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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

TUNISIA

OPINION
ON THE DRAFT INSTITUTIONAL LAW ON THE ORGANISATION OF POLITICAL PARTIES AND THEIR FUNDING

Adopted by the Venice Commission
at its 116th Plenary Session (Venice, 19-20 October 2018)

on the basis of comments by

Mr Michael FRENDO (Member, Malta)
Ms Regina KIENER (Member, Switzerland)
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Ensuring Sustainable Democratic Governance and Human Rights in the Southern Mediterranean

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I. Introduction

1. By letter dated 18 June 2018, the Minister for Relations with Constitutional Bodies, Civil Society and Human Rights of Tunisia, Mr Mehdi Ben Gharbia, asked the Venice Commission to prepare an opinion on the draft institutional law on the organisation of political parties and their funding (CDL-REF(2018)035, hereafter: "the draft law"), which is due to replace Legislative Decree no. 2011-87 of 24 September 2011 on the organisation of political parties, which is currently in force (CDL-REF(2018)036).[1]

2. Mr M. Frendo, Ms R. Kiener and Mr J. Velaers were appointed as rapporteurs. On 13 and 14 September 2018, a delegation from the Commission, composed of Ms R. Kiener and Mr J. Velaers, accompanied by Mr M. Janssen from the Secretariat, held meetings in Tunis with representatives of the relevant authorities, several political parties (from the majority and the opposition) and international organisations.

3. This opinion was drawn up on the basis of the rapporteurs' contributions and the French translation of the draft law. Inaccuracies may therefore occur in this opinion as a result of translation errors.

4. This opinion was examined by the Sub-Commission on the Mediterranean Basin (Venice, 18 October 2018) and then adopted by the Venice Commission at its 116th plenary session (Venice, 19-20 October 2018).

II. International standards relating to political parties and their funding

5. International standards relating to political parties are found principally in Article 22 of the International Covenant on Civil and Political Rights (ICCPR)[2] and Article 11 of the European Convention on Human Rights (ECHR), which both protect the right to freedom of association. The right to freedom of opinion and expression enshrined in Article 10 of the ECHR and Article 19 of the ICCPR and the right to free elections guaranteed by Article 3 of the First Protocol to the ECHR and by Article 25 of the ICCPR are also of relevance. Similarly, the African Charter on Human and Peoples' Rights[3] (ACHPR) includes protection of freedom of association (Article 10) and freedom of opinion and expression (Article 9.2). Lastly, the transparency of political party funding (and campaign funding) is covered more specifically in Article 7, paragraph 3, of the United Nations Convention against Corruption.[4]

6. In addition, standards in this area can be found in the recommendations of the UN, the Council of Europe and the OSCE. These include: General Comment No. 25 of the UN Human Rights Committee on the right to participate in public affairs, voting rights and the right of equal access to public service; Council of Europe Committee of Ministers Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns (hereafter: "Rec(2003)4"); the Guidelines on Political Party Regulation (hereafter: "*the Guidelines*") and the Guidelines on Freedom of Association, both issued by the OSCE/ODIHR and the Venice Commission. This opinion also takes account of the following Venice Commission documents: Code of Good Practice in the field of Political Parties,[5] report on the method of nomination of candidates within political parties,[6] Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources,[7]

[1] Legislative Decree no. 2011-87 was assessed in an OSCE/ODIHR opinion of 21 December 2012.
[2] Tunisia ratified the ICCPR on 18 March 1969.
[3] Tunisia ratified the ACHPR on 16 March 1983.
[4] Tunisia ratified the United Nations Convention against Corruption on 23 September 2008.
[5] CDL-AD(2009)021.
[6] CDL-AD(2015)020.
[7] CDL-AD(2006)014.

Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues,[8] Guidelines and Report on the Financing of Political Parties,[9] Guidelines on prohibition and dissolution of political parties and analogous measures.[10]

7. While acknowledging that Tunisia is not legally bound by the Council of Europe's standards, in line with its established practice, the Venice Commission refers in this opinion to the above-mentioned standards, including the ECHR and the corresponding case law of the European Court of Human Rights. From the outset, it would point out that political parties are associations and, as such, they – and their members – enjoy freedom of association as defined by Article 11 of the ECHR[11] and by other international human rights treaties, in particular Article 22 of the ICCPR. In accordance with Article 11 of the ECHR and Article 22 of the ICCPR, freedom of association may only be restricted by law, for one of the listed purposes and to the extent "necessary in a democratic society". Pursuant to Principle 7 of the Guidelines on Freedom of Association, "associations shall have the freedom to seek, receive and use financial, material and human resources." However, this freedom is subject, *inter alia*, to requirements "concerning transparency and the funding of elections and political parties, to the extent that these requirements are themselves consistent with international human rights standards."

8. The importance of transparency in the funding of political parties and electoral campaigns is also stressed in Council of Europe Committee of Ministers Rec(2003)4 and other international standards,[12] as well as in previous opinions of the Venice Commission.[13] According to the *Guidelines*, "the regulation of political party funding is essential to guarantee parties independence from undue influence created by donors and to ensure the opportunity for all parties to compete in accordance with the principle of equal opportunity and to provide for transparency in political finance."[14] "Transparency in party and campaign finance (…) is important to protect the rights of voters as well as prevent corruption. Transparency is also important because the public has the right to receive relevant information and to be informed."[15]

III. National context

9. Following the suspension of the Constitution of 1 June 1959 by the legislative decree of 23 March 2011 on the provisional organisation of public authorities, the government dealt with day-to-day business by means of decrees. Institutional Law No. 88-32 of 3 May 1988 on the organisation of political parties and Law No. 97-48 of 21 July 1997 on the funding of political parties were repealed by Legislative Decree no. 2011-87 of 24 September 2011 on the organisation of political parties. This legislative decree guarantees the freedom to set up

[8] CDL-AD(2004)007rev.
[9] CDL-INF(2001)008.
[10] CDL-INF(2000)001.
[11] See European Court of Human Rights judgment in *United Communist Party of Turkey and Others v. Turkey*, application no. 19392/92, 30 January 1998.
[12] See, for example, Article 7, paragraph 3, of the United Nations Convention against Corruption; Recommendation 1516(2001) of the Parliamentary Assembly of the Council of Europe on financing of political parties; *Guidelines*, paragraph 23.
[13] See, for example, Kosovo – opinion on the draft law on amending and supplementing the Law no. 03/l-174 on the Financing of Political Entities (Amended and Supplemented by the Law no. 04/l-058 and the Law no. 04/l-122) and the Law no 003/l-073 on General Elections (Amended and Supplemented by the Law no. 03/l-256)", CDL-AD(2018)016, paragraphs 17 et seq.; Republic of Moldova – Joint Opinion on the legal framework of the Republic of Moldova governing the funding of political parties and electoral campaigns, CDL-AD(2017)027, paragraphs 19 et seq.; Joint Opinion on the draft amendments to some legislative acts concerning prevention of and fight against political corruption of Ukraine, CDL-AD(2015)025, paragraph 41; Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta, CDL-AD(2014)035, paragraphs 36 et seq.
[14] See paragraph 159 of the *Guidelines*.
[15] *Ibid.*, paragraph 194.

political parties, to join them and to conduct activities within them. Its purpose is to enshrine the freedom to organise politically, while supporting and promoting political pluralism and consolidating the principle of transparency in the management of political parties.

10. These principles were confirmed and fleshed out in the 2014 Constitution, Article 35 of which guarantees the freedom to establish political parties, trade unions and associations; "political parties, unions and associations must respect the provisions of the Constitution, the law, financial transparency and the rejection of violence." Article 65 of the Constitution provides that the organisation and funding of political parties shall be covered by institutional laws.

