

# OVERCOMING OBSTACLES TO DEMOCRATIC ELECTIONS IN TUNISIA: A PRELIMINARY ANALYSIS OF CONSTITUTIONAL PROVISIONS

## INTRODUCTION

The formation of the interim authorities and their actions have so far followed Tunisia's constitutional framework. Taking note of the 'permanent vacancy' of the presidency following Ben Ali's escape to Saudi Arabia, the Constitutional Council vested Fouad Mebazaa, President of the Chamber of Deputies, with the functions of interim President of the Republic on 15 January 2011. Mebazaa re-appointed Mohamed Ghannouchi, Prime Minister since 1999, to his office.

However, a question arises as to whether it will be possible to continue respecting constitutional arrangements in view of the current political situation. Several critical factors impinge on this possibility: existing state institutions do not have democratic legitimacy; time may be too short to organise democratic elections; and there is pressure from the streets.

While there is little doubt that the Constitution will require a thorough overhaul in the long term, stepping outside the Constitution in the short term to address immediate needs could raise legal and political challenges unless it is done on the basis of broad consent.

In contrast to some other past transitions in other countries, there is no reference document—a pact, a charter or an agreed transitional programme—to map the road ahead. Therefore it is to be assumed that the current rules apply, including the Constitution.

Although it may not be absolutely necessary to revise the Constitution in the short term, it is necessary to reform the primary electoral legislation before elections are held. Other legislation also may need urgent reform in advance of elections; e.g., the political parties' law and media legislation. Not doing so runs the risk that the electoral process will be seriously flawed as a result of undemocratic provisions.

This paper examines some of the difficulties with the current constitutional arrangements and offers some suggestions as to how these can be circumvented and elections held within a reasonable timeframe

# 1. STATE INSTITUTIONS

## *The Interim President and Government*

According to Article 57 of the Constitution, the interim President does not enjoy the full rights of an elected President. In addition to the prohibition against dissolving the Chamber of Deputies (the lower house of Parliament), the interim President cannot call a referendum,<sup>1</sup> dismiss the government or assume emergency powers. The prohibition on the interim President calling a referendum is important: in the event that the current Parliament resists the adoption of reformed electoral legislation, the interim President cannot circumvent Parliament by directly seeking the public's opinion on the matter by holding a referendum on the issue. However, this could be an option for an incoming President; i.e., before Parliamentary elections are held.

The President appoints the Prime Minister and, upon a proposal by the Prime Minister, the other members of government. The Constitution is not clear about whether the interim President is also vested with this right, but it is assumed that this is the case. However, the interim President cannot dismiss the government and no parliamentary motion of censure may be presented against the government. The President presides over the Cabinet, but may delegate some presidential powers to the Prime Minister.

## *The Parliament*

Tunisia has a bicameral Parliament composed of the Chamber of Deputies (the lower house) and the Chamber of Advisors (the upper house). The Constitution provides for the election of members of the Chamber of Deputies by universal, free, direct, and secret vote, in accordance with the methods and terms set by the Electoral Code. Members of the Chamber of Deputies are elected for five-year terms. The Electoral Code sets the number of deputies in the Chamber of Deputies.<sup>2</sup>

The composition and role of the Chamber of Advisors is determined by the Article 19 of the Constitution. It is comprised of indirectly elected members (one third by local councillors and one third by social partners) and presidential appointees.<sup>3</sup> Members of the Chamber of Advisors have a six-year term in office, with half of the membership subject to change every three years. It is likely that there will be a political need to address the question of either keeping the bicameral system and

renewing the composition of the Chamber of Advisors soon (but possibly only after presidential and local elections are held), or revising the system for composing the Chamber of Advisors, or abolishing it altogether.

Both houses of Parliament have an important role in adopting legislation (see below). This is potentially significant if the Electoral Code is reformed prior to presidential or parliamentary elections, not least because a large majority of members in the Chamber of Deputies were elected under the banner of the ruling party, the *Rassemblement Constitutionnel Démocratique* (RCD),<sup>4</sup> and their position on democratic reform has yet to be tested.

