



Assessment of the legal framework and of the funding mechanisms for the National Constituent Assembly electoral campaign

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A. Political background related to political life funding

Political funding in Tunisia had remained opaque until the Jasmine revolution. Only a few political parties – The Constitutional Democratic Rally (RCD) and the opposition parties accepted by the president Ben Ali- benefited from public funding. Laws of 1988¹ and 1997², abrogated by decree Law n°2011-87 of 29 September 2011³, defined the sources of authorized funding, the accounting obligations of political parties as well as the –almost nonexistent- control of the Court of Auditors. This absence of control culture persisted until the development of a normative framework governing the election of the National Constituent Assembly (NCA).

The question of financing the electoral campaign was one of the issues raised during the debates of the subcommittee for elections of the “High Commission for the Realization of Revolution Objectives, Political Reforms and Democratic Transition”, known as “The Ben Achour Commission”. This commission contributed to the legislative drafting on the elections of the NCA.

B. The legal framework on the organization of the elections of the National Constituent Assembly

Several decree laws governing the organization of the elections of the National Constituent Assembly were passed:

Decree Law n° 2011-14 of 23 March 2011, on the provisional organization of the public authorities, gave the interim president of the Republic the authority to legislate by decree law in some fields including the electoral system and the funding and organization of political parties.

Decree Law n° 2011-27 of 18 April 2011, entrusted the Independent High Commission for Elections (ISIE) with supervising and monitoring the electoral campaign.

Decree Law n° 2011-35 of 11 May 2011 on the election of a constituent assembly, applied the principle of an electoral campaign funding and constitutes the normative framework of reference.⁴

Decree Law n° 2011-91 of 29 September 2011 on the procedures and methods of control by the Court of Auditors over the electoral campaign funding for the NCA, clarifies the nature and the extent of the Court of Auditors control; the body responsible for the regularity of the electoral campaign funding.

Application decree n° 2011-1087 of 3 August 2011 which fixes a ceiling for election expenses and the way of disbursing the allowances to finance the NCA electoral campaign and the

¹ Organic law n°88-32 of 3 May 1988 on the organization of political parties.

² Law n° 97-48 of 21 July 1997 on public funding of political parties.

³ Decree Law n° 2011-87 of 29 September 2011 on the organization of political parties, established the rules of political parties funding.

⁴ Article 37 applies the neutrality of the administration, of places of worship as well as the transparency of the electoral campaign at the level of funding resources and the methods for using these funds, as fundamental principles.

decision of the Independent High Commission for Elections of 3 September 2011, which fixes the rules and procedures of the electoral campaign, complement the legal framework relevant to the funding of the NCA electoral campaign.

1°) Decree Law n° 2011-35

This decree law establishes the substantive rules related to the funding of the electoral campaign: the establishment of public funding, the fixing of a ceiling for expenses, the implementation of limits on the funding method for the campaign, the dedication of a control authority and the implementation of sanctions.

Several articles are related to the funding of the electoral campaign:

Article 39 prohibits the use of public resources and tools: *“Public authorities shall not distribute the programs of candidates, the leaflets or ballot papers relevant thereto. Public tools and resources shall not be used in the campaign promotion of one or more candidate or lists. »*

Article 52 sets four principles:

- Any political party or list of candidates for the elections shall open a single bank account for the campaign;
- The Court of Auditors shall control the single bank accounts specially opened for the campaign and shall publish a report on the funding of the electoral campaign in the Official Gazette of the Republic of Tunisia;
- Political parties and lists of candidates shall not benefit from foreign funding ;
- Political parties and lists of candidates shall not benefit from donations or grants from private individuals (natural persons, legal entities).

Article 53 defines the terms for granting public support to the lists candidates to the national constituent assembly and fixes a ceiling to the expenses for each constituency.

Public support is granted to any list according to an amount set for each 1000 voters at the level of the constituency. Public support is allocated twice: 50% of the aid is distributed equally to all lists before the beginning of the campaign and the remaining 50% is distributed during the campaign. Any list that do not obtain a minimum of 3% of the valid votes at the level of the constituency must return half of the grant amount⁵.

⁵ Decree n° 2011-1087 of 3 August 2011 which fixes a ceiling for election expenses and the way of disbursing allowances to finance the NCA electoral campaign, and completed by decree n°2011-2472 of 29 September 2011, fixes the exact amount of public support for each list in each of the 27 national constituencies and in the 6 constituencies representing Tunisians living abroad (article 1):

- 35 Dinars per 1000 voters in the constituencies where the number of registered voters does not exceed 200 000 voters ;
- 25 Dinars per 1000 voters in the constituencies where the number of registered voters is equal or greater than 200 000 voters.