11. The draft law submitted to the Venice Commission for examination is intended to meet the requirements of Article 65 of the Constitution (passage of an institutional law) and ensure harmonisation with the provisions of the said Article 35. Among other things, it aims to increase transparency, in particular in the funding of political parties, including by setting up an online platform for managing political party registration files; it also provides for the introduction of annual public funding for political parties (in addition to public funding of campaigns, which has already been introduced by the 2014 Electoral Law as amended in 2017).

12. The government has stated that the draft law is based on the principles of accountability and responsibility, while preserving the liberal approach of Legislative Decree no. 2011-87 currently in force. This liberal approach has encouraged the establishment of a large number of political parties (at present there are over 200, of which 19 are currently represented in parliament). Some of them have criticised the draft law and fear that it may have a detrimental impact on small parties. The most controversial aspects include some provisions regarding the online platform (providing for the publication of a large amount of data) and public funding (which apparently would largely, but not solely, benefit the parties with seats in parliament). On the other hand, there would seem to be a broad consensus that the transparency of party funding currently leaves a lot to be desired, at least in practice, and needs to be improved.

13. In this context, reference should be made to the following findings in the "Assessment of the Tunisian legislative and institutional anti-corruption framework" drawn up in 2017 by Council of Europe experts: "While it was one of the main causes of the 2011 revolution, endemic corruption continues to be one of the fundamental problems that Tunisia has to tackle"; "the issue of the organisation, regulation, supervision and transparency of the funding of municipal elections and political parties has still not been resolved"; and "according to figures from a recent study, […] corruption is perceived to be most widespread in the following sectors: the customs service (63%), political parties (60%), […]".[16]

14. The representatives of the political parties (from the majority and the opposition) whom the rapporteurs met agreed that the relatively general provisions in Legislative Decree no. 2011-87 were inadequate and that the new points included in the draft law were a step in the right direction in overall terms. Like the authorities, they pointed out that the large number of small parties, most of which had been set up after the 2011 revolution, was not a problem in itself. It was nevertheless stressed that some parties had governance problems or barely existed at all; from this angle, more detailed rules on the organisation and transparency of parties were, to some extent, welcome.

[16] See paragraphs 9, 55 and 104 of the "Assessment of the Tunisian legislative and institutional anti-corruption framework" (French only), adopted on 31 January 2017 under the programme, "Towards strengthened democratic governance in the Southern Mediterranean" (SNAC II Tunisia).

15. The rapporteurs were told that the draft law had been drawn up by the Ministry for Relations with Constitutional Bodies, Civil Society and Human Rights of Tunisia (hereafter: "the Human Rights Ministry"), with the support of scientific advisers, and that political parties had been consulted several times during the process. The Venice Commission is pleased to note that the authors of the draft law expressed their willingness, during the meetings held in Tunis, to amend the draft in several respects and take account of the Commission's recommendations before continuing with the legislative process; for the time being, the draft law has not yet been tabled in parliament.

IV. Analysis and recommendations

16. First of all, the Venice Commission welcomes this initiative by the government of Tunisia, which responds directly to the requirements of Article 65 of the Constitution: legislation relating to the organisation and funding of political parties must take the form of institutional laws.

17. In terms of content, the draft law is based on Legislative Decree no. 2011-87, while amending some of its provisions and adding more comprehensive rules, among other things regarding transparency, financial supervision and penalties. It comprises 67 articles, whereas there were only 35 in the legislative decree. Although this analysis will not be confined to the new or amended provisions alone, it is possible that it may not cover all the aspects of the draft law; the Venice Commission wishes to underline that this will not prevent it from making further written or oral recommendations or comments on the matter in future. In addition, it should be noted that the draft law, like Legislative Decree no. 2011-87, only concerns the regular funding of political parties, not campaign funding. The latter is covered by Articles 75 et seq. of the Electoral Law[17] and will not be examined in this opinion.

