



**OSCE/ODIHR OPINION ON THE DRAFT LAW
“ON ESTABLISHING AN INDEPENDENT ELECTION MANAGEMENT BODY
OF THE REPUBLIC OF TUNISIA”¹**

4 December 2012

I. INTRODUCTION

1. This opinion reviews and comments on the Draft Law “On Establishing an Independent Election Management Body of the Republic of Tunisia” (hereafter “Draft Law”). This opinion was prepared on the basis of an invitation from the Tunisian Embassy in Vienna, as received by the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on 29 October 2012. This opinion is part of an OSCE/ODIHR project on promoting democratic structures among OSCE’s Mediterranean Partners for Co-operation and is the first opinion provided by the OSCE/ODIHR on draft or final election-related legislation in Tunisia.

2. An OSCE/ODIHR delegation visited Tunis from 27 to 31 August 2012 and met with officials from state institutions, political and electoral stakeholders, and representatives of the international community. The OSCE/ODIHR would like to thank the Ministry of Foreign Affairs for their assistance and co-operation in organizing the visit. The OSCE/ODIHR would also like to thank all of its interlocutors for taking the time to meet with the delegation.

3. This opinion is based on the Draft Law that was provided by the Tunisian Embassy in Vienna on 29 October 2012. The Draft Law was externally translated into English for the OSCE/ODIHR. It should be noted that any legal review based on translated laws may be affected by issues of interpretation resulting from translation.

4. The Draft Law is based on Article 25 of Constituent Law No. 2011-06 of 16 December 2011, which provides for adopting a law to create an independent, permanent, public body in charge of managing, organizing, and supervising elections and referenda. The law is to specify the composition and organization of such a body.

5. This opinion does not comment on the process that resulted in the Draft Law. However, it is an established principle that legislation regarding fundamental rights such as the right to genuine elections should be adopted openly, following public debate, and with broad support in order to ensure confidence and trust in electoral processes. A broad consensus on the main rules is important since electoral legislation should not favour the interests of any particular political party or parties.

¹ The English version of this report is the only official document. An unofficial translation is available in Arabic.

6. On 14 October 2012, the ruling coalition proposed 23 June 2013 as the date to hold presidential and legislative elections with a potential run-off presidential election on 7 July. While taking into account the extraordinary current circumstances in Tunisia, it should be noted that altering the legal framework for elections less than a year before an election is not consistent with good electoral practice and may affect the timely and consistent implementation of the law.²

7. At the time of writing, it appears that the Draft Law will be adopted prior to a new Tunisian Constitution, the highest legal norm of the state. While it is not a good practice for constitutional provisions to go beyond describing the foundations of the electoral system and guaranteeing fundamental rights, careful attention should be paid to ensure consistency with the future constitution.

8. The OSCE/ODIHR welcomes the readiness of the authorities to improve the legal framework for elections. The comments provided below are offered in the spirit of strengthening the electoral legal framework further. The OSCE/ODIHR stands ready to provide a legal opinion on the final law on the election management body, as well as other, future election-related laws.

II. EXECUTIVE SUMMARY

9. An independent and impartial electoral management body (EMB), operating transparently and in accordance with the law, is paramount for the effective administration of genuine, democratic elections.³ An impartial and administratively effective EMB is an essential element in building trust in the electoral process and confidence that the election results are reported honestly and accurately.

10. The Draft Law addresses several key issues to establish and operate a permanent, independent, and impartial EMB. This includes, establishing:

- The structure of the EMB, including composition of a nine-member Commission and an Executive Director to head the Secretariat.
- Transparent nomination and appointment of the Commission, including the EMB President, as well as the Executive Director of the Secretariat.
- Staggered renewal of the Commission membership, which promotes public confidence in the impartiality of the EMB as well as institutional memory.
- Provisions for an independent budget for the EMB and financial autonomy, thereby enhancing EMB independence.
- Provisions for the transition from the former EMB to the newly established EMB, which again promotes institutional memory.
- Protection of personal data, which is in line with international good practice.

11. However, aspects of the Draft Law could be clarified and additional issues may be considered to promote the independence and impartiality of the EMB, and enhance public

² 2002 Venice Commission Code of Good Practice in Electoral Matters (hereafter "CDL-AD(2002)023rev"), 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."

