527 voters, about 62% of the electorate in Tunisia and abroad, chose their polling centres. In the light of this figure, considered unsatisfactory, it was decided to open special polling centres in addition to those originally planned, for voters who did not choose their polling centre. Subsequently, the estimation of the electorate was revised upwards (8 289 900 - instead of 7 160 527 including 7 569 800 in Tunisia and 720 000 abroad) while, according to official figures, the number of registrants in Tunisia and abroad was of 4 308 800 now (including 4 094 800 in Tunisia and 214 000 abroad).

Moreover, the application of voluntary registration procedures resulted in inconsistencies, particularly regarding proxy registrations⁸⁷ and the processing of the rejections of registration.

With regard to the voters included in one of the categories of the voters declined in article 9 (see above) and allowed to register beyond the registration period provided that they make a specific request after the calling for elections and at least 10 days before the election, the registration begun on 15 August – the day that followed the end of the “ordinary” registration period - and ended on 12 October. The ISIE did not disclose the exact number of additional registrations.

4. Display of the provisional voter lists

According to the Electoral Code of 1969, once updated, the voter lists were displayed by the presidents of municipalities or by the heads of sections on 31 December and 30 June of each year for a month of verification by the public.⁸⁸ Under article 8 of the EDL, it is the responsibility of the regional sub-committees of the ISIE and the presidents of municipalities, the heads of sections, the heads of diplomatic or consular missions to display the voter lists where they were submitted (article 7), namely the offices of the regional sub-committees of the ISIE, the offices of municipalities or delegations, the offices of sections and the offices of diplomatic or consular missions. Contrary to the Electoral Code of 1969, the EDL does not specify the display time which belongs to the ISIE to establish (Article 8, second paragraph). On 16 August, the ISIE announced that the lists would be displayed from August 20 to 26 and that they would be available online. Two types of lists were published: one for all voters who registered voluntarily, and a second for all automatically registered voters. The voters registered on these lists were listed in the Arabic alphabetical order, without any mention of the polling centre to which they were allocated. The observers' reports point out that the influx of citizens at the display premises was extremely low and that could be because of the fact that these places were open only during the official working hours for public service.

Pursuant to Article 7 of the EDL, on 16 August, the ISIE also announced that the voter lists would be accessible on its website. Ultimately, the ISIE provided citizens with a search engine allowing them to verify their

⁸⁷ Carter Center report of September 1st, 2011. According to this report, while the registration procedures handbook specified that registration is a personal process that can not be delegated to a third party (paragraph 3.3.1), some registration offices authorized the registration by proxy while others did not allow for family members or third parties to verify the data of other potential voters. Receipts were issued but sometimes it was required that registrants by proxy collect it in person. The regional sub-committees of ISIE took different positions on these issues. Moreover, the registration staff did not always read the registration procedures handbook which can be explained by its relatively late dissemination.

⁸⁸ That said, if the date of the display immediately preceded the election, the voter lists were displayed from that date until the publication of the decree on calling the voters (Article 10 of the Electoral Code).

inclusion in the lists but did not give them access to the complete lists. This service, however, was activated on August 25.

5. Voter lists disputes

According to the Electoral Code of 1969, the disputes over registration or removal were within the jurisdiction of a review committee composed of five members⁸⁹ and chaired since 2003 by a judge appointed by the Ministry of Justice. Every voter who was not registered despite her/his request or was removed from the lists could file a complaint during the display period of provisional lists to the president of the municipality or the head of sector. To decide on this complaint, the commission had 8 days, not from the day the complaint was submitted but from the expiry of the period within which the complaints could be filed. The decision was then communicated to the concerned persons by the administrative authorities to which the Committee had previously transmitted the decision. Within five days from the notification, the decision could be appealed to the territorially competent Court of First Instance - which had five days to make its decision - then, within 15 days, be subject to an appeal in cassation before the Administrative Tribunal⁹⁰. It had 30 days from the day the memorandum of appeal was submitted to make its decision.

While the Election Code allowed any citizen to challenge the actions concerning her/him, the EDL allowed her/him to challenge both those that concern her/him and those that concern another voter (article 13). As in the previous Electoral Code, the periods for complaints coincide with the duration of the display of the lists which, due to the shortening of the latter in the EDL (7 days instead of one month), made them extremely short. The subcommittee itself should make its decision within a very short time, that is to say 8 days from the date the complaint was filed, whereas for the review committee, this period did not begin until the expiry of the period during which complaints could be filed⁹¹. As for the decisions of the review committee, the decisions of the sub-committee could be appealed in a similar time of 5 days from the date the decision is announced by the territorially competent Court of First Instance. Unlike the disputes submitted to the review committee, no appeal was possible against the decisions of the Court of First Instance, which within five days, had to announce its final decision. Note that the decisions of the sub-committee could be challenged before the court by the concerned parties and the administrative authorities.

For disputes relating to the lists of voters resident abroad, the sub-committee had also jurisdiction in first instance (article 12, paragraph 2) but it was the central committee's task to decide ultimately over these disputes. The central commission had to establish the procedures on these disputes which it did by the decree of 25 June. For these disputes like those concerning Tunisians living in Tunisia, the time for appeal was identical while the procedures differed just in details. It was expected that the Central Committee shall form a committee to decide over the appeals against the decisions of the subcommittees. The procedure was simplified, the complainant being particularly exempt of the assistance of an attorney.⁹²

⁸⁹ In addition to its Chairman appointed by the Ministry of Justice, there are a representative of the governor and three voters appointed by the Ministry of Interior to the review committee.

⁹⁰ *"The Administrative Tribunal shall decide through cassation over the appeals against the decisions made by courts acting on the registration on the voter lists for the presidential, parliamentary and municipal elections."* (Article 12, Law No. 72-40 of 1 June 1972 on the Administrative Tribunal.)

⁹¹ If, for example, a complaint was filed on the first day of the display of the provisional lists, the review committee had one month and eight days to decide over this complaint.

⁹² This is also the case in view of the articles of the Code of Civil and Commercial Procedure cited in Article 14, paragraph 2, for appeals before the courts of first instance for the disputes in Tunisia.

Recommendations

For each exceptional context, there is an exceptional measure: the establishment of new voter lists was a necessary step in the electoral process that began in April 2011, the lists inherited from the former regime were not reliable, but the operational challenge that this represented was underestimated both concerning the preparation, the organization and the personnel involved - and its training – and the stress of the timetable and the preparation of the electorate, informing and educating it on the new procedures in Tunisia. The confusion about the nature of the registration process (active or passive) - that the EDL, for its inaccuracies, its ambiguities, maintained itself - but also a series of delays in the intermediate steps (such as the appointment of the members of the sub-committees, the development and the distribution of the registration procedures handbook) due to logistical difficulties or other (including the failure of the Central Commission of the ISIE to plan and take the necessary decisions in due time) had outcomes on voting, which in a different political context, could have been more harshly judged. Incomplete lists and / or containing inaccurate or outdated data can, *de jure* and *de facto*, deprive significant fraction of the electorate from their right to vote. For future elections, it is also essential to accurately determine the number of registrants per constituency to ensure that during legislative elections, the seats are divided equally between the constituencies⁹³ and that, during local elections, only voters living in the locality participate in the vote.

It is important to learn from this experience by clarifying, specifying and completing the new election legislation by provisions relating to voter registration. Among the lessons to be learned, there is also the question of balance between the "reserved domain" of the law and the aspects left to the regulatory authority of the central electoral body. Asked on this point by a political party, the Administrative Tribunal recognized that as a public authority, the ISIE had a special power to regulate. However, given the sensitivity of the electoral matters and the disputes it can generate, there would probably be a limit in the law, to the scope of that power by specifying:

- That under no circumstances, the role of the electoral body should substitute that of the legislator. Its role should address the need for clarification by interpreting and completing the legislation.
- That the decisions taken by the electoral body can not be inconsistent with the provisions of the law.

Below are presented a number of recommendations which could help clarify and complete the provisions on the voter registration:

- While confirming the repealing of voting cards, the electoral legislation should explicitly provide for the establishment of a permanent register of voters or a permanent voter list⁹⁴ kept track of under the direct supervision of an independent and permanent electoral body with the cooperation of the state departments and the local authorities responsible for civil registration and for the collection and processing of all data that may be useful for the update of the voter lists.

⁹³ Other criteria for allocation added to the number of registered voters may intervene in the allocation of seats (total population, number of voters, geographic or historical criteria, protection of minorities, etc..) But the distortion should remain within an acceptable range. See Code of Conduct in Electoral Matters of the Venice Commission, Guidelines, 2.b.iv " The permissible departure from the norm should not be more than 10%, and should certainly not exceed 15% except in special circumstances."

⁹⁴ Code of Good Practice in Electoral Matters of the Venice Commission, Guidelines, 1.bi: "electoral registers must be permanent".

- This register or list should be updated regularly, at least annually⁹⁵. Whenever possible, however, the peaks of activity engendered by the creation of periodic lists should be avoided and ensure that instead of being concentrated on the period immediately preceding an election, the preparation of voter lists goes on continuously⁹⁶.
- The electoral legislation should provide for the establishment of a common or central voter list on the basis of a separate data collection system, that is meant for sharing data, to avoid duplications with the risk of the inconsistencies they contain.
- Pending the new electoral legislation, specific measures should be considered for the review of the voter lists through a new voluntary registration campaign spread over a period of time long enough to record or update data of the largest number of voters. This campaign should be conducted under the supervision of an independent electoral body that would have been previously consulted on the details of the measures governing the campaign and that would also have the task to regulate the practical arrangements. This campaign could be a test pilot for the development of the provisions of the electoral legislation on the permanent review of the lists. It should be preceded and accompanied by a public information and outreach campaign for the population through various media and targeting especially the younger generations.
- The new electoral legislation should include a residency requirement on the basis of strict criteria (as opposed to the approach of article 6bis of the former Electoral Code, which permitted the use of a plurality of criteria to allow the registration of voters).
- The electoral legislation should assign to the electoral bodies the responsibility for conducting an information, education and voter outreach campaign in support of any campaign on voter registration related to the voter lists.⁹⁷
- The legislation should provide explicitly among the tasks of the independent electoral body the task of taking all necessary measures to ensure that persons on remand and those convicted of offences that do not carry a penalty of the suspension of voting rights are registered on the voter lists and are able to exercise their right to vote in prison.⁹⁸
- The EDL does not set a deadline for the appointment by the Central Committee of the ISIE of the members of the regional sub-committees. It is essential that in case of elections, these are operational in time to perform their duties under the law, particularly regarding the updating of the voter lists.

⁹⁵ Code of Good Practice in Electoral Matters of the Venice Commission, Guidelines, 1.bi: "there must be regular up-dates, at least once a year."

⁹⁶ The disadvantage, however, of an annual review or even a review twice a year (as planned since 2003 by the former electoral law) is that the list is already outdated by several months when it is finalized and becomes more outdated over the next year. Estimates show that in some cases, especially in societies with a high mobility rate, up to 20% of voters may change their address during the year.

⁹⁷ United Nations Committee of Human Rights, General Comment No. 25 (57), paragraph 12: "Voter education and registration campaigns are necessary."

⁹⁸ United Nations Committee of Human Rights, General Comment No. 25 (57), paragraph 11: "States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated." Also in the same document: "The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law." (paragraph 4).

- After the publication of the decree on the call for elections, the electoral legislation should provide for the display of the provisional voter lists for a period of at least one month that expires a sufficient time before the elections so that any potential disputes relating to registrations and removals are decided as a last resort before the election. The legislation should indicate a deadline beyond which the provisional lists become final.
- According to article 10 of the EDL, to be removed from a voter list, the voter should submit a written request and evidence that she/he asked to be registered on another list. Conversely, this implies that any voter may submit a registration request on a list without having to prove her/his removal from another list. The electoral legislation should be unambiguous on this point, allowing a voter to submit a request to be registered on a list other than where she/he was previously registered in only if she/he can demonstrate her/his removal from the latter.
- The same article 10 entrusts the regional sub-committees with the responsibility to remove conscripts and the persons whose inability to vote was recorded. It should be stipulated that these removals should be notified to the concerned parties. If not notified, these persons would be assumed registered on the lists. Article 14 refers to such notification. Article 10 should also indicate it to avoid any misunderstanding.
- Regarding the voter lists disputes, the public information and outreach campaign should allow voters to be informed of their rights of remedy,⁹⁹ especially when, how and to whom complain and appeal. That said, the following points are worth attention:
 - The time for appeal should be extended to allow citizens to have an effective remedy.
 - The new electoral legislation should incorporate the provisions of the EDL that allows any citizen to challenge not only the decisions concerning her/him but those for another voter, provided, however, that the latter is notified of the above complaint to be able to respond to it.
 - To facilitate the work of the subcommittees, it might be possible to extend the time allotted to them to decide on the complaints from the date of expiration of the submission of complaints to the date the complaint was submitted, a priori different for each complaint.
 - The failure to give notice within a reasonable time of the decisions of the regional sub-committees and the Courts of First Instance acting respectively at first instance and on appeal concerning the denial of registration, may extend the disputes time and encroach on the following phases of the electoral process. A maximum deadline for the notifications related to the decisions should be fixed in the future texts. The decisions of the regional sub-committees abroad should be subject to an administrative proceeding under the supervision of the court as it is the case for the disputes of the same nature occurring in Tunisia¹⁰⁰ (in the same manner as the appeals against the decisions related to the refusal of a registration for a candidate list to the election taken by the sub-committees abroad are appealed to the jurisdiction of the court of First instance in Tunis.)
 - The procedures of remedy and appeal should be as simple¹⁰¹ as possible. In the future, it should not be necessary to separate the disputes over the voter lists applying to plaintiffs living in Tunisia or

⁹⁹ In the International Covenant on Civil and Political Rights (ICCPR, 1966), the States Parties undertake to guarantee "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." (Article 2).

¹⁰⁰ Venice Commission Council of Europe Code of Good Practice in Electoral Matters, Guidelines: " There should be an administrative procedure – subject to judicial control – or a judicial procedure enabling electors not on the register to have their names included "iv Ib.

¹⁰¹ United Nations Committee of Human Rights. General Comment No. 25: " *Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed.* " (paragraph 11) .

abroad. The EDL entrusted the central committee with establishing the rules of procedure applicable to the appeals in respect of the voter lists of the voters living abroad. These rules should be standardized. Beyond this question of frame and procedure, it is essential that the complainants are not required to be assisted by a lawyer (the EDL exempted them from it) or evidence (the receipt of notification should be sufficient; article 1 of the decree of 25 June also requires a copy of the decision which may be unnecessarily restrictive) that may be hindering the exercise of their rights including the right to an effective remedy.

- The electoral legislation should include provisions guaranteeing the protection of the integrity of the voter lists. Because these are public documents, in theory accessible to all, the use of personal data they contain should be, however, prevented for purposes other than the right to vote.¹⁰²

VI. REGISTRATION OF CANDIDACIES

The right to political participation as declined in the main international instruments in the form of subjective rights (voting rights and right to be candidate) is inseparable from "the equal opportunity for all citizens to become candidates."¹⁰³ The submission of candidacies may be subject to conditions. Regarding the eligibility requirements, already discussed in Section IV, they should be based on both objective and reasonable criteria and should not be discriminatory. The conditions of the submission of candidacies¹⁰⁴ should not also be discriminatory and dictated for unreasonable causes.¹⁰⁵

Under article 15, any voter, who is at least 23 on the day of the submission of her/his candidacy, have the right to run for the election of the National Constituent Assembly. In addition to the requirements of age and nationality, the former Electoral Code required that the father and the mother of the candidate are Tunisian nationals. This condition can be regarded as unreasonable in light of the international standards¹⁰⁶. A number of cases of ineligibility (see section IV) are provided in article 17 to which are added the limitations on voting rights since only candidates enjoying the right to vote may be candidates.