Public support shall be deposited on the single bank account opened for the electoral campaign. The decree also states that the first instalment of the public support shall be deposited 7 days before the beginning of the campaign period (that started on 1st of October) and that the second instalment shall be deposited during the last 10 days of the campaign « based on a written request and supporting documents on the expenditure and submitted to the appropriate Regional Treasurer. »

Article 53 *in fine* states that « *the ceiling of election expenses and the disbursement procedures of the public support shall be fixed by decree*»⁶.

Article 70 of the decree law states that « *The Central Commission of the Independent High Commission for Elections shall verify the compliance of winning candidates with the provisions on campaign funding and may invalidate their results if they are proved to have violated these provisions. In this case, the results shall be reconsidered without taking into account the votes obtained by the list whose results were invalidated.*» Article 72 provides for the possibilities to appeal in case of dispute over the preliminary results as made public by the Independent High Commission for Elections.

Articles 75 and 77 provide for criminal penalties applied in case of non compliance with the rules governing the electoral campaign funding and in case of breach of article 39 (use of administrative resources) and article 52 (donations from foreigners).

2°) Decree Law n° 2011- 91

This decree sets the procedures and methods of control of the Court of Auditors on the funding of electoral campaign, of parties and lists candidates to the election of the NCA and it was passed to overcome the shortcomings of decree law n°35 on the nature and methods of control for the funding of the electoral campaign of the NCA.

Article 2 states that the Court of Auditors control “*can be on paper or field, integral or selective. Political parties and lists of candidates that won seats in the NCA shall be necessarily subject to this control.*”

The control is *subsequent*, made through the single bank account opened by all parties and lists of candidates (article 52 of decree law n°35). The Court of Auditors control “*shall include all payment and disbursement operations carried out within the framework of the electoral campaign, even if they are not reported in the (bank) account*”. Under the provisions of article 70 of the decree law n°35⁷, the Court of Auditors can be commissioned by the Independent High Commission for Elections for control when the latter receives a request to invalidate the results of winning candidates due to a violation of the electoral campaign funding rules.

Article 4 establishes the nature of the control of the Court of Auditors which provides the completeness control of expenses and the regularity of revenues, controls compliance with the essential formalities (opening a bank account, legal revenues, respect of the ceiling for expenses, return of the second instalment of the public support) and controls that the granted public support has been used “*as part of achieving the purposes for which it was granted.*”⁸

Political parties and lists of candidates must provide the Court of Auditors, within a maximum of 30 days as of the date of the announcement of the final election results (it was

⁶ Expenses ceiling in each constituency is fixed to three times the amount of the public support for funding the electoral campaign (article 6).

⁷ Article 3 of decree law n° 2011-91

⁸ Article 4 of decree law n° 2011-91

on 14 November), with a summary of revenues and expenses subject to commitments or sold off during the electoral campaign⁹ based on a register relating to such operations signed by the president of the party or the head of the list with the statements of the single account and a detailed list of the events, activities and meetings organized during the campaign¹⁰.

Article 16 lists the financial penalties that the Court of Auditors is entitled to impose on political parties and the lists of candidates that would breach the provisions of this decree.

The Court of Auditors must submit a report outlining the results of its control over the funding of the electoral campaign within a maximum of six months as of the date the final results of the elections are announced (thus, before 14 May 2012).

Article 17 provides for the creation of a joint commission in the event that the results of the Independent High Commission for Elections and those of the Court of Auditors would be different. In case of divergence, *“the results established by the Court of Auditors shall be considered.”* The missions of this joint commission must be terminated at the same time as those of the Independent High Commission for Elections¹¹.

C. Analysis of the legal framework: strengths and weaknesses of the legislation

Through decree law n° 2011-35 of 11 May 2011 and the various texts completing it, amending it or clarifying it, Tunisia adopted a very ambitious legislation regulating the organizational and the financial aspects of the electoral process. It is also worth noting that this legislation known as “occasional” was intended only for the organization of the elections of the National Constituent Assembly.

The urgency of the situation (the elections were originally scheduled for 24 July 2011) is the source of a number of inaccuracies and even deficiencies in the drafting of texts relevant to the elections.

⁹ Article 51 of the decree law n° 2011-35 and article 3 of the decree n° 2011-1086 define the electoral campaign period as it « shall start 22 days before the Elections Day (and) shall end in all cases 24 hours before the Elections Day.” Thus from the 1st to 21 October.