³ Article 25 of the International Covenant for Civil and Political Rights (hereafter "ICCPR"); the UN Human Rights Committee's General Comment no. 25 to this Article (hereafter "General Comment"), paragraph 20: "An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant."

confidence. The below comments do not preclude clarifying some issues in separate laws and/or further regulations. These relate to EMB structure, composition, duties and responsibilities, and complaints and appeals. In particular, further consideration could be given to:

- Specifying the structure of local levels of the election administration and providing further details regarding the structure of the Secretariat, as a means to promote effective election administration.
- Providing similar mechanisms for the selection of all Commission members, including the EMB President, as a means to strengthen public trust in the independence and impartiality of the EMB.
- Revising the procedures for the election and dismissal of Commissioners, as well as for removing their immunity. Consideration should be given to including qualified majority voting requirements. This would provide greater independence and protection to EMB staff and avoid the risk of arbitrary dismissal of Commissioners on political grounds.
- Removing the five-year suspension of candidate rights, upon completion of their mandate, for former EMB Presidents, Commissioners, and Executive Directors, so as to be in line with Article 25 of the International Covenant on Civil and Political Rights.
- Extending the requirement for key EMB staff to have no membership of a political party from three years before their nomination to cover the entire term of their service.
- Promoting gender balance within the EMB, in line with international obligations under the Convention for the Elimination of Discrimination Against Women.
- Clarifying whether EMB responsibilities are direct or supervisory, as well as mechanisms for co-operation with other state institutions, so as to promote transparent and effective election administration.
- Clarifying that non-partisan citizen and international election observation is permitted as observation by independent and unbiased organizations is a key element in providing transparency.
- Adding a duty for EMBs to train all electoral officers to promote professionalism.
- Providing for timely dissemination and easy access of EMB decisions and other relevant information to increase transparency.
- Providing further details on the complaints and appeals procedures to both the EMB and the courts.

III. COMMENTS ON THE DRAFT LAW

EMB Structure

12. The Draft Law provides for a permanent EMB with legal personality and financial autonomy that is responsible for the overall conduct of elections and referenda. The EMB is composed of a nine-member Commission headed by the EMB President, and a Secretariat headed by an Executive Director.

13. The Draft Law does not delineate the lower-level structures of the election administration and Article 20 of the Draft Law indicates that the establishment of local levels is optional and left to the discretion of the Commission. In line with established good practice, effective election administration requires local structures to implement procedures at a district and polling station level. While their precise format should be determined in line with the electoral system (not yet confirmed), it would be advisable to establish broad parameters that provide for their

establishment within the Draft Law. The Draft Law should also require that such bodies be established in a timely manner before an election and adequately funded.

14. Although the Draft Law details the role of the Executive Director to head the Secretariat, no further provisions regarding the structure of the Secretariat are provided. The Draft Law could specify the structure of the Secretariat and its role in supporting the Executive Director.

15. The Draft Law provides for the transition from the former EMB to a newly established EMB.⁴ This is positive and provides for the continuation of institutional memory and avoids the disruption of a complete renewal of staff.

EMB Composition

Nomination and Appointment of EMB Members

16. The Draft Law establishes procedures for the nomination and appointment of the EMB Commission. Sixteen candidates are proposed by a special committee of the legislature, of which eight are elected by a majority vote of the legislature across a maximum of three rounds of voting. However, Article 5 of the Draft Law does not indicate the applicable majorities for their nomination or their election in the first two rounds. A qualified majority of two-thirds to elect the EMB Commission could be considered as a means to further independence from the political composition of the legislature.

17. The nomination and election of the EMB President, the ninth Commissioner, differs from the other members. According to Article 5 of the Draft Law, the President of the EMB is chosen jointly by the President of Tunisia, the President of the Legislature, and the Prime Minister, and is then approved by an absolute majority of the legislature. The difference in nomination procedures between the EMB President and other Commissioners may have consequences on the perception of the EMB President's impartiality. It could be considered to submit the EMB President to the same nomination process as for the other Commissioners. The EMB President could be elected either by the legislature directly, or by the EMB Commissioners at the first EMB session, by consensus or by the same qualified majority procedure defined under Article 7 for the Vice-President.

18. The Executive Director of the Secretariat is appointed by the EMB President after the approval of an absolute majority of the Commission. As with other EMB appointments, selection based on a qualified majority vote could enhance public perceptions of impartiality and independence.