## *The Constitutional Council*

The Constitutional Council plays an important role in election processes. It registers presidential candidates, rules on 'requests' made to it regarding presidential election results and has the jurisdiction to rule on appeals related to parliamentary elections. In matters concerning elections, decisions of the Constitutional Council are final and may not be appealed. In addition, the Council reviews the constitutionality of legislation and answers any questions about the organisation and functioning of the country's institutions.<sup>5</sup> It is possible that this also could include issues related to the timing of elections.

The Council is made up of nine members. Four, including the President of the Council, were appointed by former President Ben Ali, and two by the President of the Chamber of Deputies, who is now the interim President. The first President of the Court of Cassation, the first President of the Administrative Court and the first President of the Audit Office are *ex officio* members. It appears that members of the Constitutional Council cannot be dismissed until their term of office expires.

With the exception of its decision on who should be installed as interim President, the Council is as yet untested in the new political climate. It is also unclear how it will respond if and when the interim government authorities decide that current constitutional arrangements do not meet immediate political needs. Given that electoral laws are organic laws according to the Constitution, the Constitutional Council will have to control the conformity of any amendment to existing law. Therefore its role might be crucial in establishing a basis for the transition.

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<sup>1</sup> Article 47 stipulates that: "The President of the Republic may submit to a referendum any bill that is of national importance and any questions that concern the country's vital interests, provided these bills and questions do not go against the Constitution. When referendum results in the adoption of the bill, the President of the Republic shall promulgate it within two weeks of the date on which the results are announced. The Electoral Code sets the methods whereby the referendum is held and the results are announced."

<sup>2</sup> There are 214 members in the current Chamber of Deputies.

<sup>3</sup> One third of the members of the Chamber of Advisors are elected at the governorate level by and among members of the Municipal Councils (one or two, depending on the size of the governorate). Another third of the members are again elected by members of the Municipal Councils from lists presented nationwide by employers', peasants' and employees' organisations. The remaining third is appointed by the President of the Republic.

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<sup>4</sup> Among the 214 members of the Chamber of Deputies, the RCD has 161 members.

<sup>5</sup> Article 72, paragraph 3.

## 2. THE CONSTITUTION AND ELECTIONS

Three of the most significant problems with the current Constitution and the holding of elections include: timing of the presidential election; presidential *versus* parliamentary elections; and eligibility criteria for presidential elections.

### *Timing of the Presidential Election*

The most obvious problem with the Constitution pertains to the timeframe for holding presidential elections. Under Article 57, elections must be held within 45 to 60 days from the date of the appointment of an interim President. This corresponds to the length of the mandate of the interim President.

Fouad Mebazaa, the Speaker of the Chamber of Deputies, was sworn in as interim President on 15 January 2011.<sup>6</sup> As stipulated in the Constitution, this means that a presidential election ought to be held no later than 15 March 2011. However, this is problematic because it leaves insufficient time to reform the Electoral Code, which is necessary to increase the likelihood that elections will be genuinely democratic. As yet no election date has been set.

The Constitution does not clearly establish who calls a presidential election. The Prime Minister, Mohammed Ghannouchi, has indicated that 'elections' may be held within six months. The Constitution does not provide any deadline for setting the actual election date; e.g., no later than 30 days before election day. According to the Electoral Code, candidacy applications must be filed in the second month preceding the day of the ballot.<sup>7</sup>

Thus, if the elections are to be held within the constitutionally-mandated timeframe, the election date ought to be set in the very near future. Due to current political uncertainties and the desirability of electoral reform, it might be better to hold elections at a later date. Holding elections after 15 March could mean ignoring the Constitution. Even if this is reasonable in present circumstances, it nonetheless sets a problematic precedent that could cause unwanted legal consequences further down the line.