¹⁰ Article 40 of the decree of 3 September 2011 fixing the rules and procedures of the electoral campaign establishes that “ shall be considered as expenses to be included in the electoral campaign accounting:

- The expenses for a website creation if it was not done before the start of the electoral campaign or the expenses for the improvement of the website during the electoral campaign.
- The expenses for the printing and the distribution of books and leaflets distributed for free to voters except the expenses for the printing of books and leaflets sold to the public.
- The expenses for gifts and donations that a party or list offer to the public provided that they do not exceed 5% of the expenses. Otherwise, they shall be considered as a method and technique adopted to influence voters.
- The expenses for advertising.
- The expenses for renting meeting halls.
- Travel expenses for conducting the electoral campaign.
- The expenses for printing election advertisements and their display.”

¹¹Article 1 of the decree of 25 June 2011, which defines the regulations within the Independent High Commission for Elections, states that the mission of the latter «shall be terminated when the final results of the elections are announced and the final report is published.”

The late enactment of the decree law n°91, that clarifies the procedures for keeping financial reports and the span of control of the Court of Auditors, placed the political parties and the independent lists in a situation of waiting and uncertainty.

To overcome these delays and to ensure a better support for candidates, the authorities in charge of controlling the electoral process took seriously the implementation, in the most flexible and easy way, of the principles and mechanisms of this particular legislation. For this purpose, the candidates consulted regularly the Independent High Commission for Elections and the Court of Auditors on specific issues related to the funding of the electoral campaign.

In this context and in order to facilitate the bookkeeping and the preparing of financial statements, the Independent High Commission for Elections posted on its website a “Guide to Bookkeeping for the Electoral campaign” to help political parties and independent lists fulfil their accounting and financial obligations related to the funding of the electoral campaign. This guide, that includes 15 points listing the substantive obligations related to the funding of the campaign and that represents a handbook for candidates, seeks to explain the procedures stated in decree law n°91 in order to facilitate the control of the Court of Auditors.

The Independent High Commission for Elections organized also field visits during the electoral campaign period, carried out by the Regional Commissions for Elections, to help candidates and explain to them how to complete the summary of revenues and expenses that must be delivered 30 days after the final results are announced (thus on 14 December).

1°) Strengths: the implementation of international standards

The international standards¹² applicable in this field –and used as a guide for this study- are summarized in the guidelines established by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) in consultation with the European Commission for Democracy through Law (Venice Commission) from the Council of Europe. These guidelines are:

- Restrictions and limitations on the contributions of private individuals ;
- The balance between private and public funding ;
- Restrictions on the use of administrative resources of the State ;
- Applying fair criteria for granting financial public support ;
- Establishing a ceiling for the expenses incurred during the electoral campaign ;

¹² The main legislation in the field of international standards on political parties and campaigns funding are:

- The general comment n°25 of the United Nations Commission for Human Rights, July 1996;
- The United Nations Convention against Corruption;
- The Convention on Standards of Democratic Elections (Commonwealth of Independent States);
- Recommendation 1516 (2001) of the Council of Europe Parliamentary Assembly on the financing of political parties;
- Recommendation Rec (2003)4 of the Committee of Ministers of the Council of Europe to member states on the common rules against corruption in the funding of political parties and electoral campaigns;
- Code of Good Practice in Electoral Matters of the Venice Commission of the Council of Europe (European Commission for Democracy through Law) – CDL- AD (2002)023 October 2002;
- Code of Good Practice in the field of Political Parties of the Venice Commission – CDL – AD (2009)021 March 2009;
- Guidelines on Political Parties regulations of the Venice Commission – CDL – AD (2010)024 October 2010;
- Opinion on the Need for a Code of Good Practice in the field of Electoral Campaigns funding of the Venice Commission – CDL – AD (2011)020 June 2011;
- Political Life Funding: a synthesis of the 22 first evaluations of GRECO, third cycle of evaluation, May 2010.

- Requirements to increase the transparency of political parties and electoral campaigns funding and the credibility of their financial reports ;
- The establishment of independent regulatory mechanisms and the application of appropriate sanctions in case of violations of the law.