A. Chapter I: General principles

18. Article 1 of the draft law "guarantees the freedom to establish political parties within a civil and democratic state". This wording echoes Article 35, paragraph 1, of the Constitution. Nevertheless, *it would be preferable to retain the wording used in Article 1 of Legislative Decree no. 2011-87, which refers more broadly to the "freedom to set up political parties, to join them and to conduct activities within them."* In this context, the Venice Commission would draw attention to the case law of the European Court of Human Rights that freedom of association within the meaning of Article 11 of the ECHR goes beyond the protection afforded for the establishment of an association and "lasts for an association's entire life".[18] Among other things, this includes protection of opinions and freedom to express them, which "is one of the objectives of the freedoms of assembly and association as enshrined in Article 11".[19] Attention should also be drawn to the comments which the Venice Commission made previously about Article 35 of the Constitution, stressing the need to "*include the principle of proportionality and necessity in a democratic society and the need to comply with international standards with regard to the permitted restrictions.*"[20] *These comments, which are based directly on Article 11, paragraph 2 of the ECHR,*[21] *are also relevant to Article 1 of the draft law.*

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[17] Institutional Law No. 2014-16 of 26 May 2014 on elections and referendums, as amended and supplemented by Institutional Law No. 2017-7 of 14 February 2017 (hereafter: "the Electoral Law").
[18] See European Court of Human Rights judgment in *United Communist Party of Turkey and Others v. Turkey*, application no. 19392/92, 30 January 1998 (paragraph 33).
[19] *Ibid*, paragraph 42, with other references; "Article 11 must also be considered in the light of Article 10."
[20] See the opinion on the final draft constitution of the Republic of Tunisia, CDL-AD(2013)032 (paragraph 68); these comments concerned Article 34 of the draft constitution, which became Article 35 of the Constitution as adopted.
[21] See also, e.g. *Guidelines*, paragraphs 14 et seq. and 49 et seq.

19. Whereas Article 2 of Legislative Decree no. 2011-87 sets out only one definition, i.e. of political parties, Article 2 of the draft law also clarifies a number of other key terms. This is to be welcomed and does not call for any particular comments,[22] other than the fact that *it would be better for the definition of private funding to be worded more precisely: the reference to "resources" is not really helpful here and could be added to along the lines of the definition of foreign funding (which includes "donations, gifts or payments in cash, in kind, in the form of advertising or in artistic form") or of Article 35, which refers to "aid, donations, bequests and legacies in kind and to voluntary services". These various provisions should be harmonised. It is also recommended reviewing the usefulness of the definition of the term "self-funding", which it would seem is not used anywhere else in the text.* The definition of a political party has been altered only slightly; even though no universal definition exists here, it is to be welcomed that the one used in the draft law is close to that in, for example, the *Guidelines.*[23]

20. Under Article 3 of the draft law, the right to take part in setting up political parties and to become members of them is guaranteed for Tunisian citizens alone. This restriction was already inherent in the definition of political party in Legislative Decree no. 2011-87 and is also to be found in Articles 10 and 21 of the draft law on the establishment of political parties and membership of them. As it has already indicated in this connection,[24] the Venice Commission believes in principle that "general exclusion of foreign citizens and stateless persons from membership in political parties is not justified"; it has also stated that "at the very least, the country of residence should make membership in political parties possible" for persons who can take part in elections; however, in Tunisia, only Tunisian citizens are allowed to vote (see Article 5 of the Electoral Law). With all due respect for Tunisia's legitimate choice here, consideration could nevertheless be given to rethinking this approach in future, "as non-citizens may have an interest in participating in the political life of a country, especially if they have lived there for some time".[25]

21. Public funding for political parties was already provided for in Article 21 of Legislative Decree no. 2011-87, but has not been put into practice to date (apart from public funding of election campaigns as provided for in Articles 78 et seq. of the Electoral Law). Seen from this angle, it is good that the draft law establishes it as a general principle (in Article 5) and introduces more detailed provisions (in Articles 37 et seq.), given that international standards clearly advocate (some) public support for political parties[26] – while stressing that "legislation should attempt to create a balance between public and private contributions as the source for political party funding",[27] and the relevant country's budgetary situation also has to be taken into account.