It might be possible to defer elections without acting unconstitutionally. Article 39 of the Constitution states that: "In the event it is impossible to organise elections on a timely basis, due to war or imminent peril, the President's term of office may be extended by a law adopted by the Chamber of Deputies, until such time when elections can be organised." It is not clear if this provision

could be applied to an interim President. It may be prudent for the interim President to seek the opinion of the Constitutional Council on this matter, something that is permitted under the Constitution. If approved by the Council, prolongation of the interim President's mandate would still require the Chamber of Deputies to adopt a law to this effect.

***Article 39 may allow the extension of the interim President's term, which would give time to more thoroughly reform the framework for Presidential elections.***

### *Presidential vs. Parliamentary Elections*

In legal terms, it is only the vacancy of the presidential office that has triggered the need for a presidential election. As noted, the Constitution specifically prohibits the dissolution of the Chamber of Deputies by the interim President.<sup>8</sup> If developments proceed within the framework of the Constitution, then it is only after a new President is sworn in that parliamentary elections could be called. If the incoming President dissolves the Chamber of Deputies, the Constitution requires that early legislative elections must be held with 30 days.<sup>9</sup>

Thus, the immediate priority ought to be to improve the electoral framework for presidential elections. It may be possible to defer reforms necessary to ensure a genuine parliamentary election (e.g., the system of representation) until after the next president is elected. In such a scenario, it is advisable to delay the dissolution of Parliament until such time as the Electoral Code has been thoroughly reformed. However, if the presidential elections are delayed beyond 15 March, there may be time to reform the framework for both types of election before they are held.

### *Eligibility to Stand for Election*

Article 39 of the Constitution stipulates that: "The President of the Republic shall be elected... by... an absolute majority of the votes cast. In the event that such a majority is not reached during the first round, a second round shall be organised on the second Sunday following the ballot."<sup>10</sup> Only the two candidates having obtained the highest number of votes in the first round are entitled to participate in the second round.

***Depending on the timing of the election, in the event of a second round it may be necessary to extend the interim President's mandate to ensure there is an office holder until such time as the next President is sworn into office.***

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<sup>6</sup> On 14 January 2011, the Prime Minister Mohammad Ghannouchi assumed the role of interim President, possibly with reference to Article 56 of the Constitution. However, he immediately withdrew on 15 January when it became clear that the President of the lower house of Parliament (the Chamber of Deputies), Fouad Mebazaa was constitutionally mandated to assume the role.

<sup>7</sup> Article 66 of the Electoral Code.

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<sup>8</sup> Article 57 provides that: "The interim President of the Republic exercises the powers of the President of the Republic, without, however, ...dissolving the Chamber of Deputies..."

<sup>9</sup> See Article 63, paragraph 2.

<sup>10</sup> Although it is perhaps a minor detail, there could be problems with the wording of this Article depending on whether *invalid votes* are considered as votes. If they are, then it becomes possible that neither of the two candidates in a second round achieves a majority of the votes cast.

Only those who are exclusively of Tunisian nationality (citizenship) and not possessing any other nationality, who are Muslim, and whose father, mother, and paternal and maternal grandfathers and grandmothers are all of Tunisian nationality without discontinuity may serve as President. On the day of submitting their candidacy, candidates must be at least 40 years of age and at most 75 years of age, and ‘*shall enjoy all his civil and political rights.*’ (Article 40 of the Constitution). The latter requirement could limit the field of candidates if removal of civil and political rights occurs as a result of imprisonment or by a court sentence. This could conceivably lead to the exclusion of those who have served a term of imprisonment; e.g., for ‘political’ crimes.

This is potentially a major problem and must be addressed prior to holding the presidential election to ensure that no one is denied the right to stand for office on the grounds of possibly arbitrary sanctions imposed by the former regime against dissidents. As it is not possible to amend the Constitution, it should be ensured that the political and civil rights of dissidents are restored, be it through amnesty, pardon or otherwise.