19. In line with good electoral practice, the Draft Law provides for the staggered renewal of the terms of the EMB Commissioners, which promotes independence and institutional memory. In particular, it is positive that the Commission is not replaced in its entirety either shortly before or immediately after an election, so as to avoid perceptions that individuals are appointed to ensure a certain outcome in an upcoming election or are appointed as the spoils of the victors in a recent election. Article 10 indicates that the partial renewal of the EMB Commission should be identified "three months before approaching the last day in the election period." The Draft Law does not clarify what would be "the last day in the election period" and it could be considered to

⁴ The former EMB was established by the Law-Decree No. 2011-27 of 18 April 2011 and officially terminated its work on 18 May 2012.

specify a date in the law. It would not be advisable to renew the board within the year prior to elections or shortly before an electoral event.

20. The requirements to nominate the EMB President, Commissioners and Executive Director are provided in Articles 6 and 25. The third and fourth requirements may be specified by providing criteria for possessing integrity, independence and neutrality, while prior electoral competence could be specified in terms of experience, training, and/or education.⁵ In addition, the minimum age requirement of 40 years appears excessive and may be reconsidered.

21. The Draft Law does not include any provision to promote gender balance. In line with Tunisia's international obligations under the Convention for the Elimination of Discrimination Against Women (CEDAW), it should be considered to add a general provision for this purpose and/or specific provisions on nomination and appointment of EMB officials.⁶

Status of EMB Members

22. Several provisions of the terms of reference outlined for the EMB President, Commissioners, Executive Director and assistants under Articles 11 and 30 could be generalized and made applicable to all electoral officers. In addition, the requirement for the EMB President, Commissioners and Executive Director to have no membership of a political party for three years before their nomination should be extended to cover the term of their service.

23. Articles 11 and 30 deprive the EMB President, Commissioners, and Executive Director of the right to stand as candidates for a period of five years after their terms expire. The right to stand as a candidate is a fundamental right under Article 25 of the International Covenant on Civil and Political Rights (ICCPR). Although the intention to separate EMB members from political competition may be admissible for the duration of their EMB mandates, the objective and reasonable criteria required for suspending the right to stand once their mandates have expired is seriously challenged by the existing provision.⁷

24. Article 16 of the Draft Law indicates that the EMB Commission propose their own remuneration, to be charged against the EMB budget. It may be considered to determine the applicable remunerations by assigning the Commissioners official grades, which would be comparable to those of other state officials.

25. The legal status and mandate of the "supervisors" and the "assistants," under Articles 3(10) and 30 respectively, should be specified.

Termination of Mandates of EMB Members

26. Articles 13 and 14 of the Draft Law outline procedures for removing the immunity of Commissioners and/or dismissing them. In both cases, a request must be made by the EMB President or at least half of the Commissioners and then be confirmed by a majority vote in the legislature. The relative ease with which this can be achieved raises concerns about the level of protection provided to Commissioners and risks the arbitrary removal of Commissioners on

⁵ CDL-AD(2002)023rev, II.3.1. paragraph 83: "Members of central electoral commission should be legal experts, political scientists, mathematicians or other people with good understanding of electoral issues."

⁶ CEDAW Articles 2(b) and (f), and 7(2).

⁷ General Comment no. 25 to Article 25 of the ICCPR, paragraph 4.

potentially political grounds. It could be considered to introduce a qualified majority vote for both the request and vote on the removal of immunity of Commissioners and their dismissal.

27. Article 12, paragraph 2, broadly defines the possible conflicts of interest of Commissioners. The sanctions attached to declare a conflict of interest and the grounds for establishing it may appear disproportionate. It may be considered to exclude a member who declares such a conflict from the relevant board sessions, deliberations, and/or decisions, which are not necessarily all sessions, deliberations, and decisions. Paragraphs four and five of Article 12 provide for the Commissioner's resignation, or removal, once a conflict of interest, or intent to hide the conflict, is established. When a conflict of interest is temporary or minor, it could be considered to exclude the concerned Commissioner from the relevant sessions, deliberations, and/or decisions. When the conflict appears to be permanent or grave, the concerned Commissioner may be removed under the procedures outlined in Article 14 as an exception. In all cases, the EMB should comply with due process requirements and investigate the case before making any decision on suspending or removing a member.