¹⁰² See OSCE ODIHR, "Guidelines for Reviewing A Legal Framework for Elections", 2001, page 14.

¹⁰³ Resolution 1999/57 on promoting the right to democracy of the United Nations Commission on Human Rights, April 27, 1999 (51-0-2).

¹⁰⁴ There are, in many countries, conditions for the submission of candidacies meant to establish a minimum level of representativeness of the candidacy or to ensure the reliability of the motivations for it and / or to eliminate frivolous candidacies. The type of required conditions varies according to the pursued objective that, in any event, should not be used to justify discriminations unrelated to the sole concern of ensuring a minimum level of representativeness and reliability. Among the conditions imposed for that purpose in some states is the requirement that the candidate aggregates a given number of voter signatures in support of his candidacy or that she / he can take advantage of a minimum number of supporters (the United Nations Committee of Human Rights, in its General Comment No. 25, paragraph 17, states that " If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy." or that she / he pays a financial guarantee. It is not uncommon that these conditions are combined. The phase of checking the accuracy of the lists of supporters can be difficult and give rise to abuse or excessive formalism denaturing the spirit of this type of provision.

¹⁰⁵ United Nations Committee of Human Rights, General Comment No. 25, paragraphs 16 and 17.

¹⁰⁶ United Nations Committee of Human Rights, General Comment No. 25, paragraph 15: " Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation."

1. Ineligibilities, incompatibilities and conflicts of interest

In the same section 1 of Chapter III on candidacy, ineligibility and incompatibilities are dealt with indifferently. By definition, ineligibilities prohibits running for election, thus to submit a candidacy whereas incompatibilities do not prohibit it a priori but are worth a posteriori invalidation of the election. The ineligibilities (article 17) and the incompatibilities that are worth the invalidation of the election immediately after the announcement of the final results (articles 18 and 19¹⁰⁷) cause, when they occur, the resignation, while in office, of the member of the assembly or its dismissal following the decision of the Assembly (article 23). Another scenario is however mentioned in article 22. There is a question not of incompatibility, in the true sense, which can be determined in an objective and indisputable manner but of conflict of interest. The standard for determining whether or not there is a conflict of interest - "use its quality (as a member of the assembly) in any publicity relating to financial, industrial, commercial or professional projects" – may have a wide interpretation and its effects can hardly be anticipated with sufficient certainty so that concerned persons are able to adapt their behaviour to that covered by the text. This provision could therefore be problematic in terms of its compliance with the principle of legality. It should be clarified in the rules of the Constituent Assembly - and, in the future, in that of any legislative assembly. The electoral law or otherwise could be limited, as here, to define its principle, but whatever the formula or the means used, the goal of a clear provision, objectively enforceable and not amenable to arbitrary measures, must be preserved.

2. Checking the reliability of candidates or the degree of their representativeness

The candidacy is not subject to any condition establishing a minimum level of representativeness and / or reliability of the candidacy which, in the context of the election of a constituent assembly aimed at bringing together the largest number of political sensitivities, can be understood and justified. The former Code did not provide conditions other than procedural for the requirements for submitting a candidacy to the Chamber of Deputies or the Municipal councils but required of any potential candidate for presidency the payment of a fee of 5000 dinars -which should be returned to the candidate only if she/he obtains at least 3% of the valid votes - and that the candidacy be supported and presented¹⁰⁸ also by at least thirty citizens among the members of the Chamber of Deputies or the heads of Municipal Councils. The proliferation of the lists of candidates for the election to the National Constituent Assembly can not be, however, directly attributed to the absence of conditions establishing the reliability or a minimum of representativeness of the candidates. It can be explained by an exceptional context marked by a revolutionary enthusiasm, the free expression of opinions after decades of censorship and the desire of citizens to avoid leaving the sphere of public affairs for the sole political elite. Other factors could also have contributed to the proliferation of candidacies, including the system of public support for the funding of the electoral campaign of the lists of candidates, itself devoid of any conditionality.

In many countries, there are conditions for the submission of candidacies meant to establish a minimum level of representativeness of the candidacy in question or to ensure the reliability of its motivations and / or to eliminate frivolous candidacies. The type of required conditions varies according to the pursued objective that, in any event, should not be used to justify discriminations unrelated to the sole concern to ensure a minimum level of representativeness and reliability. Among the conditions imposed for that purpose in

¹⁰⁷ Articles 18 and 19 enunciate the prohibitions of overlapping between the elective office of a member of the National Constituent Assembly and the tasks assigned by a foreign state or an intergovernmental organization or "non-elective public office" paid by the state or by organizations that are directly or indirectly related to her/him (or management positions within these organizations).

¹⁰⁸ This is an important distinction because it implies a commitment - Individual or collective - of the support for candidacies. This support does not simply certify the reliability of a candidacy but it supports it politically. Which explains that such support can not be given, under the Code, to more than one candidacy.

some states, there is the requirement that the candidate collects a given number of voters signatures in support of her/his candidacy or that she / he can take advantage of a minimum number of supporters¹⁰⁹ or that she / he pays a financial guarantee. It is not uncommon that these conditions are combined. The phase of checking the accuracy of the lists of support can, however, be tricky and lead to abuse or excessive formalism denaturing the spirit of this type of provision.

For the upcoming election, the opportunity of a mechanism for establishing a minimum level of representativeness of candidacies or for ensuring the reliability of their motivations could be examined. If this will be the case, this review should be inseparable from an assessment of the lessons learnt from the system of public support for the funding of the campaign of the lists of candidates as applied in the context of the election of the National Constituent Assembly.

3. Limiting the number of candidates on the lists

Articles 26 and 27 require that a candidate can not run for elections in more than one constituency and on more than one list that the same name can not be assigned to more than one list and that in the same constituency; many lists can not belong to the same party. Article 26 also requires that the number of candidates in each list equals the number of seats allocated to the constituency. This provision is unnecessarily rigid. Provided that the seats are distributed among candidates in the order in which they are listed on the list and that the lists are not allowed to perform any substitution after the election, the fact that the lists contain more candidates than the seats allocated should not be problematic and could also avoid having to replace in extremis a deceased candidate or a candidate wishing to withdraw his candidacy. The former Electoral Code allowed the replacement of a candidate wishing to withdraw his candidacy only up to the deadline for the submission of candidacies¹¹⁰ while the EDL allows up to one day before the electoral campaign¹¹¹. Concerning deceased candidates, under the EDL, they can be replaced up to 10 days before the election (if they deceased after the deadline for the withdrawal of candidacies), while the former Code permitted it until up to 5 days before the election. Such provisions, unnecessarily complex and always likely to cause problems given the procedures involved, could be avoided if in addition to the conditions listed above, the lists would be allowed to contain more names than the number of seats to be filled (with possibly a ceiling to prevent abuse).

4. Enforcement of the registration procedure and the display of the lists

The period for the submission of candidacies to the regional sub-committees was established by the ISIE through the decree of 25 June to the period between 1 and 7 September. The reports of the international observers indicate that the regional sub-committees were flexible in enforcing the provisions governing the registration of candidacies. They avoided a formalistic interpretation of these provisions by ensuring that candidates are informed of the errors found in their applications in order to correct them in time. This good practice should be reflected in the electoral legislation, or at least, be integrated into the training curriculum of the members of the regional sub-committees so that it becomes a common practice. Any refusal of candidacies for purely formal reasons would be contrary to the spirit of the international instruments that require that any restriction should be objective and reasonable, which is valued not only as

¹⁰⁹ The United Nations Committee of Human Rights, in its General Comment No. 25, paragraph 17, states that "If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy."

¹¹⁰ Article 97, Electoral Code of 1969.

¹¹¹ Article 28 allows the withdrawal of candidacies until two days before the start of the electoral campaign and the replacement of the candidate who withdrew her/his candidacy within one day after a notification was submitted concerning this withdrawal.

regards to the used methods for the registration of candidates but also to the pursued objective, namely the free choice of voters and the fundamental right of any citizen who qualifies to run for their suffrages.

The EDL does not provide for the display of the lists of candidates.¹¹² It should be provided for in the forthcoming legislation. The display should take place before the start of the electoral campaign and should remain for a period that allows citizens to be informed. Other means of information such as the publication of the list on the website of the central authority could be provided for in addition to the display. Having no involvement with the electoral calendar, the display period would not require any reformatting.

5. Disputes over the registration of the lists of candidates

Articles 24 to 27 are, to a large extent, inspired by articles 91 to 98 of the former Electoral Code but instead of being submitted to the governor,¹¹³ the candidate lists should be submitted to the regional sub-committees. A provisional receipt at first and then a final receipt given within 4 days of the submission of the candidacy should be provided to the registrants. It is stipulated in article 25, paragraph 3 that the non-delivery of a final receipt shall be interpreted as a refusal. Any refusal of candidacy is a serious decision in that it infringes a fundamental right, the right to become candidate, and even though this right is not absolute and may be subject to conditions, these should be based on objective and reasonable criteria, should not be discriminatory and should be reviewable through a fair process. In the absence of a reasoned decision, the declarant is not aware of the reasons for the refusal and she/he will challenge it before the Court of First Instance without knowing its reasons. For all these reasons but also to avoid overloading the courts with appeals that could have been avoided if the plaintiff knew the reasons for the refusal, it should be provided, that on the contrary, in the absence of a reply within 4 days, the declaration of candidacy is deemed accepted¹¹⁴. If this provision was maintained, it would be important, however, to specify, in the case of an implicit refusal, on which date begins the period for the appeal before the Court of First Instance, namely when the period of 4 days is over after the issuance of the provisional receipt.

The disputes on the accreditation of the lists of candidates are governed by the provisions that were not in the original text of the EDL. The new article 29 details the procedure for the submission and processing of complaints made by the head of the list or her/his representative against a refusal of registration. This article provides only the possibility to challenge the refusal for registration. Consideration should be given to the option to include explicitly in the law the decisions of acceptance among the decisions likely to be subject to an appeal before the Courts of First Instance or to an appeal before the Chamber of Appeals of the Administrative Tribunal. This implies the recognition that a third party can benefit from the public interest in support of its application both before the Court of first instance and before the Administrative Tribunal. This is the position taken by the latter in a case where the Court of First Instance was declared incompetent.¹¹⁵

¹¹² Since August 2003, the article 92 of the former Electoral Code provided for the display by the Governor of the lists of candidates no later than 20 days before the election day, however without specifying the display time.

¹¹³ Article 92, Electoral Code of 1969.

¹¹⁴ Similarly, in the absence of the decision of the Chamber of Appeals of the Administrative Tribunal on time (appeal against a decision of the Court of First Instance on a refusal for a registration of a list of candidates), the candidacy is "deemed registered automatically" (Article 29, last paragraph).

¹¹⁵ This was an appeal of the Association for the Defence of Human Rights in Tataouine against the decisions of the regional sub-committee. The Administrative Tribunal finally ordered the removal of a list and the registration of another one.

The territorially competent Court of First Instance¹¹⁶ decides over the complaints in first instance against the lists of candidates, and the Chamber of Appeals of the Administrative Tribunal decides, as a last resort, over these appeals. The appeal periods are short: 4 days before the Court of First Instance, two days before the Administrative Tribunal. The first has five days to decide while the Chamber of Appeals of the Administrative Tribunal has three days to convene an oral hearing after which it has one day to deliver the judgment that, at the latest, must be notified to the complaining party two days maximum later.

The proceedings before the Chamber of Appeals of the Administrative Tribunal are subject to detailed provisions, in large part taken from Chapter III of Law No. 72-40 of 1 June 1972 on the Administrative Tribunal, which describes the procedure before the Chamber of Appeals. This is a simplified procedure that differs significantly from the common law procedures described in the aforementioned law, particularly in terms of time limits for appeals and the exemption from the assistance of an attorney¹¹⁷. The electoral disputes require accelerated and simplified¹¹⁸ procedures provided that the simplifications made to the procedure of the common law do not end up depriving the complainants of the guarantee of a fair trial. In this case, the deadlines given to the Chamber of Appeals of the Administrative Tribunal to decide over the decisions of the Courts of First Instance are particularly short. As the period of the submission of candidacies is over no more than 7 days, any influx of complaints would risk clogging the five Chambers of Appeals. These would, indeed, be called upon to decide within few days on a large number of claims brought to it almost simultaneously. The reports of international observers report the number of 90 appeals for 140 appeals before the Courts of First Instance but mostly they point out that disputes were not exhausted at the start of the electoral campaign. The last appeal before one of the Chambers of Appeals of the Administrative Tribunal was finally resolved on October 6, thus 6 days after the start of the electoral campaign. The deadlines given to the Chambers of Appeals of the Administrative Tribunal should be extended while ensuring that these deadlines do not interfere with the electoral campaign.¹¹⁹

A significant fraction of the cases brought before the Chambers of Appeal of the Administrative Tribunal came not from the heads of the lists or their representatives but from the regional sub-committees so that the Administrative Tribunal had to play the role of an arbiter between these latter and the courts, particularly regarding the implementation of Article 15 of the EDL.¹²⁰ But it was not the only reason for

¹¹⁶ For the complaints concerning voter lists that are subject to registration before the regional sub-committees serving abroad, it is the Court of First Instance of Tunis that is competent.

¹¹⁷ This is article 59 of the law of 1972 on the Administrative Tribunal that states the cases where the applicant is exempt from the assistance of an attorney. This case is not provided in it (see also article 33 of the same law).

¹¹⁸ Venice Commission, Code of Good Practice in Electoral Matters, Guidelines, 3c.b: "The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals."

¹¹⁹ Venice Commission, Code of Good Practice in Electoral Matters, Ic.v: "Validation of signatures must be completed by the start of the election campaign."

¹²⁰ The candidates excluded by the regional sub-committees because they allegedly counted among those "who implored the ousted president to be a candidate for a new term in 2014 (mounachidines)" appealed against their exclusion before the Courts of First Instance that invalidated the approach of the regional sub-committees. These sub-committees decided these exclusions in reference to the "black lists" established on the basis of article 15, by estimating, for many of them, that the burden of proof was the responsibility of the candidate. The courts invalidated these exclusions based on the fact that the candidates should have been given the opportunity to prove that they did not implore the former President Ben Ali to run for presidency, being named in the blacklists can not be regarded as a sufficient evidence. This approach was validated by the Administrative Tribunal.

this lack of consistency. Article 26¹²¹ also resulted in significant differences in its interpretation by the regional sub-committees with the result of lists of candidates running under confusing names. Given this situation, the Administrative Tribunal restored a standardized approach but it remains that the provisions in question deserve to be reconsidered in the light of this dispute. For a standardized enforcement of article 26, it may be necessary to give a normative translation to the criterion used by the Administrative Tribunal, namely that the first list to be reported under a given name acquires a monopoly over it for all the constituencies, but in the context of a legislative election, this is something that should be considered also in light of the legislation on political organizations¹²². With regard to article 15, the approach is the issue: the differences of view on this issue highlight how the practice of "blacklisting" is problematic.