22. Article 35 of the Constitution provides that "in their internal charters and activities, political parties, unions and associations must respect the provisions of the Constitution, the law, financial transparency and the rejection of violence". These principles are reiterated and expanded upon in Articles 6 and 7 of the draft law, which are the same as Articles 3 and 4 of Legislative Decree no. 2011-87, with a few exceptions. The fact that the new provisions more broadly prohibit recourse to "any form of discrimination" and threats to the republican and democratic system of the state is to be welcomed. owever, the term "fanaticism" in this

[22] For the term "foreign funding", see, however, D below.
[23] See paragraph 9 of the *Guidelines*: "For the purposes of these Guidelines, a political party is 'a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections.'" See also paragraphs 26 et seq.
[24] See the Guidelines and Explanatory Report on Legislation on Political Parties: some specific issues, CDL-AD(2004)007rev, Guideline H.
[25] See opinion CDL-AD(2016)038, paragraph 18.
[26] See, for example, Article 1 of Rec(2003)4 and *Guidelines*, paragraphs 176 et seq.; see also, for example, Venice Commission opinion CDL-AD(2015)025, paragraph 22. For further details, see D below.
[27] See *Guidelines*, paragraph 176.

same context lacks clarity and lends itself to subjective interpretations.[28] In this connection, it should be noted that Article 22 of the ICCPR and Article 11 of the ECHR require any restriction of freedom of association to be "prescribed by law", which means that legislation should avoid the use of imprecise or vague terms.[29] Any restrictions must be designed so that they cannot be applied in an arbitrary or unwarranted manner; the relevant legislation must be accessible and sufficiently clear to allow individuals and associations to ensure that their activities comply with the restrictions. *It is recommended that the term "fanaticism" as used in Article 7 of the draft law be clarified so as to make it legally applicable and comprehensible for individuals and political parties or, if that is impossible, that the reference to the term be deleted.*

23. Article 9 of the draft law provides for the establishment of an online platform for managing political party registration files. As indicated above, the principle of transparency is enshrined in the international standards concerning political parties and their funding. The *Guidelines* state that "political parties may obtain certain legal privileges, […], that are not available to other associations" and that, "as a result of having privileges", political parties are subject to certain obligations in terms of transparency.[30] From this point of view, the establishment of an online platform is to be welcomed as such, provided that the rights of parties and their members are respected. The actual idea of a tool of this kind seems to respond to the recommendation by Council of Europe experts[31] that a department be designated to take charge of the centralised publication of the directory of political parties and all documents, reports and statistics relating to financial transparency in politics; the details will be examined below.

B. Chapter II: Establishment and membership of political parties

24. Under Articles 11 et seq. of the draft law, a political party must be registered on the new online platform in order to be regarded as lawfully established. To that end, the founders must register information concerning their identities and the party, including the party statutes.[32] The main changes compared to the provisions of Legislative Decree no. 2011-87 are the publication of the information on the online platform and more precise requirements relating to the content of political party statutes; for example, responsibility for deciding whether the party registration files comply with the law is transferred from the Prime Minister to the "administration", i.e. the ministry responsible for political parties. Neither Legislative Decree no. 2011-87 nor the draft law lays down substantive requirements for the establishment of a political party, such as a minimum level of support or geographical distribution of its members.

25. In this connection, the *Guidelines* stress that the European Court of Human Rights "has consistently ruled that requirements for registration do not, in themselves, represent a violation of the right to free association. As political parties may obtain certain legal

[28] The authorities indicated that in the original (Arabic) version of the draft law, the term referred more to "extremism" within the meaning of the anti-terror legislation. However, this interpretation was not confirmed by some other people the rapporteurs met, who said that the term was correctly translated with "fanaticism" and was not included or defined in other laws.