Decree law n°35 and n°91 established a funding system for the electoral campaign that in many respects implements the international standards:

→ *restrictions and limitations on the contributions of private individuals* : Article 52 of the decree law 35 prohibits donations from private and foreign individuals ;

→ *restrictions on the use of administrative resources of the State*: article 39 of the decree law n°35 prohibits the use of public resources and tools;

→ *applying fair criteria for granting financial public support*: article 53 of the decree law establishes a public support and articles 1 to 5 of the decree n°1087 set the rules for the calculation and the distribution. It should be emphasized that the parties and the lists of candidates received indirect public funding in the form of free time on Tunisian television and radio during the period of the electoral campaign¹³;

→ *establishing a ceiling for the expenses incurred during the electoral campaign* : article 53 of the decree law n°35 sets the principle for establishing a ceiling for expenses and article 6 of the decree n°1087 sets the methods of calculation ;

→ *requirements to increase the transparency of political parties and electoral campaigns funding and the credibility of their financial reports*: articles 8 and 10 of the decree law n°91 provide for the requirement to present a summary of revenues and expenses to the Court of Auditors by all political parties and lists candidates to the NCA within 30 days as of the date the final results of the elections are announced;

→ *the establishment of independent regulatory mechanisms and the application of appropriate sanctions in case of violations of the law*: article 48 of the decree law n°35 entitles the Independent High Commission for Elections as the body in charge of controlling the regularity of the electoral campaign and the Court of Auditors as the body in charge of controlling the regularity of electoral campaign funding (article 52). Criminal and financial penalties are provided for respectively by decree law n°35 and decree law n°91.

2°) Weaknesses : inaccuracies and loopholes

a) Bank account

Article 52 of the decree law n°35 requires that each party and each list of candidates open a single bank account for the electoral campaign. The requirement for opening such a single account only meets a requirement for transparency and completeness. All revenues must be deposited on the account and all expenses must be paid through the account.

¹³ Article 3 of the decree of 3 September 2011 of the Independent High Commission for Elections sets the conditions for producing, scheduling and broadcasting radio and TV programs related to the electoral campaign.

The decree law does not specify whether this single bank account must be opened by each list candidate of a party at the level of a constituency or by each party at the central level. In the absence of clarification, this requirement was strictly interpreted and the political parties having many lists candidates through the Tunisian territory opened just one single bank account. The lists of candidates abroad used the private bank account of the head of the list because of problems associated with the opening of the bank account under the different national legislations.

Most parties adopted a rather similar way to operate for the collection of funding resources: the centralization of revenues for all lists in the single bank account opened by the party for this purpose. However, parties worked differently to pay for the expenses in each constituency: some obtained easy terms and the central commission of the party paid the debts, others paid by bank or postal transfer by depositing the needed resources on the personal bank account of the head of the list, others gave money in cash to the different heads of lists who were in charge of paying for the expenses which made the enforcement of decree law n°91, requiring payments by check for each expense greater than 250 Dinars, impossible.

The restrictive interpretation to open a bank account for each party and not for each candidate list led to the centralization of the financial management of the electoral campaign and generated complications and difficulties at the level of the practical management of the campaign. The transparency requirement which met the requirement of a single bank account, and which could have been respected by authorizing the opening of a bank account for the lists of parties by constituency, was partially undermined.

b) Definition of election expenses

There is no definition of election expenses in the legislation governing the elections of the NCA. In its "Guide to Bookkeeping for the Electoral campaign", the Independent High Commission for Elections clarified that *"all expenses related to the consumption of equipment, products and services that were designed to attract voters and that were used during the electoral campaign shall be considered as electoral campaign expenses."*

The definition adopted by the Independent High Commission for Elections aimed for the implementation of a provision of the decree law n°91 on payment and disbursement operations made within the framework of the campaign, *"even if they are not reported on the account (single bank account)"*.

This novelty, aiming for tracing in the summary of revenues and expenses not only the expenses that resulted in a financial movement but also the evaluation of the contests for candidates or their parties, was introduced few days before the start of the electoral campaign (the decree law was published on 29 September). This embarrassed many parties and lists and raised many questions about the evaluation and the attribution of these in kind benefits: Should the use of the offices of a political party based in Tunis be appreciated up to the share of its use for the purposes of the campaign? How to assess the competition brought by running candidates and activists to the campaign? This provision, according to

the political parties we met with, made the work of volunteers more complicated and the work made for the establishment of financial reports more difficult.

Adopting a definition of the election expenses would enable candidates to prepare their campaigns by classifying the expenses that must be included in their financial report and the body in charge of control to determine its area of expertise basing its control on a legal definition of the election expenses. Election expenses could be defined as *“any expenditure, in cash or in kind, incurred by a candidate or its party, during the electoral campaign, to get the voters voices.”*

The inclusion in the summary of revenues and expenses of the expenses that resulted in a financial movement and of all the in kind benefits collected by the candidate or the political parties would guarantee the completeness of the financial reports and would be in line with a better transparency of the electoral campaign funding.

c) Calculation of the ceiling of expenses and length of the electoral campaign

The ceiling of expenses is fixed to three times the amount of the public support grant that is calculated according to the number of voters in the constituency¹⁴. The adopted calculation method, a fixed amount granted for each 1000 voters, decreasing beyond 200 000 voters, had a very practical impact: the ceilings of expenses did not match with the electoral representation of the different constituencies. Indeed, some small constituencies applied a ceiling of expenses that was significantly higher than those applied in bigger constituencies¹⁵.