Beyond these issues, it is important that measures are taken to prevent the recurrence of similar discrepancies in the application of the law. These measures can not be normative, at least not exclusively. There would be a need to consider that instructions or directions, issued by the highest judicial body in charge of the electoral disputes, should be prepared and disseminated to all judges who may be required to make decisions in this field to allow a greater consistency in the processing of these cases and, thus, a greater legal certainty for all the involved parties, including the voters. Similarly, the electoral central authority could take initiatives to ensure a standardized approach in the processing of these cases, to strengthen the legal support to the regional and sub-committees and to refine the training of their members on the issues related to the disputes.¹²³

Recommendations

- The provisions on conflicts of interest deserve to be clarified in the electoral law so as not to have an overly broad interpretation. The electoral law could be limited to define their principle, but whatever the used formula or means are, the goal of a clear provision, objectively enforceable and not amenable to arbitrary measures, should be sustained;
- For the upcoming elections, the opportunity to develop a mechanism establishing a minimum level of representativeness of candidates or ensuring the reliability of their motivations could be examined. However, if this was the case, this review should become part of an assessment of the lessons learned from the system of public support for the funding of the electoral campaign of the lists of candidates as applied in the context of the election of the National Constituent Assembly.
- Requiring that the number of candidates in each list equals the number of seats allocated to the concerned constituency represents a provision that is unnecessarily rigid. The related provisions including the substitution of deceased candidates seem unnecessarily complex and may create more problems than they provide solutions. They should be reconsidered.
- The flexibility demonstrated by the regional sub-committees in the processing of the errors and irregularities observed in the applications for candidacies could be reflected in the electoral legislation in the

¹²¹ Article 26 prohibits the use of the same name by more than one list. Now it happened that splits within the Movement of the Socialist Democrats (MDS) resulted in the submission of lists of candidates under this name in several constituencies which required the intervention of the ISIE to certify the sole legal representative of that party. This intervention was not enough. Article 26 continued to give rise to differences of interpretation between the regional sub-committees.

¹²² The problem encountered in the election of the Constituent Assembly may be a characteristic of this type of election where political forces are not yet clearly identifiable and which one of the issues precisely is to allow them to stand out from each other, not only in terms of programs but also, more prosaically, in terms of labeling, appellations.

¹²³ See on these issues the publication of the OSCE / ODIHR "Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System," Chapter II "Generic Guidelines for Election Dispute Resolution" Section J "Consistency in the interpretation and application of election dispute provisions " (text available only in English).

form of provisions providing such regularization measures. In any event, this good practice should be integrated into the training curriculum of the members of the regional sub-committees so that it becomes common practice. Any refusal of applications for purely formal reasons would be contrary to the spirit of the international instruments.

- A display period, of sufficient time, for the lists of candidates should be provided for in the electoral legislation, before the start of the electoral campaign, to allow citizens to be informed. Other means of information such as the publication of the list on the website of the central authority could be provided in addition to the display.
- Any refusal of candidacy represents a serious decision that needs to be challenged through a fair process. It should be provided that in the absence of a response in a timely manner, any declaration of candidacy should be deemed accepted. If the reverse, however, were to prevail, it would be important to specify the date from which the period of the appeals before the Court of First Instance begins.
- Consideration should be given to the option to include explicitly in the law the decisions of acceptance among the decisions that may be appealed against. This implies the recognition that a third party can take advantage of the public interest as a support to its application before the Court of First Instance and before the Administrative Tribunal.
- Consideration should be given to the possibility to extend the deadlines given to the Chambers of Appeals of the Administrative Tribunal while ensuring that these deadlines do not interfere with the electoral campaign.
- Some provisions gave rise to disputes (in particular articles 15 and 26) in light of which it would be appropriate to consider the possibility of amending them. (see section IV).
- There would be a need to consider instructions or directions, issued by the highest judicial body in charge of the electoral disputes in first instance or as a last resort, to be prepared and disseminated to all the judges in charge of these disputes to allow a greater consistency in the processing of these cases and, thus, a greater legal certainty for all the parties involved, including the voters. Similarly, the central election authority may have to take initiatives to ensure a standardized approach in the processing of these cases, to strengthen the legal support to the regional sub-committees and to refine the training of their members on the issues related to disputes.

VII. PARITY BETWEEN MEN AND WOMEN

Under article 16 of the EDL, the lists of candidates that do not involve women and men candidates listed alternately should be rejected. This system was designed to ensure a higher number of women in the Constituent Assembly. This number will be even greater because there will be fewer lists in each constituency (and therefore a priori a higher ratio of seats per list) and more women as heads of lists. But it turned out that besides the large number of lists competing in each constituency, few women were heads of lists. The proportion of lists that obtained more than one seat was not high enough to permit the hoisting of women's representation in the assembly at a level of parity: of the 217 seats, 59 are held by women, while about 5,000 women were candidates. Women did not represent more than 7% of the heads of lists. Parity between men and women was reached only in one constituency; Ben Arous.

Tunisia ratified the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in July 1985¹²⁴ but this ratification was subject to reservations to articles 9, 15, 16 and 29 of

¹²⁴ The Additional Protocol, which allows individuals to file complaints before the Committee in charge of the control of the implementation of the Convention was ratified in 2008. However, Tunisia is also one of the four member countries of the African Union that refused to sign, before even considering ratifying it, the Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa (Maputo Protocol).

the Convention and to the general statement according to which "the Tunisian government states that it will not adopt under the Convention, any administrative or legislative decision that would likely go against the provisions of chapter I of the Constitution." Among the provisions contained in this chapter there is the principle of equality of citizens before the law (article 6) so that the above mentioned statement can be interpreted as designed to exclude the possibility of positive discrimination measures in favour of women¹²⁵. Clearly, Article 16 of the EDL ignores this statement and represents an innovation with regard to the status of the Tunisian legislation on this issue. The fact remains that the passing on 16 August 2011 by the Cabinet of a draft decree law lifting the above reservations¹²⁶ has not, however, confirmed this innovative approach as the decree in question maintained the general statement.

The principle of equal right of men and women to participate in public affairs and, more specifically to exercise elective office, enjoys wide recognition by the international law as reflected since 1952 in the Convention on the Political Rights of Women whose provisions were contained in article 7 of the Convention on all Forms of Discrimination Against Women which guarantees to women the right to vote, to hold public office and to work in the government. In the practice of the international organizations, to the many statements of principle¹²⁷ were added more concrete commitments in favor of the full equality facilitated by the means of special measures in the spirit of article 4 of the Convention on all Forms of Discrimination Against Women, according to which the passing of "temporary special measures to accelerate the achievement of a de facto equality between men and women should not be regarded as an act of discrimination". This development is confirmed at the regional level in the Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol)¹²⁸ which, in article 9 expresses the commitment of States "to take specific positive action to promote participative governance and the equal participation of women in the political life of their countries."¹²⁹ The possibility of such measures, provided they are timely, is also recognized by the United Nations Committee of Human Rights¹³⁰. In practice, today many states established a quota system, in one form or another, that have significantly increased women's representation in politics.

The quota system is not the only method used to facilitate women's access to elected office. Moreover, there are different quota systems, some are required by law, others are just optional, left at the discretion of political

¹²⁵ Some commentators interpret it also as allowing to justify the maintenance of legal or regulatory provisions that discriminate against women.

¹²⁶ Tunisia is now the only country of the African Union that does not have reservations to this Convention.

¹²⁷ Among which may be mentioned: the resolution 2003/36 of the United Nations Commission on Human Rights "interdependence between democracy and human rights", April 23, 2003, "Stresses the need for equal opportunities for men and women to participate in political and public life..." ; the IPU resolution on "strengthening democracy" (Mexico, April 23, 2004): "Reaffirms that parliamentary democracy can only be truly meaningful if women are represented in parliament on the basis of full equality with men, both in law and practice, and strongly urges parliaments to ensure that such equality is achieved, inter alia, by the adoption of temporary special measures...".

¹²⁸ Tunisia is one of the four members of the African Union that refused to sign, before even considering ratifying this Protocol.

¹²⁹ According to the same article 9, "States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: a) women participate without any discrimination in all elections; b) women are represented equally at all levels with men in all electoral processes; c) women are equal partners with men at all levels of development and implementation of State policies and development programmes"

¹³⁰ United Nations Committee of Human Rights, General Comment No. 25, paragraph 23.

parties, or encouraged and /or rewarded by law and in some cases, matched with financial penalties. The system established by article 16 of the EDL is one of the most effective in its principle. In a "normalized" political system; ie where the number of lists in the presence is significantly reduced, where political parties are placing greater weight, its effectiveness could be greater than it was in the context of the election of the National Constituent Assembly. Therefore, it is important that it is maintained for the next legislative elections and that it is also enforceable for the local elections. Consideration could be given to enhancing its efficiency by providing a quota at the level of the heads of lists in order to ensure that women are not always positioned in a second place on all or most all the lists. The system could be complemented by a provision that if a woman candidate, once elected, was to resign or decline her nomination, she is replaced by the woman candidate coming immediately after on the list on which she was elected. This could prevent women candidates from being subject to pressures before or after the election. In any event, it would be necessary to precede the stage of the drafting of these provisions by consultations with the civil society organizations that work on these issues and that could benefit the legislator from their expertise in this field. It is not necessary that the new Constitution explicitly legitimates a quota system since it is intended only to be temporary measures. That said, it would be necessary to ensure that it will not be impeding and that the general declaration that Tunisia accompanied its ratification with the Convention on all Forms of Discrimination Against Women is reconsidered so that it could not be invoked against any temporary measure of positive action.

Recommendations

- The quota system introduced in the EDL should be maintained for the upcoming legislative elections. It could also be applied for the local elections. It could be envisaged to enhance its efficiency by providing a quota for the heads of lists in order to ensure that women are not always positioned in a second place in all or most of the lists.
- The system could be completed by a provision that if a woman candidate, once elected, was to resign or decline her nomination; she is replaced by the woman candidate coming immediately after on the list in which she was elected.
- In any event, it would be necessary to precede the stage of the drafting of these provisions by consultations with civil society organizations that work on these issues and that could benefit the legislator from their expertise in this field.

IX. ELECTORAL CAMPAIGN

To vote is to express a choice and to be free, this choice implies the existence of a pluralistic political system, the equal opportunity for citizens to inform themselves freely, to communicate their ideas, to confront them without censorship and discrimination, the equal opportunity for all citizens to associate, to form political parties, to be able to communicate their ideas to the greatest number of people, without censorship and discrimination. Are not only considered the elements directly relating to the electoral sphere but also the rights and freedoms related to the wider democratic environment, to the participation in the sense of vector to the democratic debate and to the conditions that make it possible¹³¹. The freedom of

¹³¹ United Nations Committee of Human Rights, General Comment No. 25, paragraphs 14, 25 and 26; Venice Commission, Code of Good Practice in Electoral Matters, Explanatory Report, paragraph 60: "The holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with (...) the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality" See also paragraphs 7.6, 7.7 and 7.8 of the Document of the Conference on the Human Dimension of the CSCE (Copenhagen, June 29, 1990).

expression, the freedom of conscience and opinion, the freedom of association, the freedom of assembly and the freedom of media are the pillars of the democratic debate. Any electoral campaign is not limited to the legal warranties and to the parameters of the enclosing procedure but includes all the practices that determine the extent to which voters could express their freedom of choice.

Below are discussed in the first instance, matters relating to the environment of the electoral campaign where come into play a number of fundamental rights which the State should undertake to respect and guarantee¹³². In a second step, the proper regulation of the electoral campaign is considered.

1. Freedom of association and assembly

a. Freedom of association (political parties)

Since 1997, the 1959 Constitution contained, in its article 8, provisions on political parties. It attributed to them a central function (the supervision of citizens for the organization of their participation in political life) while requiring them to be "organized on a democratic basis," to respect "the sovereignty of the people, the Republic's values, human rights and the principles relating to the personal status" and to commit to "banning all forms of violence, fanaticism, racism and all forms of discrimination." The same article went even further since it forbade to any political party to rely "in its principles, objectives, activities or programs, on a religion, language, race, sex or region" and to have "bonds of dependency vis-à-vis foreign parties or interests."

An organic law of 3 May 1988¹³³ completed these constitutional norms. This law established a system of prior authorization for any new party by the Ministry of Interior. A registration refusal could be subject to an appeal before a special chamber of the Administrative Tribunal whose decision was final. The founders and the leaders of political parties had to be Tunisian citizens for at least 10 years and their members for at least 5 years. The law gave wide latitude to the Ministry of Interior to decide over the dissolution of a party or over a possible suspension of its activities, allowing it, exceptionally, to temporarily suspend the activities of a party in the absence of a court judgement. Moreover, the penalties and sanctions in the law were particularly heavy and the reasons for suspension or dissolution were worded very broadly, paving the way to abuse. On this basis, it would have been possible to suspend or dissolve a political party that would only advocate a change to the constitutional¹³⁴ order or that would simply defend unpopular ideas¹³⁵.

¹³² Article 2 of the International Covenant on Civil and Political Rights.

¹³³ Organic law No. 88-32 of 3 May 1988 organizing political parties (Official Gazette of the Republic of Tunisia n° 31 of 6 May 1988, page 703).

¹³⁴ This point was subject to an extensive jurisprudence of the European Court of Human Rights, which has always insisted that "the protection of opinions and the freedom to express them is one of the goals of the freedom of assembly and association (enshrined in article 11 of the European Convention on Human Rights). It is all the same in the case of political parties, given their essential role in ensuring pluralism and the proper functioning of democracy." (See *the Socialist Party and Others vs. Turkey*, 1998, paragraph 41).

¹³⁵ Copenhagen Document, paragraph 7.6: *"The participating States will respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities."*

The adopted approach in the decree law No. 87 on political parties of 24 September 2011¹³⁶ is at odds with the constitutional provisions as well as with the law of 1988 which it substitutes. First, the text establishes a presumption in favor of the creation and non-dissolution of political parties (articles 1 and 5) it cancels the requirement for the founders and leaders of the parties to have the Tunisian nationality for at least 10 years and the party members to be Tunisian citizens for at least 5 years and it allows minors over 16 to join a political party. The law is more liberal in terms of corporations and attributes, this said, it contains audit and funding rules that are more detailed than in the previous legislation. Like the previous legislation, it provides for a procedure of prior authorization by the Prime Minister that is shorter in terms of time (60 days instead of four months) and that can be appealed against before the Administrative Tribunal. In case of breaches, and contrary to the former law, the new legislation provides for an adjustment period of one month during which the concerned political party is offered the option to terminate the infringement. If the party does not terminate it, the Prime Minister may request the suspension of the party's activities¹³⁷. As in the law of 1988, such a decision can only be taken by the Court of First Instance. The legislation does not require proof of a minimum support nor the payment of registration fees.

In general, the new legislation complies with the general principles applying to the regulation of political parties as reflected in the States practice, the regional jurisprudence and the general guidelines provided by the international organizations¹³⁸ regarding these issues. It may be noted that the substantive and procedural requirements for registration do not exceed what is reasonably necessary for the legitimate objectives, necessary in a democratic society. Only practice will, however, confirm that assessment.

From this point of view, clarifications may be needed in particular with regard to article 28 which sets out the sanctions to which political parties expose themselves. This article applies to a wide range of offences, some are related to the breach of certain procedural obligations (eg, the submission to the Court of Auditors of an annual report showing expenditures and sources of funding), others are related to the infringement of substantive provisions, and in fact, it does not induce a graded approach depending on the seriousness of the offence. The penalty should not be the same for relatively minor offences, administrative offences, and for serious offences that may justify measures of great severity up to the suspension of the party's activities. Moreover, the law could be complemented by provisions that would not suspend the activities of a party because of the actions of some of its individual members. It should be demonstrated that the statutory body of the party committed the breach so that a decision of suspension is taken¹³⁹.

It is also only practice that may allow an assessment of the compliance of article 4 of the decree law of September 2011 with the international standards on the protection of the freedom of expression. To this

¹³⁶ The decree law was published in the Official Gazette of the Republic of Tunisia n° 74 dated September 30, 2011. The same day another decree law on associations was published in the Official Gazette of the Republic of Tunisia (No. 2011-88).

¹³⁷ Regarding the dissolution of political parties, all the international practice as well as the regional jurisprudence underline the importance of considering any action for dissolution as an exceptional measure that can only be considered as a last resort. For example, the General Assembly of the Council of Europe stated in paragraph 11 of its Resolution 1308 (2002) that "political party should be banned or dissolved only as a last resort," „in accordance with the procedures which provide all the necessary guarantees to a fair trial."

¹³⁸ The most comprehensive document to date on these issues is the Guidelines on the regulation of political parties of the OSCE / ODIHR and the Venice Commission.