[29] See, for example, European Court of Human Rights judgment in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan,* application no. 37083/03, 8 October 2009, paragraphs 56 and 57. See also Guidelines on Freedom of Association, paragraph 109.

[30] See *Guidelines*, paragraph 23.

[31] See paragraph 748 of the above-mentioned Assessment of the Tunisian legislative and institutional anti-corruption framework (French only).

[32] In the case of political parties already lawfully established, the transitional provisions of Article 65 provide that they "are required to register on the online platform within one year of the entry into force of this law"; in the event of failure to comply, the authority will send a reminder to the headquarters of the party concerned and, 90 days thereafter, if the party has still failed to comply with the registration requirement, it will be dissolved by judgment of the Tunis Court of First Instance on application by the authority.

privileges, based on their legal status, that are not available to other associations, it is reasonable to require the registration of political parties with a state authority. While registration as a political party is required, substantive registration requirements and procedural steps for registration should be reasonable."[33] The Venice Commission has also stated that "any requirements in relation to registration, however, must be such as are 'necessary in a democratic society' and proportionate to the objective sought to be achieved."[34] According to the *Guidelines*, "some states require political parties to publicly file a party constitution upon registration. While such a requirement is not inherently illegitimate, states must ensure that this requirement is not used to unfairly disadvantage or discriminate against any political party. Such a requirement cannot be used to discriminate against the formation of parties which espouse unpopular ideas".[35] Lastly, "it is a legitimate requirement that political parties provide basic information with their application for registration defining their organisational structure. This is necessary given the need for responsible persons to be identified within the party for the receipt of communications from the state and for the operational oversight of certain activities such as elections."[36]

26. The compulsory registration of political parties as provided for in the draft law, which includes information concerning the parties and their founders, as well as the party statutes, is therefore in principle consistent with international standards. The fact that the official registration of a party may be refused if the file does not comply with the provisions of Articles 6 and 7 of the draft law (respect for democracy and human rights, rejection of violence, etc.) or with the requirements relating to registration (after providing an opportunity to remedy any shortcomings) may be regarded as "necessary in a democratic society" and does not violate freedom of association, provided that the arrangements are implemented properly and are not used to the detriment of a particular party or for discriminatory purposes. The provisions of Article 17 of the draft law, according to which a decision to refuse official registration of a political party may be challenged in the administrative courts and may not prevent the founders from starting the process again are of great importance in this context.

27. Nevertheless, the registration procedure does raise some questions in terms of timeframes. In this connection the *Guidelines* provide that "deadlines for deciding registration applications should be reasonably short to ensure realisation of the right of individuals to associate. Expeditious decisions on registration applications are particularly important for new parties seeking to present candidates in elections. Deadlines which are overly long constitute unreasonable barriers to party registration and participation",[37] in particular in the context of elections. However, Articles 14 et seq. of the draft law provide that the relevant ministry has 60 days to take a decision on the compliance of party registration files with the legal requirements; and in the event of non-compliance, it must make a fresh decision within 30 days of expiry of the deadline for the remedying of shortcomings by the founders (the latter deadline being 90 days). These various deadlines are quite long and it is not clear why the second decision by the ministry (where applicable) must be taken within 30 days of expiry of the 90-day deadline rather than of actual rectification of the file by the founders. Moreover, it is worrying that Article 17 of the draft law does not lay down any specific deadlines for the administrative courts to process appeals against refusals to register parties

[33] See *Guidelines*, paragraphs 65 et seq.
[34] See CDL-AD(2004)007rev, Guideline B.
[35] See *Guidelines*, paragraph 72, which refers to the judgment by the European Court of Human Rights in *Refah Partisi (The Welfare Party) and Others v. Turkey*, applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.
[36] *Ibid*, paragraph 73.
[37] See *Guidelines*, paragraph 69.