According to the general opinion of political parties and the various control commissions for elections, the ceiling of expenses was seen as too low compared to the reality of the electoral campaign. The respect of the ceiling of expenses, as determined by decree n°2011-1087 of 3 August 2011, applied for the electoral campaign period as stated by article 51 of the decree law n°35, thus from 1st to 21 October 2011. To get around the low ceilings, some political parties started their campaign before the beginning of the statutorily defined period.

The study of the Administrative Tribunal decisions related to the funding of the electoral campaign is very interesting in this regard. Through the decision of 27 October 2011, the Independent High Commission for Elections invalidated 5 lists of “the Popular Petition”, under the provisions of article 52 of the decree law n°35, based on the fact that the cost of the printing of distributed flyers for the electoral campaign was not mentioned in the financial movements of the single bank account. The Administrative Tribunal, through five decisions dated 8 November 2011¹⁶, quashed the decision of the Independent High Commission for Elections, based on the fact that the latter did not provide sufficient

¹⁴ The ceilings of expenses varied between 6300 Dinars (for the constituency of Tozeur) and 31650 Dinars (for the constituency of Bizerte).

¹⁵ The applied coefficient was of 35 Dinars per 1000 registered voters for the constituencies whose the number of registered voters is less than 200 000 and was of 25 Dinars per 1000 registered voters for the constituencies of more than 200 000 registered voters. Thus, in a constituency where 250 000 voters were registered, the ceiling of expenses was of 18 750 Dinars, whereas in a constituency of 180 000 registered voters, the ceiling of expenses was of 18 900 Dinars.

¹⁶ Decisions 77, 78, 79, 80 and 81.

evidence to establish that this expense was made during the electoral campaign period. The “Popular Petition” explained that these flyers were printed and distributed during the pre-campaign period and as such their cost was not to be traced in the single bank account.

The shortness of the electoral campaign represents a problem in terms of accounting for the election expenses that are not included in calculating the compliance with the ceiling because incurred prior to the election period¹⁷.

d) A priori payment of public support

The question that arose during the drafting of the articles of the decree law n°35 on the funding of the campaign for the election of the NCA was that of the method of funding. To support the transition to democracy and to promote equality between candidates it was decided to choose public funding. The establishment of a state funding was coupled with fixing a ceiling for expenses to limit the capacity of the richest political parties of self-funding and to create the conditions for a fair competition involving the various parties and lists of candidates equally.

Article 2 of decree n° 2011-1087 of 3 May 2011 established a highly regulated process for granting public support that was deposited in two instalments, before and during the electoral campaign. The total amount of this public support, as budgeted by the Ministry of Finance, was of 9.5 million Dinars (about 4.8 million Euros)¹⁸.

Due to the restrictive interpretation of the provisions of the decree law on the opening of a single bank account, the first instalment of the public support was deposited in one block on the single bank accounts of political parties and independent lists¹⁹.

The territorially competent Regional Treasurer had to play an important role since it had to adjudicate the claims presented by political parties and lists “with supporting documents concerning the incurred expenses” and seeking payment of the second instalment of the public support, within a period not exceeding 5 days as of the date the claim was presented²⁰. The second instalment was paid only if “*the amount of the expenses mentioned in the statement is greater than or equal to the amount of the first public support instalment.*”

¹⁷ In a disputed decision upheld by the Administrative Tribunal, in interlocutory, the Independent High Commission for Elections prohibited any commercial advertisement for political purposes in private and public media starting from 12 September, thus before the beginning of the electoral campaign. This decision can be analysed as a desire to limit a particular form of expenditure incurred and paid not during the electoral campaign period but whose electoral character is obvious.

¹⁸ 1523 lists in Tunisia benefited from the payment of the first instalment and 987 lists from the second instalment and 145 lists for the constituencies abroad. Due to issues encountered in the different countries comprising the six constituencies abroad, including foreign banking legislations banning the use of bank funds for political purposes, the amount of the first instalment of the public support was deposited directly on the personal bank account of the head of the list.

¹⁹ The payment of the first instalment of the public support encountered some issues due to the late opening of bank accounts by political parties and independent lists (70% of the accounts were opened in September) and to the length of banking deadlines.