¹³⁹ See on these issues the *Guidelines on prohibition and dissolution of political parties and analogous measures* adopted by the Venice Commission at its 41st Plenary Session (Venice, 10 and 11 December 1999).

article echoes article 38 of the EDL which, in the specific context of the electoral campaign, prohibits any propaganda that calls for hatred, intolerance and discrimination based on religious, tribalism or community. We may first question the nuances or inflections introduced in a text or another (excluding those of article 6 of the decision of the ISIE establishing the rules and procedures of the electoral campaign), likely to cause confusion or to have unintended implications. Although in international law, restrictions on freedom of expression and, by extension, freedom of association, can be considered legitimate under certain conditions, under articles 5 and 20 paragraph 2 of the International Covenant on civil and Political Rights¹⁴⁰, it is important to ensure a reasonable enforcement of this provision, based on objective criteria.

Article 18 of the decree law on Political Parties states that "providing financial benefits to citizens shall be forbidden for any political party." This provision which, it seems, caused controversy at the time of the drafting of the text, should be clarified. It should apply only to financial benefits constituting fraudulent and corrupt electoral practices and no to electoral promises.

Any regulation on political parties should not result in undue interferences with their exercise of the right of freedom of association and, as part of the general principles it enacts, it should be careful not to interfere in their internal affairs. That said, the legislation can be used to encourage or compel political parties to ensure the participation and representation of women in the political process. If appropriate in the current context, it would be appropriate to initiate discussions on the opportunity of such measures not as an alternative to the quota system established for the elections by article 16 of the EDL but as a complement to this and as part of an overall strategy.¹⁴¹

Recommendations

- The legislation on political parties should graduate the sanctions it imposes according to the seriousness of the offences.
- It should not be possible to suspend the activities of a party because of the actions of some of its individual members. It should be demonstrated that it is the statutory body of the party that committed the breach for the suspension to be imposed;
- Article 4 of the decree law on political parties should be enforced in a reasonable and proportionate manner, based on objective criteria, in light of article 5 paragraph 2 and article 20 paragraph 2 of the International Covenant on Civil and Political Rights.
- Article 18 of the decree law on political parties should be clarified. The prohibition it enacts should not be applied to the electoral promises. It should only be applied to the financial benefits constituting fraudulent and corrupt electoral practices.

¹⁴⁰ See in this regard, the jurisprudence of the Commission and the European Court of Human Rights. For example, in the case of the German Communist Party vs. The Federal Republic of Germany where the Commission argued that the stated purpose of the party in question involves the removal of various rights and freedoms protected by the Convention. Also, in the case of Refah Partisi (Welfare Party), Erkaban, Kazan vs. Turkey (July 31, 2001), the Court held that the sanctions imposed on the applicants could reasonably be considered as meeting a "pressing social need", namely the protection of the democratic society, to the extent that the leaders of Refah Partisi, under the pretext that they are giving to the principle of secularism a different content, had declared their intention to establish the plurality of the legal system based on the discrimination according to the beliefs, to introduce Islamic law (Sharia) that stands out significantly from the values of the Convention and they had left some doubt about their position on the use of force to gain power and, especially, to keep it.

¹⁴¹ See on these issues the report of the Venice Commission on the impact of electoral systems on women's representation in politics (CDL-AD (2009) 029).

- Within the framework of the consultations that might arise from the quota system to promote women's participation in public affairs, it would be appropriate to consider the measures that political parties may take to this effect.

b. Freedom of assembly¹⁴²

Article 27 of the former Electoral Code allowed *"to prohibit any speech contrary to the public order or morality or inciting to an act constituting a crime or an offence."* Article 41 of the EDL merely mentions the preservation of order and the good conduct of the meeting as a possible reason to terminate an electoral public meeting. These provisions must be considered in light of article 21 of the International Covenant on Civil and Political Rights which makes the possibility of restricting the exercise of the freedom of assembly subject to very strict conditions. Such restrictions should not only be prescribed by law but also be sufficiently precise to enable any person or group of people to adapt their conduct accordingly. The restriction is justified only by the reasons that article 21 lists in a limited manner (national security, public safety, public order, protection of public health and morals, the protection of the rights and the freedoms of others). Finally, the restriction must be "necessary in a democratic society" and proportionate to the pursued aim, based on a proven risk assessment and not hypothetical. The enforcement of the provisions relating to the freedom of assembly in concrete situations, matters much more than their terminology: there lies the true test of their compliance with the international law.

In the case of article 27 of the former Electoral Code as of article 41 of the EDL, there is a system of prior notification, not of authorization which is consistent with the spirit of the provisions of the international law and of the interpretation given to them by the bodies responsible for their enforcement. That said, the term "provocation" in article 27 is problematic because it paves the way to a subjective interpretation attached to the message content¹⁴³ rather than to the existence of a real and imminent risk of violence. The EDL's approach is a priori quite different since article 41 does not use the content of a message as a reason to break up a public meeting.

However, two points deserve consideration. On the one hand, it should be noted that the freedom of assembly is a complex matter that can not be regulated in all its ramifications by the electoral law and because of the conflicts of interest and the complexity it raises, in many countries, it is the subject of a legal framework of its own. In the absence of such a legal framework, it is essential that these conflicts (on the one hand, the

¹⁴² Article 20 (1) of the Universal Declaration of Human Rights, article 21 of the International Covenant on Civil and Political Rights. The freedom of peaceful assembly resulted in a growing jurisprudence from the European Court of Human Rights which was itself the basis for the development of guidelines and other international documents specifying the scope of this liberty and the principles that apply to judge the legitimacy of restrictions that may hereafter be made. See in particular "Guidelines on Freedom of Peaceful Assembly" OSCE / ODIHR and the Venice Commission, second edition, 2010.

¹⁴³ The free expression of opinions benefit from the protection of article 19 of the International Covenant on Civil and Political Rights so that any regulation related to the freedom of assembly should not in theory be based on the content of the expressed messages. In recent years, the European Court of Human Rights dealt with many cases dealing with these issues and the starting point of its jurisprudence was to consider as unacceptable that an interference with the freedom of assembly can be justified simply by the views of the governments as to the appropriateness or not of the views expressed during a demonstration or public meeting (Hyde Park and others Vs. Moldova No. 1 (2009)). Moreover, the Court distinguishes the expression of support for illegal activity from the support for acts of violence, the criterion should be the threat of an imminent violence: on these issues, see Cisse Vs. France (2002), Tsonev Vs. Bulgaria (2006), Stankov Vs. United Macedonian Organization (2001), Christian Democratic People's Party Vs. Moldova No. 2 (2010).

protection of a number of legitimate interests such as restrictively defined in the relevant international instruments, on the other hand, the presumption in favor of the freedom of assembly, this should be the rule and not the exception) do not lead, in the framework of an electoral campaign to restrict unduly the exercise of that fundamental right¹⁴⁴. On the other hand, article 41 is completed by chapter 2 of the decision of 3 September of the ISIE establishing the rules and procedures of the electoral campaign which includes a provision containing a number of elements that are ambiguous. These include article 22 of this decision which prohibits any "discourse affecting public order and morality, inciting to hatred, fanaticism or discrimination according to religion, race, region, sex" and any discourse "affecting the physical integrity and honor of candidates and voters." This provision overlaps to a large extent, the wording of article 38 of the EDL and deserves also to be discussed at the joint reading of articles 19, 20 paragraph 2 and 21 of the International Covenant on Civil and Political Rights.¹⁴⁵ Leaving aside these questions - that go beyond the analysis of a single electoral framework - it would be appropriate however to consider the possibility to clarify the last part of this article because the notions such as "the honor of the candidates and the "honor of the voters" are, to say the least, subject to broad interpretation, that could significantly expand the scope of the legal restrictions on the freedom of assembly, well beyond what is permitted by the international law.

Other issues should also be clarified. One can, for example, evoke the question of the potential responsibility of the members of the political bureau in the cases of violence¹⁴⁶. This last point should also be examined in light of the prohibition in article 38 of the EDL of "Any campaign that includes a call for hatred, fanaticism, segregation based on religion, class, region, tribalism, during the elections." since any person infringing this provision shall be subject, under article 75 paragraph 1, to a term of imprisonment of one month and to a fine of one thousand Dinars.

Recommendations

- There is a need to clarify the scope of the provisions to restrict the freedom of assembly on the basis of criteria relating to the expressed opinions or views, rather than the existence of an imminent threat of violence. The use in the legislation of terms such as the "honour of the candidates" and the "honour of the voters" could open the scope of the legal restrictions beyond that permitted by the international law.

¹⁴⁴As required by the Guidelines on the Freedom of Peaceful Assembly of the OSCE ODIHR and the Venice Commission (2010) in paragraph 6 of their Interpretative Notes: " Legal measures that are potentially more restrictive than the normal regulatory framework governing freedom of assembly should not be necessary to regulate assemblies during or immediately after an election period, even if there is heightened tension. On the contrary, the general law on assemblies should be sufficient to cover assemblies associated with election campaigns, an integral part of which is the organisation of public events."

¹⁴⁵ Note that in paragraph 25 of the General Comment No. 25 of the United Nations Committee of Human Rights, there is the following point: "It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas."

¹⁴⁶ See on these issues paragraphs 109 and 197 of the "Guidelines on The Freedom of Peaceful Assembly" OSCE / ODIHR and the Venice Commission, second edition, 2010.

- Other points are also to be clarified, particularly regarding the non-notification - or failure to notify on time – on an electoral public meeting and on the potential criminal responsibility of the members of the political party in cases of violence.¹⁴⁷

2. Regulation of the electoral campaign and pre-campaign

The regulation of the electoral campaign for the election of the Constituent Assembly was particularly detailed, even meticulous; the EDL simply established the basic principles. The 16 articles that were devoted to it in the EDL were completed a few weeks before the beginning of the campaign by three decisions of the ISIE one of which, the decision of 3 September establishing the rules and procedures of the electoral campaign, which completes, corrects and includes some provisions of the EDL. This decision is, in fact, an amplification of section II of the decree law, since it includes some provisions while clarifying or completing them, including with respect to the regulation of the activities related to the campaigning conducted prior to the official electoral campaign. A joint reading of these two texts reveals a number of difficulties.

Concerning the form, section II of the EDL is structurally unbalanced: it combines very detailed provisions on matters including disputes (article 47 in particular), with the statement of general principles (articles 37 and 45 in particular) which, in fact, result in a broad delegation of regulatory power in relation to the enactment of the "rules and procedures of the electoral campaign" as a whole (article 46).

Such delegations are not necessarily problematic and are even desirable to the extent that some rules or technical criteria should not necessarily be included in the electoral law. It is up to the election authority to apply it in exercising its regulatory power within the limits assigned to it. The decision of the ISIE on the conditions of production, programming and broadcasting of radio and television programs, clearly remains within these limits, which defined the terms of enforcement of the articles 44 and 45 of the EDL. However, the decision establishing the rules and procedures of the electoral campaign did not only clarify the rules for enforcing the EDL or clarify and expand some of its provisions. This decision is and looks like a recast of section II of the EDL, it inserted the provisions of the latter in a structure - which was lacked in the EDL - matched it with definitions (electoral campaigning, campaign poster, electoral campaign, etc. .) - also missing in the EDL - but it also added to them some elements that were not included in the EDL. This is particularly true of the notion of electoral pre-campaign (a period that article 2 of the decision in question makes it begin on 12 September and end with the start of the official electoral campaign).

The question of the extent of the regulatory powers of the ISIE was brought before the Administrative Tribunal by an interlocutory appeal seeking the deferment of the decision of the ISIE that establishes the rules and procedures of the electoral campaign. The Administrative Tribunal confirmed that as an independent public authority, the ISIE had a special regulatory power. One can however question how to reconcile a power as broad and as "special"¹⁴⁸ as this one with the principles of legality and legal certainty.

¹⁴⁷ See on these issues paragraphs 109 and 197 of the "Guidelines on the Freedom of Peaceful Assembly" OSCE / ODIHR and the Venice Commission, second edition, 2010.

¹⁴⁸ Can also be seen as problematic the fact that the ISIE can give to itself the power to complete its own decisions by other decisions (see in particular articles 27, 28, 29 and 30 of the decision establishing the rules and procedures of the electoral campaign). Although these articles proceed to a large extent from articles 45 and 46 of the EDL, there is an anomaly.

In addition to the question related to the frame that endeavours to define the scope of the law relative to the regulatory authority, the practical consequences of the addition to the electoral campaign of a pre-campaign subject to rules that pose problem, should be considered. Because these rules were enacted only nine days¹⁴⁹ before the start of the pre-campaign period, the candidates and the political parties had very little time to adjust their activities to comply with the new rules. One of them in particular, namely the prohibition of all forms of political advertising during the pre-campaign period (article 15 paragraph 2 of the Decision¹⁵⁰), was designed to strengthen equality between the lists and the political parties but because of its late passing and its questionable frame, it was controversial¹⁵¹ and because it was not enacted in the EDL. This controversy showed the difficulty of the ISIE to enforce the rules it established and whose legality was contested by some political parties. It may be noted that article 15 paragraph 2 of the decision of the ISIE did not limit the prohibition of all political advertising during the pre-campaign period but also provided for it for the duration of the campaign while the EDL was silent on this point. Again, this is much more than a mere clarification.

Articles 4 and 5 of the decision of the ISIE also contain rules that were not included in the EDL. These rules target the media, prohibiting them from all forms of disguised campaigning¹⁵² during the electoral campaign as well as during the pre-campaign. The late enactment of this rule is problematic for the same reasons as indicated above with regard to article 15 of the same decision. If one can argue whether such a ban clarifies, completes or innovates compared to the EDL - if, in fact, it has a legal basis -, it is clear that because it applies to the pre-campaign period, which was not provided in the EDL, this provision does not leave the time for adaptation to the key stakeholders.

As noted above, the decision of the ISIE establishing the rules and procedures of the electoral campaign overlaps somewhat Section II of the decree law, resuming some of its provisions but in a renewed structure. This is not without contradiction between the two texts. For example, the EDL uses the term "campaigning" broadly applicable to all campaigning activities (article 43) set during the electoral campaign, while paragraph 2 of the article 2 of the decision of the ISIE limits the scope of these terms to the activities that take place during the pre-campaign period.

Another contradiction is the one between article 38 of the EDL and article 6 of the decision of the ISIE. Article 38 of the EDL prohibits the electoral campaign in the places of worship, the workplaces and schools, which article 6 of the decision of the ISIE confirms. The same article 38 of the EDL prohibits during the electoral campaign "Any campaign that includes a call for hatred, fanaticism, segregation based on religion, class, region, tribalism.". This provision is found in article 6 of the decision of the ISIE but in a formulation that reduces greatly its scope. Indeed, under this article any incitement to "hatred between candidates belonging to different political parties or ideological currents" is prohibited, which, obviously, is significantly reduced in comparison to the text of article 38 which punishes any incitement to hatred without excluding from its scope the calls targeting groups of people or the persons other than the candidates. Moreover, article 6 of the decision of the ISIE is worded in a way that seems to be applicable only to calls to hatred that are

¹⁴⁹ Article 4 of the decision itself was amended on 16 September; four days after the pre-election period had begun.

¹⁵⁰ This prohibition is also contained in article 15 of the Decision of 3 September establishing the rules that broadcasters should respect during the electoral campaign.

¹⁵¹ Designed to ensure equal conditions for all candidates, it came at a time when several political parties had already invested financially in campaigns through posters across the country and through various media. The Progressive Democratic Party (PDP) and the Free Patriotic Union (UPL) in particular challenged the legality of this ban and refused to comply to it.

¹⁵² Article 4 is very specific on the issue while article 5 imposes a general prohibition.

directed from a place of worship, a place of work or an academic institution or a university, which could be interpreted as a permission for such calls to hatred when they are expressed other than in one of these places. Finally, it is unclear if the temporal scope of article 6 of the decision of the ISIE includes or not the electoral pre-campaign. This should be clarified in the future legislation because it is hardly conceivable that calls for hatred are subject to a different treatment depending on whether they occur before or after the start of the electoral campaign.