Article 40 of the Constitution also stipulates that: “Candidates shall be presented by a number of members of the Chamber of Deputies and municipal presidents, in accordance *with the terms and conditions set out in the Electoral Code*” (emphasis added). The Electoral Code provides that this number is 30 eligible persons.<sup>11</sup> This seriously and unreasonably restricts the field of candidates and, in the current context, is wholly inappropriate because the large majority of the Chamber of Deputies’ 214 members and municipal presidents were elected under the banner of the *Rassemblement Constitutionnel Démocratique*.<sup>12</sup> While the Constitution cannot be amended, nonetheless it might be possible to amend the Electoral Code to reduce this number to one or two. Although still not ideal, this would significantly reduce the magnitude of the problem.

The Constitutional Council decides on the validity of presidential candidacy applications and registers those who are eligible. As the Council is the highest legal body and is charged with upholding the Constitution, it would appear that there is no possibility of filing a legal appeal against its decisions on candidate registration. Its approach to applying ‘old law’ to the new political situation will be of utmost importance for ensuring that there is a wide range of candidates from which voters can choose. The interim President is prohibited from standing for election (Article 57 of the constitution).

Elected for five-year terms, new elections for the Chamber of Deputies must be held during the last 30 days of their tenure in office. The last elections were held on 25 October 2009. Candidates must be born of a Tunisian father or mother and have attained at least 23 years of age on the day of candidacy. The election system for members of the Chamber of Deputies is not set out in the Constitution. Serious consideration should be given to amending this electoral system, which in its current form is not suitable for genuinely democratic elections.

### 3. PROCEDURES FOR ADOPTING LEGISLATION

If the Electoral Code is to be amended prior to the next elections, then the constitutional provisions on the adoption of legislation are of key importance. As noted, during the period of the interim presidency, no modification of the Constitution may take place. Hence any changes to the electoral framework must respect the provisions of the Constitution in its current form.

The power to initiate laws is shared equally by the President of the Republic and the members of the Chamber of Deputies. Priority is given to bills submitted by the President of the Republic. Bills or amendments to existing laws submitted by the members of the Chamber of Deputies are not acceptable if their adoption leads to the reduction of public resources or adds new costs or expenses. This provision may rule out the possibility of the Chamber of Deputies initiating any far reaching amendments to the Electoral Code as these would likely have some financial impact; e.g., the establishment of an Election Commission or instituting public funding for candidates. Thus, it is likely the President would take the lead in the preparation of a new or revised Electoral Code.

Given that the Electoral Code is *an organic law*,<sup>13</sup> amendments require an absolute majority of all elected members of Parliament (the Constitution implies in both houses of parliament).

Constitutional provisions regarding adoption of legislation are complex, particularly for organic laws. Assuming that a bill is initiated by the President, it must be scrutinised by the Cabinet and the Constitutional Council<sup>14</sup> before it is submitted to both houses of Parliament.<sup>15</sup> A bill for an organic law may not be submitted for deliberation by the

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<sup>11</sup> Article 66 of the Electoral Code.

<sup>12</sup> A constitutional amendment introduced in 2008 permitted the leading official in each party (party president, general secretary, first secretary, etc.) to run for President, provided that s/he was elected to the position and held the position on the day of submitting his/her candidacy for the presidential election, and that s/he held the post for at least two years. However, the provision only applied to the 2009 elections.

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<sup>13</sup> Laws considered to be of an organic nature are those specified by Articles 4, 8 (freedoms of expression, association [including political parties] and assembly), 9, 10 (freedom of movement), 33 (adoption of legislation), 66 (judicial appointments), 67, 68, 69, 70, 71 and 75 (Constitutional Council) of the Constitution. The Constitution specifies that the Electoral Code is an organic law.

<sup>14</sup> It is mandatory to submit to the Constitutional Council bills for organic laws (including the Electoral Code) and bills regarding the general methods of application of the Constitution.

<sup>15</sup> As the Electoral Code is an organic law, it must be discussed by both houses of parliament.