²⁰ Parties and lists must provide the Regional Treasurer (or the accounting officer of diplomatic and consular missions abroad) with a statement, certified on honour, listing the incurred expenses, specifying for each the name of the provider, the tax registration number, the invoice references, the nature of the expenditure, its quantity and its amount.

In practice and to facilitate the procedure due to time restraints, a simple statement of the head of the list with a summary table with the various expenses and a sworn statement were accepted under the claim of payment for the second instalment. The only denial of payments were due to claims presented after the time period, to the absence of supporting documents or evidence for the expenses of the first instalment.

In total, around 8.2 million Dinars (4.1 million Euros) were spent from the amount originally budgeted²¹.

The a priori payment of such public allowance, that some people called “blind subsidy”, prompted a number of lists to apply only to receive public funding. Indeed, the first instalment was obtained regardless the results whereas the second instalment had to be returned if the list did not obtain 3 % of the valid votes.

According to the general opinion of the speakers we met with, the amount of public funding, that seems to be set according to the number of lists that were registered and without prior impact study, was too small and did not reflect the real cost of an electoral campaign. The proliferation of applications led to the scattering of the public funding and sometimes even to situations of unjust enrichment for some “ghost lists” and resulted also in a surprising situation to say the least: some lists that won seats in the NCA have the obligation now to return the second instalment as they did not obtain 3% of the votes.

e) Control of the electoral campaign funding

Article 52 of the decree law n°35 confers jurisdiction on the Court of Auditors over the control of the single bank accounts opened by the parties and the lists. The Court of Auditors control is a document control or a field control, integral or selective and made subsequently. This control is being implemented from the summary of revenues and incurred expenses during the electoral campaign that the parties and lists had to submit to the Court of Auditors 30 days maximum as of the date the final results of the election were announced (the deadline was 14 December). The Court of Auditors has at its disposal a narrow range of sanctions- all financial- to take action against the breach of some rules related to the funding of campaigns.

The legislation established two bodies for the control of the regularity of the campaign funding: the first body, the Independent High Commission for Elections acts upstream and has extensive powers but has little time to conduct an in depth control. The second body, the Court of Auditors, intervenes subsequently and has few resources but 6 months to accomplish its control mission.

Article 17 of the decree law n°91 provides for the creation of a joint commission between the two control commissions in the event the results of the subsequent control of the Court of Auditors are different from those of the Independent High Commission for Elections. To date, this commission has never been established even though the question of the regularity of the electoral campaign funding was the main issue during the campaign.

²¹ According to information provided by the Ministry of Finance during the field visit.

The decisions of the Administrative Tribunal made on the appeals related to the funding of the lists of the “Popular Petition” highlight the consequences of the lack of an effective control body for the funding of the campaign. In its decisions of 8 November 2011, the Administrative Tribunal relied solely on the findings of the Independent High Commission for Elections, based on its decision to invalidate five lists of the “Popular Petition”, to quash the decision of the Independent High Commission for Elections. An intermediate step was missed in this process of control: the opinion of the Court of Auditors.

In two other appeals, also related to the “Popular Petition” lists, the Administrative Tribunal acknowledged the existence of an irregular funding of a legal entity under foreign law but it did not invalidate the results of these two lists because of the lack of impact of this irregularity on votes under the difference of votes between the applicants and the lists of the “Popular Petition”²². Again, the Court of Auditors was not consulted.

The report that the Court of Auditors must submit by 14 May will have to take into account these various decisions. Its power to control is very limited and the time within which its control is gripped is too long for it to act the role of an efficient controller of the regularity of the funding of the electoral campaign. Its power to impose sanctions is very limited and does not enable it to jeopardize the responsibility of candidates in case of breach of the rules of funding the electoral campaign. The sanctions provided by the law are not sufficiently binding to act as a deterrent. Thus, the Court of Auditors does not have the possibility to compulsorily retire an elected candidate or to announce his/her ineligibility.