Except for the reference to the pre-campaign period, the decision of 3 September, establishing the rules that broadcasters should respect during the electoral campaign, has the characteristics of an enforcement action. It may be noted however that in many ways, this text is closer to a code of conduct than a regulatory text. No doubt, it would be desirable to insert in the electoral law some of the general principles contained in this text and that are of great importance to guide its implementation by the relevant staff, including the courts. However, some of its principles can be understood as precepts or exhortations without any normative value. Some provisions, including article 4 which prohibits the national media from disseminating slander or misleading statements and potentially controversial statements about the electoral process, are confusing. In the case of article 4 mentioned above, it is not clear whether the wording used would be consistent with the freedom of expression: what should be understood, indeed, from "slander" and "controversy about the electoral process"?

The "special" circumstances of this election could certainly justify the entrusting of the ISIE of an extended regulatory authority, but the practice shows that the credibility of any independent electoral authority is largely dependent on its anchorage in terms of the law and of the fact that it is perceived as adhering strictly to the application of the texts that are necessary to it as to all the other parties involved in the electoral process.

Recommendations

- It is important that in the future, the normative framework of the electoral campaign is consolidated and stabilized and that the included sequences - including a possible pre-campaign -and rules and procedures relating thereto, are specified in the law to allow the candidates and political parties to prepare themselves in order to comply with them and develop their campaign strategy accordingly.
- A clearer division between general principles, substantive provisions, enforcement measures and evidence related to the code of conduct would facilitate a consistent application of the texts. In the new legislation, the contradictions or ambiguities that plague the various texts that were applied for the election to the National Constituent Assembly should also be eliminated. (for a detailed account of these contradictions or ambiguities, see above).

3. Monitoring the compliance with the electoral campaign rules: regularization measures, sanctions and disputes

For clarity, it is important to separate the control exercised by the ISIE - leading to regularization measures and possibly to sanctions - and the disputes stage in itself.

a. Monitoring, regularization measures and sanctions

Article 47 of the EDL entrusts the ISIE with the responsibility of monitoring the compliance with the rules of the election campaign as defined in the EDL and in the relevant decisions of the ISIE¹⁵³. To exercise this control, the ISIE is responsible for investigating possible breaches of the electoral campaign.

¹⁵³ Article 4 of the decree law No. 27 of 18 April 2011 merely stated that the ISIE was responsible for "monitoring the electoral campaigns and ensuring the equality between all men and women candidates."

In terms of the ISIE authority for regularization, three cases are to be distinguished:

- Under article 47, the ISIE can take "the necessary measures to stop the breaches" on the basis of an appeal or on its own initiative. These measures should be taken before the end of the electoral campaign. The ISIE should notify the concerned parties within one day of the day the decision is taken. These measures may result in a disputes phase before the Chambers of Appeals of the Administrative Tribunal. Only the heads of the lists of the concerned lists of candidates or the representatives of the concerned media organisms can challenge the decisions of the ISIE.
- Under article 33 of the decision of the ISIE establishing the rules and the procedures of the electoral campaign, the ISIE can take certain actions (which may include the suspension of the program or, in case of recidivism, the deprivation of the right to cover the campaign) against any media that breaches the rules and the procedures established by this decision. Article 34 of the same decision provides sanctions - by way of a formal notice and a withdrawal of accreditation in case of recidivism – for the foreign media in case of breach of these rules and procedures.
- Under article 70, the ISIE is responsible for verifying the compliance with the rules related to the funding of the electoral campaign. In case of breach, the ISIE may decide not to record the votes obtained by the list that committed the offence (article 70). This decision may be appealed before the plenary assembly of the Administrative Tribunal (article 72) under strict conditions of admissibility. Only the heads of lists can challenge it. The election results disputes provide also for an opportunity to challenge the results without having to rely on a decision of the ISIE annulling the results of a particular list (see section X).

Any action of regularization or correction has the effect of an electoral sanction whose effect can result in the cancellation of the election. This kind of sanction may however be combined with a criminal conviction. Four cases are to be distinguished:

- The refusal to comply with a warning to stop a breach of the rules of the electoral campaign as it is stated in articles 44, 45 and 46 of the EDL can be worth immediate appearance before the Criminal Chamber which delivers a fine (article 79). The warning mentioned above is carried out with the assistance of the prosecution.
- In the particular case where a candidate received foreign material support directly or indirectly, a sentence of one year imprisonment and a fine of two thousand Dinars may be imposed. This conviction may be subject to a penalty of the suspension of the right to be candidate or, where appropriate, to a cancellation of the election of a candidate. Note that for this offence, the right to sue will disappear only after a period of two years from the date the results are announced (article 77).
- Article 75 of the EDL imposes a penalty of imprisonment of one month and a fine of one thousand Dinars for any breach of the article 38 - which prohibits campaigning in places of worship, places of work and academic institutions and universities as well as any campaigning during the electoral campaign, "calling for hatred, intolerance and discrimination based on religious, community, regional or tribal considerations."
- The same article 75 imposes a penalty of one year imprisonment and a fine of two thousand Dinars for the distribution by the agents of the public authority of programs, pamphlets or ballots of candidates or for the use of public resources and tools during the electoral campaign.

This system calls for several comments.

First, Article 33 provides for the measures that the ISIE can take to punish the breaches of the rules not only that apply to the electoral campaign but also to those applying to the pre-campaign ("in case of breach of this Decision"). However, this article applies only to the offences committed by media institutions but not to those committed by the candidates and the political parties. To punish the breaches committed by the

candidates or the political parties to the rules applying to the pre-campaign period (including articles 2, 3 and 15 paragraph 2), there is no equivalent system in the decision of 3 September, article 79 of the EDL. In the absence of such a system, the ISIE found it useful to refer to article 315 of the Penal Code which was not however suitable for the offences the ISIE wanted to sanction. These ambiguities require the incorporation of clarifications into the future legislation regarding the sentencing authorities of the electoral commission. It is important that all the provisions that regulate these issues are aggregated and free from any ambiguity about their scope of application.

Secondly, article 79 provided for penalties for offences that were not defined in the law at the time of its passing as articles 44, 45 and 46 to which refers the article 79 referred to, to a large extent and without fixing deadlines for their passing, subsequent decisions of the ISIE to define the rules and procedures of the electoral campaign. These decisions occurred late, just days before the election sequence to which they applied. In addition, they introduced a new sequence in the electoral process, that of a pre-campaign period, highlighting the legal uncertainty and lending itself to a controversy detrimental to the transparency of the campaign and the trust of its key actors. In the forthcoming legislation, attention should be paid to the principle of legality and legal certainty through incorporating into the legislation provisions regulating the electoral campaign.

Thirdly, regarding article 75, the contradiction noted above between the wording used in article 38 and that in article 6 of the decision of the ISIE establishing the rules and procedures of the electoral campaign generates an additional level of uncertainty because there are two prohibitions that contradict each other or at least, are not consistent with each other, which makes the application of article 75 problematic. And all the more problematic are the penalties it provides that are of great severity.

Finally, one may wonder about the deterrent effect of the penalties described in the aforementioned articles. If the penalties provided for in article 75 are severe, those imposed for the breach of the rules or the procedures of the electoral campaign are not. One can doubt their deterrent effect. Given the variety of these rules and procedures and the differences between their impact on the fairness and transparency of the campaign, there would be a need to introduce a greater differentiation of sentences so that they are not only deterrent but also proportionate to the seriousness of the offence, which is in itself related to the nature and to the extent of the impact on the fairness and transparency of the campaign. In the forthcoming legislation, article 79 should be amended accordingly.

Recommendations

- In general, for the sake of legal certainty, it should be ensured that the legal framework regulating the electoral campaign is standardized, coherent and free from any ambiguity and that the tasks of the central election authority and its regional subdivisions in terms of supervision, control and regulation of the electoral campaign are precisely defined.
- The legal framework of the election in general and of the electoral campaign in particular can be clarified, specified, completed by the central electoral authority but the authorities of the latter should be limited to interpreting and enforcing the electoral law. They should not include the possibility to enact new rules, especially at a date that is too close to the election or, in this case, the beginning of the electoral campaign, thereby depriving the concerned parties of the opportunity to adjust their programs of activities accordingly.
- If, in the future legislation, a pre-campaign period, to which would be applied specific rules, was to be expected, it should be explicit in the electoral legislation. Its duration and the basic rules which may be applied to it should be specified in the electoral legislation.

- For the sake of legal certainty, the rules and procedures contained in the decision of the ISIE establishing the rules and procedures of the electoral campaign should be integrated, to a large extent, in the electoral legislation. To facilitate a standardized and consistent enforcement of the legislation, most of the rules and procedures that define the legal framework of the electoral campaign should be part of the electoral law. For example, the law can not prescribe penalties for offences that are not defined by the law. This also applies to the definitions of the terminology specific to the electoral campaign whose absence would jeopardize the standardized enforcement of the legislation. That said, it would be up to the election authorities to implement these provisions in the context of each election by means of decisions or instructions dedicated to the staff in charge of their enforcement.
- If it belongs to the election authority to specify the rules applicable to media as part of an electoral campaign, it is essential that these rules are known by media well in advance to enable them to take the provisions necessary to comply with them.
- To facilitate the standardized enforcement of the rules and procedures governing the access to media as part of the electoral campaign, it might be possible to synthesize them in the form of a code of conduct or a practical guide.
- Texts should not be tainted with ambiguities, even contradictions between some of its provisions such as those that exist between article 38 of the EDL and article 6 of the ISIE decision establishing the rules and procedures of the electoral campaign.
- Given the variety of the rules and the procedures of the electoral campaign and the obvious differences of impact between them on the fairness and transparency of the campaign, there would be a need to introduce a greater differentiation of sentences so that those are not only deterrent but also proportionate to the seriousness of the offence, which itself depends on the nature and extent of their impact on the fairness and transparency of the campaign. In the forthcoming legislation, article 79 should be amended accordingly.
- Under the provisions applying to the electoral pre-campaign and campaign, it might be useful to complete the provisions already included in the EDL – and the decisions completing it – with a provision governing the advertising campaigns for the achievement or management of an organized community within the communities interested in the vote. This type of provision should be based on the mechanism governing the funding of the electoral campaign and in particular the provisions circumscribing the "election expenses" and specifying the demarcation between them and the routine expenses of political parties.

4. Electoral campaign disputes

At first, the disputes procedures described in article 47 of the EDL allow only to challenge the decisions taken by the ISIE concerning the breaches of the rules of the electoral campaign. No details are given about the appeal procedures that are only mentioned in articles 47 and 48. It is article 32 of the decision of the ISIE establishing the rules and procedures of the electoral campaign that brings these details: such appeals may be brought before the ISIE by the heads of the lists and the representatives of media within 24 hours of the announcement of the breach. It is not clear yet how soon the ISIE is required to decide over such appeals. Article 47 discusses the need for immediate action to end any failure but this indication is not directly related to the procedure of article 32 of the above mentioned decision. This gap in the text should be filled.

The ISIE can, however, on its own initiative and at any time, take measures to stop any offence it would observe on its own or on the basis of an appeal brought to its attention concerning such offences. Article 32 of the decision of the ISIE provides, however, little guidance on the procedure to follow before the ISIE. The procedure described in article 47 is very detailed, whereas the procedure of article 32 seems

to be quite informal, close, in its brevity, to the terms of the initial version of article 47 (before its recast by the decree law of 3 August).

Article 47 of the EDL is interested in the procedure of appeal, the one that permits to challenge the decisions of the ISIE either they were taken on the basis of information gathered by the ISIE or on the basis of an appeal before the Court of First Instance. In the event an appeal was brought before the ISIE - under the procedure of article 32 of the above mentioned decision -, article 47 of the EDL does not provide, however, the possibility to appeal against a lack of decision of the ISIE¹⁵⁴. By stating the time for appeal from the notification of the decision, the article excludes implicitly this case. And as article 32 of the decision of the ISIE establishing the rules and procedures of the electoral campaign does not specify the time given to the ISIE to take its decision in case of appeal, this deficiency deprives the applicants of any effective appeal. There is a need to complete these provisions so that such a deadline will be clarified and that the appeal process allows applicants to appeal before the Chamber of Appeals of the Administrative Tribunal in case of absence of the decision of the ISIE.

Regarding the appeal process, article 47 provides, in its final version, a set of procedures and rules of procedure contained, in a large measure, in the "ordinary" administrative disputes. In particular, conditions of admissibility that the preliminary version of this article did not provide are imposed on the parties appealing.

On the issue of standing in court, article 32 of the aforementioned decision of the ISIE like article 47 are particularly restrictive since they allow the standing in court only to the heads of lists (and their representatives) and to the media institutions (or their representatives). However, these parties are not the only ones with an interest to stand in court and as far as standing in court coincides with the locus standi, this limitation deserves to be reconsidered.¹⁵⁵ Indeed, every voter has a legal interest to stand in court if the irregularities committed by media in covering the electoral campaign or by candidates and political parties in the conduct of the campaign are likely to be detrimental to him. The freedom of expression and the freedom of opinion reinforce each other and there can not be a free choice if voters are subjected to "any form of coercion or compulsion to disclose how they intend to vote or how they voted¹⁵⁶. If this choice has to be subjected to such "coercion", it is not only the rights of candidates that are being infringed, but also those of voters, including their right to seek and receive information to make "an informed choice."¹⁵⁷ Therefore, the disputes procedure for the disputes relating to the electoral campaign should also be open to voters. The need to find a balance between the right to an effective remedy and the constraints, including time, inherent in any electoral disputes could justify, however, the provision for a mechanism for the

¹⁵⁴ Explanatory Report of the Code of Good Practice in Electoral Matters of the Venice Commission, paragraph 92: "If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results (...) It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding "

¹⁵⁵ Note that this condition was applied particularly with a strict manner by the Plenary Assembly of the Administrative Tribunal within the framework of the disputes over the preliminary results of the election (see analysis of the disputes over the preliminary results of the elections of the National Constituent Assembly of 23 October 2011 Electoral Support Team of the EU in Tunisia, 31 January 2012, pages 9-10).

¹⁵⁶ United Nations Committee of Human Rights, General Comment No. 25, paragraph 20 which also indicates that voters should not be exposed to "any manipulative interference".

¹⁵⁷ IPU, Declaration on Criteria for Free and Regular Elections, 3 (3).

verification and / or filtering of the frivolous or manifestly unfounded appeals.¹⁵⁸ As for the lists of candidates standing in court should not be limited to only the heads of lists.

If we compare articles 72 and 47, we note that the procedure and the admissibility conditions they enact are identical, including in respect to the deadlines for appeals and judgment, except that unlike article 72, article 47 exempts the parties appealing from the requirement to be assisted by an attorney.

According to article 47, a decision of the ISIE can not be appealed against but within two days from the date the decision is announced after which the Chamber of Appeals of the Administrative Tribunal will lay hold of the case and will have 10 days to decide over it (to which are added two days to announce the decision). It appears that an appeal against a decision of the ISIE that occurred in the last days of the electoral campaign would be unlikely to be resolved before the end of the campaign. In the future legislation, the legal framework should be articulated so that any appeals involving offences committed during the electoral campaign can be resolved in time, ie before the end of the electoral campaign.