(unlike, for example, the legal provisions governing electoral disputes).[38] It was brought to the rapporteurs' attention that such proceedings may, in practice, take many years, which is unsatisfactory in this area. *It is recommended that Articles 16 and 17 of the draft law be amended accordingly and shorter deadlines be introduced for taking decisions on registration applications and ruling on appeals against refusal of registration so that expeditious decisions are ensured.*

28. Lastly, with regard to the publication on the online platform of the above-mentioned information, the opponents of the new tool raise concerns about data protection, whereas the draft law's authors state that personal data will not be disclosed. In this connection, it should be stressed again that the principle of transparency is enshrined in the international standards relating to political parties.[39] For example, the Code of Good Practice in the Field of Political Parties provides that "parties should make public their statutes and their programme".[40] Given that the draft law makes no provision for the publication of personal data such as party founders' addresses or financial circumstances, the Venice Commission considers that the mechanism complies with international standards, including Article 8 of the ECHR, which protects the right to respect for the private and family life, home and correspondence of the individual.

29. The absolute ban on belonging to more than one party at the same time, which is provided for in Article 22 of the draft law and was already in Article 7 of Legislative Decree no. 2011-87, seems too strict. In this connection, the *Guidelines* point out that "free association is a fundamental right which should not be limited by requirements to only associate with a single organisation" and that laws which limit party membership to a single party "must show compelling reasons for doing so".[41] However, no such compelling reasons have been given by the authors of the draft law; during the talks in Tunis, they merely indicated that a restriction of this kind would be conducive to greater clarity in the current situation in the country, which was marked by a large number of parties and frequent changes in the political landscape (for example, through party mergers). As it has already stated in this connection,[42] the Venice Commission believes that membership of more than one party "should not be specifically prohibited in law, but rather be left to the individual parties, which should decide whether they see membership in their party as exclusive.The respective provision could, however, require instead that a person cannot be a founding member of more than one political party (as long as both parties are registered and functioning)." *It is recommended that Article 22 of the draft law be amended accordingly.*

30. The ban on judges and certain members of the executive (e.g. governors, armed forces personnel and internal security forces personnel) belonging to a political party, as provided for in Article 23 of the draft law and already in Article 7 of Legislative Decree no. 2011-87, seems acceptable in the light of international standards: in particular, here, Article 11, paragraph 2, of the ECHR allows states to impose lawful restrictions on the freedom of association of members of the armed forces, of the police or of the administration of the state. The European Court of Human Rights has acknowledged that that can justify restrictions on political activities – including membership of a party – by these categories of persons with a view to ensuring their impartiality and the proper and non-partisan exercise of their duties, provided that this interference with the exercise of the right protected under Article 11 (and Article 10) of the ECHR is proportionate to the aim set out (and does not

[38] See Articles 145 et seq. of the Electoral Law. Nevertheless, the very short deadlines laid down in these provisions are justified by the particular urgency of elections, which does not apply in the same way in the case of the registration of political parties.
[39] See *Guidelines*, paragraph 23.
[40] CDL-AD(2009)021, paragraph 28.
[41] See *Guidelines*, paragraph 119.
[42] See opinion CDL-AD(2016)038, paragraph 21.

apply, for example, in absolute terms to all persons in government service).[43] *It could nevertheless be indicated more clearly in Article 23 of the draft law that the ban on membership of political parties applies to the categories of persons listed in the provision solely during the period when they exercise the relevant public duties (and, if appropriate, for a clearly specified, limited period after they cease exercising those duties).*