At the time of writing this assessment, at the beginning of February 2012, only 30% of reports were submitted to the Court of Auditors, placing it in a difficult position to exercise its control and highlighting the lack of knowledge of candidates of procedures as well as some laxity. This failure to submit the vast majority of the financial reports is contrary to the principles of the electoral campaign as stated in article 37 of the decree law n°35, which calls for *“Transparency of the electoral campaign in terms of funding resources and the methods of disbursement of the allocated funds.”* »

To ensure the transparency of the electoral campaign, all candidates to the election, whether elected or not, must submit their financial reports that must be checked by an impartial and independent body of control.

f) Deadlines for appeals and evidence

Article 72 of the decree law provides that the preliminary results can be appealed before the General Assembly of the Administrative Tribunal within two days from the date the Independent High Commission for Elections announces the preliminary results. The party seeking to appeal must send an appeal notice to the Independent High Commission for Elections through bailiff. It is stated in paragraph 3 of this article that the appeal must be presented through an attorney at the Court of Cassation and that *“the request shall be reasoned and accompanied by evidence.”* This article raises a very interesting issue in terms of appeal time limits and evidence. The anticipated deadlines are constrained and the applicant has to submit the evidence supporting his/her request which can be difficult to get

²² Decisions 95 and 98 of 7 November 2011.

in such cases. Moreover, the request must be submitted through an attorney at the Court of Cassation, which significantly reduces the number of attorneys that can be hired (approximately 1000 attorneys are attorneys at the Court of Cassation).

Among the 104 appeals, 52 were rejected for legal flaw. The deadlines for appeals, the interest in acting and the obligation of a government department undoubtedly reduced the number of appeals and can be explained by the application of the maxim *legitimacy rather than legality*. Indeed, some preferred leaving behind the results of the universal suffrage even though they were aware of a number of irregularities throughout the campaign.

Remedies as provided by the normative framework for the election of the NCA are restrictive and the deadlines for appeal are extremely constrained.

g) Lack of harmonization of the legislation governing the funding of political life

There are currently three legislative texts that organize the funding of political life in Tunisia: decree law n°35, decree law n°91 and decree law n°87. The first two legislative texts focus only on the funding of electoral campaigns whereas decree law n°87, on the organization of political parties, has three chapters on the funding of political parties.

This legislative text establishes the principle of mixed funding: donations of private individuals are authorized but are limited to 60 000 Dinars per year and per person and political parties benefit from public funding. However, neither the amount nor the procedures for granting this public funding are clearly defined. The decree law also abrogated the law of 1997 on political parties funding which included an annual public allowance in the form of a fixed part (of 60 000 Dinars payable in two instalments) and a calculated part according to the number of deputies for each party. Currently there are no more provisions in the relevant legislation on the calculation method and the allowance of public support.

Each party must open a single bank account and appoint a fiscal agent responsible for the establishment of the party's financial statements. These financial statements are audited annually by one or two auditors who have the responsibility to draft a report. This audit report is submitted to a committee chaired by the president of the Administrative Tribunal. This report is then submitted to the Prime Minister within one month from the date the financial reports of the party were submitted by the auditors.

Furthermore, each party must submit to the Court of Auditors an annual report including a detailed description of the funding resources and of the expenses. However the extent of the control of the Court of Auditors is not specified and it is difficult to assess the effectiveness of this system of control in various stages since it is new and it has not been implemented yet.

The penalties provided for by decree law n°87 are just criminal penalties that can be imposed, on request of the Prime Minister, by the Court of First Instance of Tunis. Financial penalties may be imposed on political parties that breached some rules of funding.

In many ways, the legislation governing the funding of political parties is incomplete and fragmented. There is no real external control – in addition to the ‘internal’ control made by the auditors – over the funding resources of political parties. The Court of Auditors has no jurisdiction other than receiving annual reports. For such, it can not impose penalties. The reports submitted to the Court of Auditors are not intended to be made public which can be seen as a problem of transparency of the funding of political life.

The themes of political parties electoral campaign funding are imbricated. Political parties need adequate funding to fulfil their primary functions both during the electoral campaign and between the elections. It could thus be considered to link the terms of public funding allowances to electoral results – in terms of votes obtained and seats won in the parliament – of political parties during the last elections, taking also into consideration their geographic basis²³.

To facilitate a better reading and understanding of the applicable legislation to the funding of electoral campaigns and political parties, it would be better to aggregate all the relevant legislative texts in a single collection of texts, as the Election Code.

D. Recommendations

The recommendations listed thereafter aim for considering the improvements that could be brought to the implemented system for the election of the National Constituent Assembly and that could serve in the future as a basis for the establishment of a legislation on the funding of electoral campaigns and political parties²⁴.

- ▶ to ensure the completeness of financial movements and the transparency of campaign funding, it is recommended to make the opening of a single bank account dedicated to the electoral campaign mandatory for any candidate in the election (and not to lists), whether she/he is supported by a political party or is part of an independent list;
- ▶ to allow candidates to limit the type of expenses that they must include in their financial reports and the Court of Auditors to assert its control over an objective design of the expenses listed in the summary of revenues and expenses, it is recommended to define the election expenses as *“any expenditure, in cash or in kind, incurred by a candidate or its party, during the electoral campaign, to get voters voices.”*
- ▶ to be able to take into consideration and to include into the financial reports of political parties and lists, if necessary, the election expenses incurred upstream the election period to obtain the voters voices, it is recommended to define a pre-election period;

²³ This can be done taking into account their national, regional or local representation. Thus, a party with a national headquarters and representative offices in each of the governorates would be eligible for more funding to the extent that it has ramifications in all or part of the country. This would also take account of local political parties by ensuring to them a minimum grant.