It should be added that in the disputes over the preliminary results of the election, the Administrative Tribunal has broad authorities, enabling it to exercise full control of the disputes involving the entire electoral process, including the electoral campaign. In the cases judged on the basis of article 72 of the EDL, the administrative judge noted that its control could not be dismissed solely because specific remedies were provided by the EDL for each sequence of the electoral process. In one case, it said that its control over the compliance with the rules of the electoral campaign was exercised fully provided that the decisions of the ISIE under article 47 were not confirmed either because they were not subject to an appeal before the Chambers of Appeals or because they were not subject to its final judgment. This position of principle is of great importance in that it decompartmentalizes the electoral disputes, giving priority to the rule of a comprehensive approach, the better able to provide an overall judgment on the fairness and transparency of the elections - not only from the point of view of possible breaches of the electoral rules but also in terms of their impact on the fairness and transparency of the elections. However, to the flexibility shown by the electoral judge in assessing the extent of its control should correspond on the one hand, a less formalism regarding the conditions of admissibility imposed on the parties appealing and on the other hand, a significant increase in the means of investigation given to the electoral administration in order to lighten the directive phase before the election judge.

This section does not examine the issues related to the funding of the electoral campaign that were examined separately.

Recommendations

- In the legislation, the deadlines for the ISIE to decide over the appeals for the breaches of the rules and procedures of the electoral campaign should be clear.
- There is a need to complete the provisions regulating the disputes over the electoral campaign so that such a deadline is clarified and that the appeal procedure allows the appealing parties to appeal before the Chamber of Appeals of the Administrative Tribunal in the absence of a decision of the ISIE.
- The disputes procedure relating to the electoral campaign should also be open to voters. The need to find a balance between the right to an effective remedy and the constraints, including time, inherent in

¹⁵⁸ In the Code of Conduct on Electoral Matters, the Venice Commission raises the possibility that a "A reasonable quorum may be imposed for appeals by voters on the results of elections" (Explanatory Report, paragraph 99). Such a mechanism could be extended to the disputes over the electoral campaign.

any electoral disputes could justify, however, the provision of a mechanism for the verification and / or the filtering of appeals that are frivolous or manifestly unfounded.¹⁵⁹ As for the lists of candidates standing in court should not be limited to the heads of the lists.

- In the future legislation, the legal framework should be articulated so that any appeal involving offences committed during the electoral campaign can be resolved in time, ie before the end of the electoral campaign.
- To the flexibility shown by the Administrative Tribunal in assessing the extent of its control over the legality of the election results should correspond on the one hand, a less formalism regarding the conditions of admissibility imposed on the parties appealing and on the other hand, a significant increase in the means of investigation of the electoral administration in order to lighten the directive phase before the election judge.

X- THE ELECTORAL ADMINISTRATION

Today, an independent electoral process managed in an impartial way is essential to holding free and regular elections. The establishment of an independent electoral authority is considered as an important phase as it allows the initiation and, in the long term, the establishment of a tradition of independence and impartiality and to win the trust of both voters and political players. In practice, there are different models of electoral commissions; a difference essentially based on the structures of the commissions themselves. The electoral apparatus can be either impartial or balanced. Impartial, if the individuals appointed in the central commission enjoy the trust of all the political players and civil society, and balanced if, in the absence of individuals enjoying such trust, representatives of political parties are appointed. It is the relative maturity of a political system which determines – among both formulae each of which can be modulated—the better and more adequate choice.

The international tools ensure such practical solutions. The UN Human Rights Commission recommends setting up an independent electoral authority “in order to supervise the electoral process and ensure that it is carried out according to the equity and impartiality conditions.”¹⁶⁰ The African Democracy, Free Elections and Governance Charter, which came into effect in 15 February 2012, requires from its member states the “creation and consolidation of national independent and impartial electoral bodies to be in charge of the management of elections.” (Article 17). In its statement on the criteria for Free and Regular Elections, the Inter-parliamentarian Union recommends the establishment of “a neutral, impartial and balanced mechanism for the management of elections.” (Paragraph 4.2). Among the conditions for the implementation of the rights to a universal, equal, free, secret and direct ballot, the Venice Commission of the European Council gives a central place to holding elections by an impartial and permanent authority. It underlines the importance of such authority in a context marked by the absence of a long tradition of independence and management of elections and their relationship with the political authorities¹⁶¹. Finally, we can equally mention the project of an agreement developed by the Association of Elections Managers in Central and Eastern Europe on standards, rights and freedoms in elections¹⁶². This document also insists that the organization and management of elections must be “carried

¹⁵⁹ In the Code of Conduct on Electoral Matters, the Venice Commission raises the possibility that a “A reasonable quorum may be imposed for appeals by voters on the results of elections” (Explanatory Report, paragraph 99). Such a mechanism could be extended to the disputes over the electoral campaign.

¹⁶⁰ General Remark N°25, Parag. 20.

¹⁶¹ Venice Commission, Code of Good Conduct in Elections, Guidelines, 3.1.

¹⁶² This law has never been adopted but remains significant reflecting an effort to crystallize international elections law based on the accumulated experience of the European Council and various states in matters related to the legal regulation and management of democratic elections.

out appropriately by a group electoral bodies managed by a central electoral authority acting in an independent and impartial way.” (Article 13, Paragraph 1). Only independence, impartiality and transparency can stand against political manipulation and guarantee an adequate management of the electoral process.

According to the previous legislature, the electoral process was managed by the ministry of interior affairs and the governorates. By establishing ISIE, Decree-Law N°27- of April 18, 2011 marked a radical break with the past. Whatever the guarantees provided by the new laws, the necessary conditions to win the trust and confidence of the voters and the different protagonists in the elections would have been difficult to obtain had it not been the existence of an independent electoral authority that was assigned the task of monitoring and controlling the regularity of elections. Never before had the country known authentically democratic elections. In the absence of such a tradition, and more importantly, in the absence of a tradition of independent management of elections vis-a-vis the political authorities, the establishment of an independent structure in charge of managing the whole electoral process was the required condition to ensure the realization of the objectives of free, plural, transparent and honest elections.

This is a necessary condition but not a sufficient one. As reminded here-above, there are different electoral management models. Besides, each model is modulated according to the choices carried out namely in terms of the authority's and its branches' status, the scope of powers as well as the parameters fixed for the application of powers. A successive review of the establishment, powers and operation of ISIE is provided below.

1. Establishing independent electoral commissions: structure, appointment, status

ISIE is made up of three levels: a central commission located in Tunis, 33 regional independent elections authorities (IRIE) covering 27 constituencies in Tunisia and 6 abroad (Article 5 of Decree-Law N°27163) and 264 local elections authorities (ILE) at the level of the *délégations* (one per *délégation*¹⁶⁴).

a. The Central Commission

Two types of central commissions are possible according to the model selected: the independent or impartial commission. Independent if it is made up of persons whose independence is the subject of a broad consensus at the level of the whole country and political contexts, and impartial if the members are representative of the various political parties.

In accordance with Article 8 of Decree-Law N° 27, the ISIE Central Commission is made up of 16 members who cannot be members of political parties (Article 10 of the same Decree-law), members of the government, governors, or hold other high-level positions in the local government. Nor can they be candidates to the Constituent Assembly or hold executive positions in a public institution or company. During the period of their function, limited in time in the same way as that of the institution itself- the members of the Central Commission, including the president, are held “to have no jobs or activities affecting the impartiality and independence of the authority.” Any failure to comply with these obligations would be submitted to the ISIE Central Commission which may decide, by a two-third vote of its members, to end the mission of the member whose failure to comply with the obligations is confirmed.

It is evident that the circumstances would justify the choice of an authority which does not depend on political parties, and which is still in the making and emerging from a period characterized by a system of *de facto* unique

¹⁶³ Based on Decree 1088 of 3 August 2011 which fixes the number of electoral constituencies.

^{164A} « *délégation* » is an administrative constituency which is intermediate between the governorate and sector. There are 264 « *délégations* » under the administration of 24 governorates.

party. In the context of political transition, the choice of a structure made up of independent individuals is not always an easy task. However, this has not been a major problem in Tunisia so far.

To the choice of independent individuals, we can add the choice of an authority that brings together various competences, found essential for the fulfillment of tasks entrusted to it. Article 8 requires that out of the 16 members, three must be magistrates, three lawyers, one solicitor, one bailiff, one accountant, and “a communication specialist”, two representatives of human rights NGOs, one representative of Tunisians abroad, one ICT specialist, and finally two university academics. All the members are selected and appointed by the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform and Democratic Transition (ISROR). This selection is based on suggestions made by relevant professional organizations and bodies namely for jobs and positions represented at the level of the Central Commission namely magistrates, lawyers, solicitors, bailiffs, accountants, journalists (or communication specialists). To these propositions are added those of NGOs for their two representatives. As regards university professors and the representative of Tunisians abroad, there is no mention of how many candidates are proposed and by whom. All the propositions must be submitted to ISROR within ten days. Otherwise the ISROR will be free to appoint individuals of its own choice who meet the conditions required for the vacant seats.

The formula selected by Decree-Law N°27 involves the mobilization of technical competences by profession. If the importance is that the members of this institution should include representatives of the judiciary¹⁶⁵, one may ask why it should include representatives of each sector within the central commission. This overrepresentation is not problematic. In many countries, the profiles needed are those of high-ranking professionals, who are familiar with the various aspects of the electoral administration. In the context of a democratic transition, these profiles are rare and even inexistent. The committee members who were in charge of elections in the past are generally discredited. The stress is therefore put on the electoral experience per se such as the professional stature of the candidates and their supposed ability to apprehend rapidly the tasks entrusted to them

In the future, the formula to be chosen for the composition of the central electoral commission may face objections (not met in the past) during the exceptional circumstances of the Constituent Assembly elections. These elections have helped identify the political forces and the provisional executive role attributed to the Constituent Assembly, thus contributing to clarifying positions, programs and also divergence. Appointing independent personalities members in the Central Commission (if the same formula is retained) may be the subject of less consensus than in the summer of 2011. This is especially true as the new Commission will be a permanent one. Whatever the formula to be selected, the future electoral law should strengthen the guarantees attributed to the members of the central commission namely to take into consideration the permanent aspect of this structure which implies a “professionalization” of the function. It would be necessary, for instance, to consider members disposing of attractive status and remuneration which would allow prevent the rather large rotation of the members, and which may tempt other officials, incompatible with their function as members of the Central Commission. In fact, within the new legislation, it will be necessary to specify the duration of the members’ terms. In this respect the regulator must equally be concerned with the continuity of the Central Commission’s work. It is important, within what is possible, to have a commission that does not require the renewal of all the members at once¹⁶⁶ and that the terms end during the months that precede elections. Within this perspective, it is possible to envisage that some members of the Central Commission,

¹⁶⁵ In the Guidelines of the Code of Good Conduct in elections, the Venice Commission underlines that at least one of the members of the Electoral Commission must be a judge. (3.1.D.i).

¹⁶⁶ See OSCE/BIDDH, Guidelines for Reviewing a Legal Framework for Elections, page 12.

whose term ends, figure among the members of the new Commission which would help give this authority an “institutional memory” related to the first experience of democratic elections witnessed by the country.

Besides, the concern with efficiency might reduce the number of members in the next Central Commission. Different arguments can be provided in this respect. It is not so much the choice of a model for the Central Commission (commission made up of independent personalities or composed of representatives of political parties) which would influence the choice of the number of members, as its operation system: a better distribution of the roles between the Commission, the technical, administrative and financial body in charge of supporting the State departments and providing the necessary facilities for the material organization of elections. This would help the Commission focus on its supervision and role to control, and therefore, not to be involved in a number of operations that may affect its capacity to act. In this case, it is possible to envisage a Central Commission reduced in number and refocused on supervision.

Seriously enough, Article 21 of the ISIE Rules of Procedure submits the resigning of the members of the Central Commission to the approval of two thirds of the members. The reason of such a provision is not clear.

Article 8 of the Decree Law N°27 of the ISIE Rules of Procedure imposes parity between men and women in the structure of the Central Commission and IRIE. It is important to note that the objectives have not been achieved¹⁶⁷. These provisions and this objective must be maintained in the future electoral legislation.

b. The sub-commissions

Article 5 of the Decree Law N°27 contains a simple elliptical reference to “sub-commissions at the level of electoral constituencies.” (Article 5) and assigns to ISIE the task of deciding on the structure of these sub-commissions. In practice, as indicated here-above, the two levels have been constituted at local level: Regional Independent Elections Authorities (les Instances Régionales Indépendantes pour les Elections (IRIE) and the Local Elections Authorities (les Instances Locales pour Elections (ILE). The law must define the structure of the electoral administration. This decision should not be entrusted to the Central Commission as it is essential that the provisions define the electoral commissions at all levels and detail the responsibilities giving them legal status. It is a question of legal security and, in the final analysis, efficiency. The provisions taken later by ISIE have only partially filled the lacunae of the decree-law. We can note the following anomalies:

- The decree-law, not more than the ISIE Rules of Procedure, does not specify the deadline for the appointment of IRIE members. In fact, IRIE members¹⁶⁸ were appointed by ISIE on the 6th of July, few days before launching the voter registration campaign (11 July). These appointments have been finalized on 19 October by decision of ISIE with retrospective effect as from 2 July 2011.
- As far as ILE is concerned, the disparities among these authorities and from one constituency to another in terms of structure and appointments calendar¹⁶⁹ reflect the absence of regulation, and in their case, not only in the law but also in the later provisions taken by ISIE including in its Rules of Procedure.

¹⁶⁷ According to the European Union report on electoral observation, women represented 12.5% of the members of the Central Commission, 16% of the IRIE members and 11% of the ILE members.

¹⁶⁸ IRIEs were made up of 14 members at the level of the governorates. The IRIEs embedded in the diplomatic missions abroad were made up of 8 to 14 members.

¹⁶⁹ In this case, it was evident that the ILEs have never been established. Most of them were established shortly before the beginning of the electoral campaign.

As revealed in the electoral observation reports, the delay and lacks noted in setting up the IREs and ILEs had a negative impact on the whole electoral process and mainly on the voter registration phase. This was due not only to the limited time to train the sub-commission members in their tasks, but also to the fact that IRIE had to struggle with a number of tasks immediately after they were set up.

Recommendations

- The future ISIE Central Commission must be permanent. The laws providing for its structure, the term and the operation method should include the provisions of Decree-Law N°27 while seeking to complete the gaps by provisions specific to any permanent institution, namely by attributing a status to its members – coupled with an appropriate remuneration- that reflects the importance of their positions. This may help avoid an important rotation of the staff which can be harmful to the quality of the work. Generally speaking, the legislator must be guided by concern to ensure the continuity of the Central Commission's work while seeking, where possible, to provide a structure of membership that does not need to renew all the members of the Commission at once, and that their term ends shortly before elections. Within these views, it is possible to envisage that some members of the Central Commission whose term has expired figure among the members of the new Commission.
- Decree-Law N°27 essentially regulates the higher level, the central part of the electoral administration, giving it the responsibility to define, constitute and appoint all the lower levels. It is the task of the law, however, to define the structure of electoral management at all levels, to enumerate the tasks, not only those of the Central Commission but also the local ones, and to fix the rules applicable to the composition and appointment of the latter. The provisions instituting the electoral commissions at all levels and defining the terms and responsibilities must enjoy legal status
- A better distribution of roles between the Central Commission, the technical support, administrative and financial body and the State departments providing the facilities required for the material organization of the elections, would help envisage a Central Commission focused on its supervision and control facilities. Hence, it is possible to envisage reducing the number of its members.
- It would be interesting to distinguish in the laws between the provisions related to the ISIE Central Commission and those related to the authority's entire components, including the regional sub-commissions. Some provisions which, evidently, are related to the Central Commission only, are formulated with reference to ISIE, which in certain cases, is confusing. For example, Article 8 indicates the structure of the Central Commission, but refers to ISIE defined by Article 5 as being the sum-total of Sub-Commissions and the Central Commission.
- The well-grounded article 21 related to ISIE Rules of Procedure which submits the resigning of a member of the Central Commission to the approval of two thirds of this Commission's members is worth reconsidering.
- The electoral law should indicate the dates for the appointment of the Sub-Commissions members by the Central Commission members, as well as those set up at the level of the electoral constituencies and délégations. The electoral law should equally include the provisions contained in the ISIE Rules of Procedure related to the procedures for the selection and appointment of IRIE members. It is equally important to consider the opportunity of maintaining a structure at IRIE level, which is made up of the same profession grid as that of the Central Commission. Greater flexibility can be appropriate. The law, however, should include provisions on the incompatibility of some professions with the quality of the commissions' members by adapting Article 10 which decrees those applicable to the Central Commission, in the specific case of IRIE. Finally, the law should equally regulate the questions related to the structure, appointment and criteria for the selection of ILE members.
- The parity rule between men and women in the Central Commission and Sub-Commissions should equally be maintained in the future electoral legislation and implemented accordingly.