Chamber of Deputies until two weeks after it has been tabled. Introduction of amendments by the Chamber of Advisors<sup>16</sup> can result in further delays, as well as the involvement of the government, if the Chamber of Deputies is not in agreement with the proposed changes from the Chamber of Advisors. After the text is agreed by both houses, it is returned to the President for promulgation.

If the President is not satisfied with the bill, s/he can return it to Parliament for further reading.<sup>17</sup> The Constitutional Council must also verify that the final text of a bill is compatible with the Constitution. The Council has one month to complete this task.

It is impossible to know how long it would take to amend the Electoral Code after the draft text of the bill is finalised. Suffice to say, depending on the approach taken by the various institutions, especially the degree of political will to reform, it could take several months to adopt amendments. In turn, this could have serious implications for the timing of elections. The possibility of regulating the elections through Presidential Decree instead of law does not appear to be an option.<sup>18</sup>

## 4. THE CONSTITUTION AND FUNDAMENTAL FREEDOMS

Respect for fundamental freedoms is essential for a genuine election process. The Constitution does contain provisions on fundamental freedoms and human rights (Articles 5 through 10). However these are rudimentary in comparison to such provisions in the constitutions of other countries.

Article 7 states that: ‘Citizens exercise all their rights in the forms and according to the terms provided for by law. *The exercise of these rights can be limited only by laws enacted to protect the rights of others [and] the respect of public order*’ (emphasis added). Article 8 provides that: ‘Freedom of opinion, expression, the press, publication, assembly and association are guaranteed *and exercised according to the terms defined by the law*’. No mention is made of civil society organisations’ right to associate or media freedoms.

Article 8 indicates that ‘no political party may take religion... as the foundation for its principles, objectives, activity or programs’. The law sets the rules governing the

establishment and organisation of political parties. Past experience in Tunisia in the period 1987-1989 have shown that these rules can be applied in different ways depending on the political interests. This aspect will be crucial with respect to the expected re-emergence of the Islamist *Ennahda* movement on the political scene. Article 10 stipulates that: “Every citizen has the right to move freely within the country, to leave it, and to take up residence *within the limits established by the law*” (emphasis added).

***In the longer term, the Constitution should be revised to better protect fundamental rights. In the short term, primary legislation dealing with these issues should be reviewed to ensure that citizens’ rights are adequately protected during elections.***

## 5. CONCLUSION

There are several key issues in the Constitution that could undermine a genuine contest in presidential elections. These include: problems over the timing of the presidential poll; the requirement for support from deputies and municipal presidents for candidates to stand for office; and the problem of those who may have had their civil and political rights withdrawn.

In other respects, the provisions of the current Constitution are unlikely to seriously impede the holding of a democratic election. However, it is highly likely that primary legislation—notably the Electoral Code, as well as laws related to political parties and the media—will require amendment in the immediate to the short term to improve the chances of genuine elections being held.

This requires Parliament to adopt or amend legislation expeditiously. It also indicates that the Constitutional Council should apply existing law in a manner that is appropriate to the current political situation.

So far, neither of these factors has been tested.

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<sup>16</sup> The Chamber of Advisors must complete its examination of the bill within 15 days. In case the Chamber of Advisors does not adopt the text within this period, the President of the Chamber of Deputies can submit the bill adopted by the Chamber of Deputies to the President of the Republic for promulgation.

<sup>17</sup> In which case, if the bill is adopted by a two-thirds majority of the members of the Chamber of Deputies, it becomes law and is published within a second maximum two-week period.

<sup>18</sup> Article 28 provides that: “The Chamber of Deputies and the Chamber of Advisors may authorise the President of the Republic, for a set period of time and for a specific purpose, to issue decrees which he submits, as the case may be, to ratification by the Chamber of Deputies or by both chambers, upon expiration of that period.” Because the Electoral Code is an organic law, it is unlikely that, legally, the President could issue a decree amending the Electoral Code; i.e., any change would probably have to be in the form of organic law.

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