28. Article 15 of the Draft Law lists disability as a reason for replacing a Commissioner. To be in line with Article 27 of the UN Convention on the Rights of Persons with Disabilities, as ratified by Tunisia, the cases of disability could be specified with precise conditions and/or legal documents to be outlined.

EMB Duties and Responsibilities

29. Article 3 of the Draft Law lists the EMB duties and responsibilities, and Article 21 addresses co-operation and co-ordination with other state institutions. It could be considered to further specify which activities the EMB organizes directly and which it only supervises. In particular, these issues could be clarified for registering voters, redistricting, regulating the electoral campaign, and managing the public campaign funding. For instance, Article 3(2) seems to assign redistricting to the EMB only, while a mixed commission with representatives from other relevant state institutions may be preferable.

30. In addition, Article 21 specifies that the Prime Minister's Office will facilitate all co-operation between the state and the EMB. While such co-operation is indispensable, it should be clarified that the EMB is not subordinate to the government. In line with good electoral practice, the Draft Law could contain a provision requiring the authorities to meet the demands and needs of the EMB.⁸ Identifying clearly the institutional responsibilities and duties would enhance transparency in the electoral process.

31. Article 3(8) indicates that the EMB is responsible for producing codes of good electoral conduct to "guarantee the principles of integrity, transparency, impartiality, and proper use of public money without any conflict of interests." It could be considered to clarify for whom the codes of conduct are to be developed.

32. Article 3(9) references "international guests" after mentioning observers. Although it may result from a translation issue, the provision should clearly provide for non-partisan citizen and international observers, in the same manner that it provides for "local and foreign journalists."

⁸ CDL-AD(2002)023rev, II.3.1. paragraph 85.

Independent and unbiased citizen and international election observation is essential for strengthening transparency and confidence in an electoral process.⁹

33. In line with good electoral practice, Article 3(11) provides for the EMB to organize programmes for the encouragement and education of voters. This is an important provision and the EMB should actively work to educate and inform voters about voting processes, candidates, political parties, and complaints and appeals processes in order for there to be a true expression of the will of a people in an election. Article 3(11) also provides for the EMB to co-operate with civil society. This co-operation could be enhanced by providing full, public access to all Commission sessions.¹⁰

34. In line with good international practice, Article 22 prohibits the use of personal data for any purpose that is not related to the electoral process.

35. To promote the professionalism and efficiency of the election administration, a provision should be included to mandate the EMB to train all electoral staff.¹¹

36. Article 18 of the Draft Law provides for the publication of EMB decisions in the official gazette. To strengthen the transparency and integrity of the electoral process, the EMB should also be required to publish them on its official website in the same way as for the special, annual and financial reports under Articles 3(16) and (17), and 29. All decisions, regulations, codes and other relevant documents and data should be made available on the EMB website in a timely manner.

37. Article 3(7) of the Draft Law provides for the EMB to announce the preliminary and final elections results. To enhance transparency and confidence in the election results, consideration should be given to specifying that preliminary and final results should be published in a timely manner on the EMB website with a complete breakdown of the vote by district and polling station and including the number of ballots received, given out, and valid/invalid votes cast.

Complaints and Appeals

38. Article 18 of the Draft Law provides for the right to appeal EMB decisions to “special courts.” It is a good practice that decisions of the highest electoral body be appealable to the courts. However, this article would be strengthened by specifying which “special courts” EMB decisions can be appealed to.

39. The Draft Law does not detail procedures for submitting complaints and appeals to the EMB. Consideration should be given to introducing regulations that outline these procedures including the provision of deadlines to ensure timely and effective remedy should electoral rights be infringed.

⁹ CDL-AD(2002)023rev, II.3.2.a.: “Both national and international observers should be given the widest possible opportunity in an election observation exercise.”

¹⁰ CDL-AD(2002)023rev, II.3.1. paragraph 81: “The meetings of the central electoral commission should be open to everyone, including the media.”

¹¹ CDL-AD(2002)023rev, II.3.1. paragraph 84: “Members of electoral commissions have to receive standardised training at all levels of the election administration.”

40. In the event that local levels of election administration are established, it would also be advisable to include provisions detailing how complaints and appeals to these bodies are to be handled.