2. ISIE Tasks and Responsibilities

It is necessary that the legal framework includes the provisions needed for the good operation of the ISIE Central Commission and sub-commissions. This implies that the responsibility of ISIE at its various levels must be clearly defined and so must the decision mode and regulations aimed at ensuring transparency of the work. The electoral Commissions must equally dispose of the required financial and human resources that would allow them to accomplish their tasks independently.

The main reason for being an independent electoral authority is to “supervise the electoral process and ensure that it is carried out in accordance with the rules of equity and impartiality,¹⁷⁰ and in the respect of electoral rights and voter’s free choice. In practice, and in many countries which have independent electoral authorities, this electoral body is in charge not only of supervising but also of managing elections. In practice, the combination of both the supervision and administration of elections is not an easy task particularly in a context of challenges to the authorities or when confidence can be obtained only through a scrupulous concern with independence. However, if the balance between the different levels of the electoral authority’s responsibility cannot be achieved, this authority, as well as its branches in the regions, risk finding themselves overloaded with responsibilities and dealing simultaneously and in a very short time with a multitude of duties.

The reports of the election observers provide insights into the difficulties encountered to achieve balance. They underline a number of weaknesses and defects in the performance of the Central Commission along the electoral process. The reasons are complex, and the difficulties encountered by the Central Commission and its branches are so difficult to apprehend that they ended up nesting into one another: often, the problems encountered at one level of the electoral process affect the following steps with a risk that at one stage of the proclamation of results, their combined effects re-emerge and affect the whole process. Hereafter, these problems are not considered one by one; neither are their effects, which are provided in other parts of this report. It is rather an attempt to see how “the specifications book” of the Central Commission was not balanced and what the factors which aggravated this state of things were.

One of the immediate challenges faced by the Central Commission was the necessity to supplant the rules and procedures not provided for by the law or to explain them. Disposing of a broad regulation power as a result of its status as public independent authority, the Central Commission was overburdened by excessively heavy regulation tasks. Some of these tasks were attributed to it by law, namely for the issues related to the electoral campaign and access to the media; ¹⁷¹ others were found necessary as gaps and lacunae were revealed gradually in the laws, hence the necessity to complete them. Finally, and for the same reasons, the laws themselves had to be amended by the lawmaker even during the last periods of the electoral process. As a result, the elections legal framework continuously developed until nearly the last days before the elections. To this we add the fact that during this evolution, the Central Commission found itself imbalanced not from the general view of the balance between the supervision and administration tasks but rather because of the fact that dealing with the one and the other in the same manner was a complex issue as new rules and procedures were being added gradually to the initial apparatus making it more complex. It was the case of the electoral campaign. The Central Commission did not have the means to enforce some new rules established shortly before it was set up. It is evident therefore that the electoral campaign rules established by the Central

¹⁷⁰ United Nations Human Rights Commission, General Observations N°25, Paragraph 20.

¹⁷¹ See for example Article 44, 45 and 46 of the DLE.

Commission itself three weeks before the electoral campaign, and which were extremely detailed namely in terms of the media obligations during the campaign, burdened the Central Commission's and sub-commissions' monitoring tasks.

Besides, the Central Commission had never been able to adopt the decisions and manual of procedures necessary for the electoral process in time. It was essentially sensitive in matters related to voter registration and counting votes. Finally, the legal framework included provisions which were not always realistic or underestimated the size of the operations and requirements for the implementation of the tasks assigned. For example, Article 70 of the DLE underestimated the difficulty met by the Central Commission in collecting justifications for the failure to comply with electoral campaign financing in a very short time.

Direct administrative tasks must not be assigned entirely to the Central Commission and its branches. The Commission is essentially a deliberation body founded on collegiality and is not an administrative service based on a strict distribution of tasks among administrators who accumulate functions at the level of the State, and are found in different ministries and different departments at the level of one ministry. However, this perception seems to have prevailed for some time within the Central Commission. It is not necessarily surprising in a context where concern with independence seemed to prevail over any other consideration. What gave the Central Commission its reputation of uncontested independence led, in other respects, to a rigid conception of this independence. That is why the Central Commission did not benefit from technical, administrative and financial support attributed to it by law (Article 3 of Decree-Law N°27), as an authority enjoying legal entity, administrative and financial autonomy. If the technical, administrative and financial body was finally established, the staff was hired too late during the weeks preceding the elections and in insufficient number. The general manager was never recruited and the ramifications of the same body at the level of IRIE had not been set up. The mechanism of coordination with state departments in the form of intergovernmental Committee seconded to the Prime Minister¹⁷² was equally established too late. This mechanism was found essential for mainly administrative and logistical support provided to ISIE.

It is important to ensure a better coordination between the Central Commission and the sub-commissions namely with a view of ensuring a uniform application of the law. In practice, given the delay in the development and dissemination of procedure manuals (voter registration, collecting and counting votes) and other documents framing law enforcement, observers reported disparities in the application of law. This was essentially the case at the level of voter registration and the proclamation of provisional results at constituency level. These slippages can be avoided only if the Central Commission plays an important role in the different phases of the process. The relations between the sub-commissions and the Central Commission were not framed and standardized as required since the electoral calendar was not respected and information not systematically spread among every sub-commission.

3. ISIE Internal Operation

An essential characteristic of any deliberation body is its capacity to carry out its work in a collegial way. This dimension lacked at the level of the Central Commission whose 16 members were different and were even divided into two different types of seats. In the laws themselves, accent was on the specialization of the members and juxtaposition which reached fragmentation: the competences as illustrated by the choice

¹⁷² The Committee included representatives of the Prime Ministry departments, three Director Generals of the Ministry of Interior, of the Ministry of Finance and the State Property Ministry, the Ministry of Foreign Affairs, the National ICT Center and the National Statistics Institute.

provided by Article 18 of the Rules of Procedure, of sector commissions. Here, as in other provisions, it is increasingly a matter of internal coordination rather than collegiality. Although it would be excessive and even erroneous to explain the lack of cohesion, in practice, which characterized the work of the Central Commission by the hidden defects in the laws, it would be essential in the future to make the latter contribute to solve any problem of ambiguity by detailing the principles providing for the operation of the Central Commission and its branches, and which include not only the principle of independence and impartiality but also the principle of collegiality.

Another factor of internal imbalance is related to the respective positions of the President and Secretary General of the Central Commission. The President is elected by the members by majority vote (Article 9 of Decree Law N°27). He is assisted by a Vice President and a Secretary General equally elected by majority vote of the Commission members. The position of Secretary General as defined in the ISIE Rules of Procedure (namely Articles 15, 16 and 17) is hardly compatible with that of the other members of the Commission. The tasks entrusted to the Secretary General are essentially administrative (holding a register of the minutes of the meetings, distribution of copies of the minutes, mailing to third parties, the role of coordination with the administrative, financial and technical body, etc....). Given this, it seems that the Secretary General has control over the agenda of meetings (Article 16 of the Rules of Procedure) summoned by the President (Article 13 of the Rules of Procedure). The apparatus can only operate if there is perfect agreement between the President and the Secretary General as each can actually counter the authority of the other. It would be preferable in the future that the position of Secretary General is not entrusted to a member of the Central Commission. It seems initially logical—but all this depends on the mechanism to be set up by future legislation—that this position be given to the OTAF Executive Director and that the agenda of the meetings be established on the basis of a collegial procedure under the responsibility of the President. At the level of sub-commissions, the President, like the Secretary General, is appointed by the Central Commission among the members of each sub-commission (Article 24, Parag. 3 and Article 26 of the Rules of Procedure). The Secretary General of the sub-commission is in charge of tasks similar to those entrusted at central level to the Secretary General of the Central Committee. This formula has the same defects as that raised here above for the Central Commission.

The ISIE Rules of Procedure does not precise any quorum rule or decision taking procedure for IRIE meetings, nor does it provide immunity for the members. These issues must be dealt with in the future electoral law. The Decree-law, like the Rules of Procedure of the Central Commission, deals neither with the question of advertizing the meetings of the Central Commission nor with the publication of its decisions. Voter and political players' trust depends on the degree of transparency of the Central Commission's works. It is therefore essential that such decisions and the agenda of the meetings do not remain accessible to the members only but should be made available to the largest number of interested people on line if possible. The Central Commission must make use more systematically of the platform on line.

Recommendations

- Generally speaking, it is important to recast the provisions listing the responsibilities of the Central Commission as Article 4 of the Decree-Law N°27 does not reflect all the scope because of all the addenda to the initial plan, with as a consequence, new responsibilities for the Central Commission. These responsibilities themselves require powers and means not necessarily available to the Central Commission. The set of tasks attributed to IRIE and to ILE should be restated in the laws. The tasks attributed to the Central Commission and those attributed to the sub-commissions must be clearly stated. It should be useful to review the opportunities of keeping the ILE level in the electoral management structure.
- In addition to the principles of independence and impartiality, the principle of the collegiality of the Central Commission's work should be stated in the future electoral laws.

- The distribution of the work load of the Central Commission should be reviewed in depth. It should be rationalized on the basis of a better distribution of competences at sector level which, without affecting the principle of collegiality of the Central Commission's works, would allow a better articulation of its supervision/monitoring activities, settlement of disputes and operations related to the material organization of elections. Generally speaking, a better coordination of activities of the departments and sector commissions must be ensured and the division of the tasks among them must be established clearly and then closely observed. The Central Commission must be structurally better prepared for the reception and processing of claims and appeals.
- The regulation tasks must have a reduced share in the volume of the Central Commission's activities within a consolidated and stabilized legal framework. However, they should not be disconnected from other tasks because of implied legal aspects¹⁷³. On the contrary, they must be treated in a transversal way and coordinated on the basis of collegiality at the level of the Central Commission.
- The management of the electoral process implies a better articulation of the competences between the college of members of the Central Commission and the Technical, Administrative and Financial Body (OTAF) in charge of providing support to the Central Commission which must have the responsibility of technical, administrative and financial operations under the control and supervision of the members of the Central Commission.
- In the future, it is preferable not to attribute the position of Secretary General to a member of the Central Commission. It seems logical, but this depends on the mechanism to be set up by future legislation, that this position goes to the Executive Manager of OTAF and that the minutes of the meeting are decided on the basis of collegial procedures under the responsibility of the President. The same mechanism can be established at the level of the sub-commissions.
- The electoral law must affirm the principle of the right of access and consultation by members of the Central Commission of all the documents of this Commission. This right must equally be enjoyed by IRIE members.
- The future legislation must precise the quorum rules and the decision-taking mode not only for the meetings of the Central Commission but also IRIE meetings. IRIE members must equally benefit from an immunity clause similar to the one provided in Article 11 of the Decree Law N°27 for the members of the Central Commission.
- For reasons of transparency, the electoral law must provide explicitly for the publication of all the decisions, decrees and other laws taken by the Central Commission. The principle of announcing the meetings of the Central Commission must equally be affirmed in the electoral law even if it means that its modes are to be specified by ISIE Rules of Procedures. This principle must apply to the minutes of the meetings in particular. The same concern with transparency must oblige the Central Commission to use its on line platform in a more systematic way.
- The law must oblige the Central Commission to announce complete and detailed results per polling station and include the relevant support documents in due time for eventual claims (See Section X). Article 67 of the DLE must be completed within these views.

¹⁷³ Article 18 of the Rules of Procedures provides for the establishment of a legal affairs Commission. This approach, initially designed, may prove disastrous when applied namely in case of the absence of coordination between the commissions provided for by this article.

XI- POST-ELECTORAL DISPUTES

Electoral disputes are considered as a single set while in fact they are different in terms of both form and content, whether related to the denial of the right to vote (as procedure, upstream, or to being deprived of the right to vote, downstream because of absence of registration) or to being a candidate, in terms of procedures upstream, as exclusion of eligibility or, downstream because of the rejection of a candidate registration), or eventually irregularities committed during the electoral campaign (which can be invalidated, partially or wholly, because of irregularities or offenses during the voting and counting of votes or during the electoral campaign as long as these offenses and irregularities are proven to have significant impact on the vote results).

The comments here below are focused on the post-electoral phase, namely disputes over results, generally considered as the most sensitive. They are based on the data and the analysis contained in the study of the disputes published in January 2012 by the European Union Elections Assistance Team in Tunisia.¹⁷⁴ The other disputes are dealt with in the parts dealing with the electoral process to which they are related.

Electoral disputes have not been dealt with in a specific way in international tools except for the African Democracy, Elections and Governance Charter (implemented on 15 February 2012) whose Article 17 (2) affirms the commitment of the States to “create and strengthen the national mechanisms to regulate, as soon as possible, the electoral disputes.” This Charter is an indication, among others, that there is an emerging consensus among the international community on common procedures for a just, effective and impartial resolution of disputes resulting from elections or a referendum. The approach to these questions is the starting point for any apparatus in the field and is therefore the affirmation of the right to effective appeal which is a fundamental right recognized as such by a number of international tools.¹⁷⁵ It has the same value as other different rights and liberties involved along the electoral process (namely the suffrage right, the freedom of association, the freedom of expression and freedom of meeting) which must be protected efficiently by the freedom available to all and everyone and the right to reparation for such offenses by tribunals or any other institution. In practice, this right has been progressively and directly applied to electoral disputes. Various laws have dealt directly with the question of electoral disputes as a branch of the emerging internal electoral law. The UNHRC recognizes that, as far as the voting and processing of votes phase is concerned, voters must have “the possibility to apply for an assessment by a tribunal or any other equivalent procedure.”¹⁷⁶ In a statement on the criteria for free and regular elections (1994), the Inter-Parliament Union considers that for the sake of running democratic elections, it is essential that the State ensures “that the violations of Human Rights and that challenges to the electoral process must be dealt with efficiently and promptly during the electoral period by an independent and impartial authority such as tribunals or electoral commissions.” To these principles are added the elements centered on specific rights: the right of “any individual deprived of the right to vote or register as voter” to take such a case to an appeal court that will judge the case again and promptly and effectively adjust errors, the right of any individual and political party to be protected by law and to dispose of the right of appeal to courts in the case of any violation of political and electoral rights”. As indicated in the Guidelines of the

¹⁷⁴ “Analysis of the Disputes of the Preliminary Results of the National Constituent Assembly Elections of 23 October 2011,” analysis and commentary by Narjess Tahar and Mehdi Foudhaili – European Union Elections Assistance Team in Tunisia – 31 January 2012.

¹⁷⁵ Article 8 of the Universal Declaration of Human Rights, Articles 2 (2) and 2 (3) of the International Pact related to civil and political rights; Article 7 (1) of the African Human and Peoples’ Rights (to cite but these). It is important to note that in accordance with Paragraph 3 of Article 2 of the Pact, the States are committed not only to guarantee the effective practice of rights recognized by the Pact but also to ensure that any individual disposes of “useful appeal” which in the electoral context takes particular importance.

¹⁷⁶ General Remarks N°25, Parag. 20.