²⁴ These recommendations are made on the basis of international standards and best practices related to the funding of electoral campaigns.

- ▶ to take into consideration the real cost of the electoral campaign and to ensure all parties have the capacity to run an effective campaign, it is recommended to raise the ceiling of the relevant expenses, taking into consideration the number of residents in the constituency (not the number of registered voters) and applying period indexes such as the cost of inflation;
- ▶ to prevent the proliferation of ghost applications, it is recommended to replace the current a priori system of public support allowances by a mechanism of expenses repayments, after submission of a financial report tracing the collected revenues and the incurred expenses for the electoral campaign to the control body in charge of the electoral campaign funding;
- ▶ it is recommended to introduce the obligation to submit a financial report, regardless of the percentage of the obtained votes, that traces all revenues and expenses, in cash or in kind, incurred and paid by the candidate or its party in order to obtain the voices of voters during the electoral campaign. The financial report should be made public once the control is carried out;
- ▶ a control authority such as the Court of Auditors should be given exclusive and subsequent control over the regularity of the electoral campaign funding. It could, in the exercise of its functions, be supported by a department within the Independent High Commission for Elections or the permanent commission that will succeed it, that will be in charge of providing it with evidence and information related to the funding of the electoral campaign. The Court of Auditors should be empowered to conduct comprehensive control over the financial reports of all candidates for the electoral campaign. It should be able to impose sanctions proportionate to the breach;
- ▶ it is recommended to introduce a range of objective, relevant and proportionate sanctions to the specific perused goal to take into account the seriousness of the infringement. These penalties should be monetary, electoral and criminal;
- ▶ to enable a better management of the law and to improve the procedures for election disputes, it is recommended to extend the deadline for appeals and the processing times of the election disputes by the Administrative Tribunal. The locus standi should be extended to enable voters to challenge the results in their constituency and to ensure their right for an effective remedy;
- ▶ the terms of public funding allowances to political parties should be clearly defined in the relevant laws and regulations. It is recommended, in order to promote political pluralism, to allocate the same amount of money to all political parties that account for some citizens' support. A bonus, taking into account the election results of political parties in the last elections, can be added to this minimum amount and another bonus based on the number of parliamentarians from each party can also be added;
- ▶ the various laws on electoral campaign and political parties funding should be harmonized in one law or even in a collection of texts (such as an Election Code) to avoid, in particular, contradictions and to enable political actors a better readability and clarification of the existing legislation;

Appendix – List of meetings:

- Independent High Commission for Elections (ISIE):
 - Mr. Boubaker BETHABET (Secretary General)
 - Mr. Mourad BEN MWALI (Head of Legal Affairs)
 - Mr. Omar TOUNAKTI (in charge of administrative and financial affairs);

- Administrative Tribunal:
 - Mrs Hasna BEN SLIMANE (Adviser at the Administrative Tribunal)
 - Mr. Zouheir BEN TANFOUS (Chairman of the Appeals Chamber)

- Court of Auditors:
 - Mr. Chedly SRARFI (General Rapporteur of the Court of Auditors)
 - Mr. Houcine BEN HAJ MESSAOUD (Judge)

- Ministry of Finance:
 - Mrs Hedi ROUIH
 - Mrs HALIMA

- Elections Experts:
 - Mr. Ferhat HORCHANI (Chairman of the subcommittee for Elections of the "Ben Achour Commission")
 - Mr. Mustapha BELTAIEF (Member of the "Ben Achour Commission ")
 - Mr. Chafik SARSAR

- Political parties:
 - Ennahdha - Mr. Mourad BDIRI
 - Congrès pour la République (CPR) – Mrs Zouhour KOURDA
 - Ettakatol – Mrs Samia TNANI
 - Parti démocrate progressiste (PDP) – Mr. Ahmed BOUAZZI
 - Afek Tounes – Mr. Mohamed LOUZIR

- Civil Society and NGO :
 - Mrs Zahra BOUHAFI (attorney at the Court of Cassation)
 - I WATCH – Mr. Mouheb GAROUI
 - MOURAKIBOUN – Mr. Rafik Halouani