Elections Code of Conduct, the Commission of Venice is even more specific as it shifts from the requirements of a right to appeal to an efficient system made up of a number of elements.¹⁷⁷

There are two innovations which modeled electoral disputes in the case of the National Constituent Assembly Elections one of which at least would be characteristic of the forthcoming elections given the changes to occur. On the one hand, the dissolution of the Constituent Assembly, which in the former legislation was the election judge—in the sense of judge of the candidatures and results¹⁷⁸ – and whose role was entrusted by the DLE to the Administrative Tribunal; on the other hand, the establishment of an independent elections tribunal whose Central Commission and its sub-commissions were given an important role in electoral disputes. These two innovations underline another truth: the elections of the Constituent Assembly were the first elections at the origin of disputes. The previous provisions on the question have not been put into practice. That elections become synonymous with challenges and claims can itself be considered as a mark of success rather than dissatisfaction as long as these challenges and claims are settled without affecting the confidence or the credibility of the process.

In any country where an independent electoral administration has been established, this authority acquires in a very natural way a central role in the resolution of disputes which may happen during the different phases of the electoral process. This role is modulated in accordance with the characteristics of the legal system, the characteristics of administrative law (namely the availability or absence of administrative jurisdiction), penal law and the level of development of an electoral law as a specific administrative law. In any case, there must be a balance between the ordinary competence of ordinary jurisdictions and the specific competence of non judicial entities, which represents a sizeable challenge for at least two reasons: on the one hand, because of the short deadlines for any electoral dispute, the ordinary jurisdiction is rarely capable of settling disputes with the required celerity so as to have a “useful appeal”. On the other hand, the electoral commissions are not necessarily well-equipped to assume this role. Globally, it is a matter of making the ordinary jurisdiction less ordinary (by imposing exceptionally short deadlines) and the electoral commissions more ordinary (by providing them with the necessary legal tools to carry out their contentious mission).

This quest for a balance, as far as disputes on results are concerned, allowed in a first stage to avoid confusion about roles: the former electoral Law provided that the Constitutional Council announced the results then received and dealt with the claims, which made it judge and jury at the same time, and made these claims gracious. According to Article 71 of the DLE, it is the ISIE Central Commission that announces provisional results and it is the Plenary Assembly of the Administrative Court (Article 72) that deals with claims against the results.

Often, objection to results is based on allegations of rigging, manipulation or irregularities at the moment of the vote, counting or processing votes which are considered at the origin of false results. Yet, upstream any disputes, representatives of the candidates can eventually include objections in the minutes of the voting operations (Article 55). Moreover, in case no reconciliation of figures is achieved, this must be included in the minutes as required by Article 62, and an investigation would follow. The laws remain silent about dealing with the objections and errors reported, though they are duly attested in the justification documents transmitted to the Central Commission, and on the basis of which it announces the provisional results. There is no mention of the possibility for IRIE to adjust the errors reported and to review the objections mentioned in the minutes on

¹⁷⁷ Code of Good Conduct in Elections, Guidelines, (CDL-AD(2002)23), Paragraph 3.3.

¹⁷⁸ Article 72 of the 1959 Constitution made of the Constitutional Council the judge of presidential and parliament elections. The Elections Code indicates that it was a judge of the legality of candidatures to presidential and parliament elections (Articles 67 and 67 bis for the first, Article 106 for the latter) and the results of the same elections (Articles 70bis & 70 III & Article 106).

the basis of which adjustments can be made. The survey referred to by Article 62 seems disconnected from any adjustment procedure, showing that its purpose remains unclear. On the whole, the contentious phase is centralized at the level of the Central Commission which risks facing challenges based on objections or errors recorded in the minutes and which could have been dealt with at IRIE level. There are reasons to think that if such an option is not used, it is mainly because the potential claimants are not duly prepared for the disputes procedures which are very complex. In the future, it is important to provide for the possibility of making the necessary corrections to be imposed at the level of the sub-commissions whose decision can be brought to the Central Commission. After reviewing all the pending disputes, the Central Commission would announce the provisional results. In terms of such powers, the Central Commission may, if necessary, decide on partial elections. It would equally be possible that the representatives of the candidates dispose of a copy of the minutes of the polling station where the processing and counting take place.

Article 70 allows the Central Commission to penalize any infractions of the regulations concerning the financing of the electoral campaign by canceling the results of the list that has been found guilty of such infractions¹⁷⁹, but does not allow for the possibility of adjusting the penalty according to the impact these infractions might have on the results of the polls. However, in issues related to the infraction of these same rules, the Administrative Tribunal can on the contrary take into consideration their impact on the results and decide on the possibility of canceling them. This approach is compliant with the practice of a number of countries where the jurisdictional control of election results is considered a control of the opportunity rather than a control of legality. However, here we find a contradiction as on the one hand the Central Commission, in accordance with the provisions of Article 70, practices control over legality while the Administrative Tribunal practices control of opportunity including offenses to the regulations and financing the electoral campaign. For the rest we may add that it is doubtful that the Central Commission can dispose, in very little time, of the means to collect material proof to support canceling while such control is equally the power of the Financial Court (Cour des Comptes) which can submit its reports only within six months after the proclamation of the final results.¹⁸⁰ Besides, instead of investing the Central Commission with a control of legality whose practice may be found complex in so short a period, wouldn't it be better to explicitly oblige the Central Commission to review the results received from the constituencies? This would imply that it has the power to correct, and even cancel the results on the basis of appeal or upon initiative by the Commission itself and, if necessary, order partial elections. In this respect, there is a legal vacuum and the future legislature must fill this void by acknowledging the attribution of such prerogatives to the Central Commission which may contribute to preventing the risk of congesting the Administrative Court.

The contentious procedure detailed by Article 72 of the DLE¹⁸¹ projects that the preliminary results can be the subject of appeal to the plenary assembly of the Administrative Tribunal. The formalities and procedures required for appeals are specifically rigorous.¹⁸² 104 appeals were made to the plenary Assembly.¹⁸³ 37 appeals

¹⁷⁹ Nonetheless, it is important to note that the term used in this article « winners » is ambivalent: Can't the Central Commission cancel only the results of the list which obtained the highest number of seats or else the lists which obtained at least one seat ? whatever the answer is, this point must be clarified.

¹⁸⁰ Article 15 of Decree-Law N° 2011-91 of 29 September 2011.

¹⁸¹ This article was amended on 3 August. In its initial version, we find stress on the appeal and ruling deadlines and the authority in charge of deciding on the appeals

¹⁸² They are identical to those applicable to disputes during the electoral campaign before the Administrative Tribunal Appeals Body (Article 47), or almost that the latter does not oblige the claimant to be assisted by a lawyer.

were the subject of ruling for procedural reasons. 6 were the subject of satisfaction, giving an additional seat to the list that challenged the calculation method of the electoral quotient in one constituency, and, to the other five, the repeal of the cancellation of 7 seats announced by ISIE in accordance with the powers attributed to it by Article 70.

Among the conditions of eligibility, Article 72 provides for the unique possibility to act for candidates who are heads of lists or their representatives. Out of 52 cases judged as not eligible, 13 were rejected because submitted by parties other than the candidates who were heads of the lists.¹⁸⁴ Such a strict assessment¹⁸⁵ of the interest to act within the framework of electoral disputes is considered contrary to the current practice in many countries and as consolidated in international practice. In such procedure, the applicable law is a fundamental one that is not limited to that of the candidates who have obtained the legally required number of votes in order to “to be assigned to their positions”¹⁸⁶ but equally includes protection, because of the voters’ right to a transparent and honest election reflecting their choice. It is within these views that the Venice Commission recommends that the right to appeal must be granted to “any candidate and any voter in the constituency,” while specifying that “reasonable quorum can be imposed for the appeal of voters related to the results of the elections.”¹⁸⁷ In the future legislation, this limitation must be repealed in order to allow any candidate (and not only those who are the heads of lists) and any voter to challenge provisional results of the elections at the level of the constituency to which she or he belongs. It is possible to consider establishing a quorum in order to avoid the congestion of the Administrative Court.

Another procedure required was the assistance of a lawyer, a condition of which are exempted the claimants in other forms of appeals in electoral matters (registration of voters, registration of candidates, electoral campaign) and which proved to be one of the most important causes of rejection. In fact, out of the 52 cases of illegibility, 31 rejections were based essentially and sometimes exclusively on the fact that the appeal was not submitted by a lawyer empowered to defend cases in the Court of Appeals. The assistance of a lawyer can in principle be justified by the technical aspect of the procedures before the plenary assembly for instance. Out of the 52 cases of illegibility, 20 were represented by lawyers, which means that the argument was not sound. Besides, it seems that the Tribunal was not flexible enough as regards the possibility of regulating the applications submitted without the assistance of a lawyer, and did not accept, with one exception, applications received after the deadline.

Article 72 should fix the moment marking the beginning of the two-day period to submit an appeal to the plenary assembly. Indicating that the deadline begins with the announcement of the preliminary results is not sufficient. What is meant by announcing? Does it refer to the unique proclamation of results as published by the media or does it mean their publication in the Official Gazette? It is important that this point be clarified for

¹⁸³ The study by the European Union reveals 52 cases of eligibility (out of which 51 cases of failure to comply with the contentious formalities and one for incompetence), 14 cases of abandonment, 1 case of radiation, 31 cases of rejection of substance, 6 cases of acceptance of substance.

¹⁸⁴ Among these cases, 5 were introduced by citizens/voters, either as a group or individually, 5 by political parties, one jointly and one by a member of a list who was not head of the list, one by a head of a list which was not validated.

¹⁸⁵ The Administrative Tribunal applied this condition in a very strict way, not allowing for example a claimant who has submitted a request as president of a party instead of doing so as the head of a list which he was at the same, to adjust the request.

¹⁸⁶ Document of the Conference on the Human Dimension of the CSCE (Copenhagen, 29 June 1990), Paragraph 7.9.

¹⁸⁷ Code of Good Conduct in Elections, Guidelines, Parag. 3.3f.

claimants especially that the deadline is short and the procedures are complex; hence the risk of a large number of regularization applications which must be submitted before the expiration of this same deadline. If we equally take into consideration that regardless of Article 71, some IRIEs announced provisional results at the level of their constituencies, the risk of confusion increases for the potential claimants.

Deadlines for appeal and ruling must be short so as to avoid creating tensions that may affect considerably the credibility of the elections. The Venice Commission Code of Good Conduct in elections raises the question of deadlines which must not exceed 3 to 5 days for first instance courts.¹⁸⁸ Given the complexity of the procedural aspects (which are not limited to those mentioned here above as we must also add, among other possible causes of illegibility, the notification of the appeal to the Central Commission by means of a bailiff – which was one of the major illegibility causes¹⁸⁹ – and the presentation of means and justifications). Because any failure by the claimant to rectify any failure to comply with the conditions can be adjusted by the claimant only during the same period granted for appeal, and because the claimant cannot collect in a very short time the justifications needed to support the case, it is important to recognize that this appeal period is unreasonable. It is even less reasonable for the claimants who are not resident in Tunis. As a consequence, it is recommended to extend the appeal deadline to challenge the results of the elections before the plenary assembly of the Administrative Tribunal.

Generally speaking, the legislation's formalism as well as its ambiguities were broadly been the major cause of a large number of cases of illegibility. In electoral terms, the formalism inherent to all the contentious procedures must be limited to the strictly necessary, to the formalities without which justice cannot be delivered. In any respect, the scrupulous concern with form and procedures must not lead to imposing formalities which can be defined as in fine, whose main *raison d'être* would be avoiding the congestion of the Administrative Tribunal. As reminded by the Venice Commission in its Code of Good Conduct in elections, the procedures must be simple and formalism free, particularly in matters related to eligibility in appeals.¹⁹⁰ There would be no effective and useful appeal if the conditions of form imposed end up by emptying the law of its meaning. In the light of such considerations, it is important to envisage the possibility to mitigate the formal rigidity of the contentious procedures related to the results of elections.

The effectiveness of appeal to an administrative judge is tributary to the degree of precision of the results announced by the Central Commission. In the absence of complete results (all the results, including those of all the competing lists), detailed (including the results by polling station), and backed by the relevant documents, and considering that the justifications provided after the deadline have been rejected by the judge, the claimant parties may find themselves deprived of the means to submit to the tribunal the justifications likely to confirm their grievances. Globally, the administrative judge disposes of a very short time to rule (10 days). In order to allow an in-depth investigation of the matter instead of limiting the case to what is provided by the claimant, more time is needed. Without full, detailed and documented results, the claimants may see their chances before an administrative judge significantly limited.

Recommendations

The disputes involving the results of the elections are often the moment where the credibility of the election is either won or lost. Procedures which are not very restrictive, a filtering apparatus which is not too selective, appeals submitted to burdensome conditions of eligibility, may have the reverse projected effect, generating

¹⁸⁸ Paragraph 3.3 g.

¹⁸⁹ Out of the 52 illegibility cases, 41 were founded, either exclusively, either partially on the failure to respect notification formalities

¹⁹⁰ Paragraph 3.3 b.

frustrations, polarizing the elections protagonists, risking to further perceptions on the reality of facts. The DLE apparatus was excessively formalist. It must be reconsidered in the future legislation in the light of the following findings:

- It is essential to provide for the possibility of making corrections and adjustments which impose themselves, at the level of the sub-commissions whose decisions might be the subject of appeal to the Central Commission, procedures in terms of which the latter, after reviewing all the pending disputes, would announce the provisional results. It is equally important that the representatives of candidates dispose of a copy of the minutes of the polling station where they have attended the counting of votes.
- The Central Commission should dispose of powers to correct results received from the constituencies on the basis of appeal or on personal initiative and, eventually, order partial elections. It would be necessary that future legislation fills this legal void by recognizing such prerogatives to be those of the Central Commission. This may contribute to preventing the risk of congestion of the Administrative Court
- There is a contradiction between the legality enjoyed by the Central Commission as per Article 70 and the control of the opportunity practised – downstream – by the Administrative Tribunal (taking into consideration the eventual impact of infractions reported on the election results). Article 70 should be reviewed accordingly either by requesting from the Central Commission to found its decisions on an evaluation of the impact of infractions on the results or by canceling the control.
- In the future legislation, restricting the right of acting to the candidates who are heads of the running lists (and their representatives) should be canceled so as to allow any candidate (and not only the heads of lists), and eventually any voter to challenge the provisional results of the elections in the constituency to which he or she belongs. It would be possible to envisage establishing a quorum in order to avoid the congestion of the Administrative Tribunal.
- Article 72 should precise the beginning of the two-day period required to submit an appeal to the plenary assembly of the Administrative Tribunal. Indicating that the deadline begins with the announcing of preliminary results is not sufficient. What is meant by “announce”? Does it refer to the unique proclamation of results as published by the media or does it mean their publication in the Official Gazette? It is important that this point be clarified for claimants especially that the deadline is short, and the formalities are complex, hence the risk of large number of regularization applications to be submitted before the expiration of this deadline.
- Given the complexity of the procedural formalities and the fact the claimants can rectify any failure to observe them before the deadline for appeal, and given the difficulty of collecting the justifications needed to support the case in such a short time, it is evident that this period of time is not reasonable. For claimants not living in Tunis, it is even more unreasonable. It is therefore recommended to extend the period granted for appeal to challenge the results of elections before the plenary assembly of the Administrative Court.
- There would be no effective and useful appeal if the conditions of form imposed end up by depriving of its essence such a right. As a result, it is important to mitigate considerably the formal rigidity of contentious procedures related to the results of elections, namely by suppressing the notification formalities by the claimant of the notification and the assistance by a lawyer. A reform of the procedures must include an information and education campaign involving political parties, the voters and civil society in general.

- The effectiveness of the appeal to the administrative judge depends on the precision of the results announced by the Central Commission. In the absence of full results (all the results, including those of the competing lists), detailed (including the results per polling station), and backed by the relevant documents, and taking into consideration that the justifications provided after the deadline will be rejected by the judge, the claimants may find themselves deprived of the means to submit to the tribunal the justifications likely to substantiate their grievances. The law must precise that by “detailed results,” Article 67 means the complete results per polling station and that at the moment of their announcement, these results must include the relevant justification documents.