31. However, it is more problematic that Article 10 of the draft law introduces a ban on individuals who hold responsibilities in the central governing bodies of associations, including those governed by Tunisian law, founding or leading political parties. Here again the question arises as to whether fresh restrictions of this kind on freedom of association can be regarded as necessary in a democratic society. In this connection, many people whom the rapporteurs spoke to said that such a separation of associations from political parties was necessary in a young democracy like Tunisia, where the conflation of the two areas had taken on worrying forms in the past.[44] The authorities added that the legislation on associations already included a rule of this kind and that the draft law was therefore intended to harmonise the legislation. In the current circumstances in Tunisia, *the Venice Commission accepts these arguments, but it urges the authorities to keep the issue on the agenda and reconsider it in future.*

C. Chapter III: Management of political parties

32. The new Chapter III (Articles 24 et seq. of the draft law) concerns political parties' internal regulations. *First of all, it would be desirable for it clearly to set out the principle of parties' freedom to determine their internal structures, subject to certain limits laid down by law.* The Venice Commission refers here to the recommendation made in A above that the law should guarantee not only the freedom to set up political parties but also the freedom to conduct activities within them, and also to its previous comments about the autonomy of parties' internal and external functioning in modern democracies.[45]

33. Secondly, it should be noted that the new provisions establish the principle of the internal democracy of parties, which is to be welcomed: while recognising the different approaches taken by states to the regulation of political parties, the Venice Commission has had occasion to indicate that parties should "respect democratic requirements" within their internal organisation.[46] At the same time, regulation of internal party functions "must be narrowly constructed as to not unduly interfere with the right of parties as free associations".[47] For example, according to the case-law of the European Court of Human Rights, "while the State may introduce certain minimum requirements as to the role and structure of associations' governing bodies, the authorities should not intervene in the internal organisational functioning of associations to such a far-reaching extent as to ensure observance by an association of every single formality provided by its own charter" or lay down the manner in which its conferences are organised.[48] The Venice Commission

[43] See, for example, European Court of Human Rights judgment in *Vogt v. Germany*, application no. 17851/91, 26 September 1995; and the judgment in *Ahmed and Others v. United Kingdom,* application no. 22954/93, 2 September 1998. See also *Guidelines*, paragraphs 117 et seq., and the Code of Good Practice in the Field of Political Parties, CDL-AD(2009)021, paragraph 109.

[44] For example, the authorities referred to cases of political parties being funded by associations or situations where party leaders also held management positions in football clubs and were therefore able to influence fans' political choices easily.

[45] See, for example, *Guidelines*, paragraph 62; report on the method of nomination of candidates within political parties, CDL-AD(2015)020, paragraph 5; and opinion CDL-AD(2016)038, paragraph 19.

[46] See, for example, CDL-AD(2015)020, paragraph 5. See also the Code of Good Practice in the Field of Political Parties, CDL-AD(2009)021 (paragraph 17), which describes the fact that several countries require parties' internal structure and operation to be democratic as a "positive experience".

[47] See *Guidelines*, paragraph 97.

[48] See, for example, European Court of Human Rights judgment in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, application no. 37083/03, 8 October 2009; and the judgment in *Yabloko Russian United Democratic Party and Others v. Russia*, application no. 18860/07, 8 November 2016.

considers that Articles 24 et seq. of the draft law are confined to certain basic requirements (e.g., being headed by structures elected freely and democratically by their members and holding their regular conferences within the timeframes laid down in their statutes) and do not place excessive restrictions on the freedom of political parties.

34. It will also be noted that Article 25 of the draft law encourages political parties to respect gender parity and ensure participation by young people and people with disabilities; the Venice Commission has recommended corresponding measures in several opinions.[49] *Nevertheless, it would be preferable to indicate in the article that it does not include a general, non-temporary requirement for absolute gender equality in all party structures.* It is doubtful whether such a requirement would be proportionate to the legitimate aim pursued; reference may be made here to international standards according to which "temporary special measures" aimed at promoting de facto equality for women and minorities may be enacted.[50] During the talks in Tunis, the authorities told the rapporteurs that Article 25 of the draft law was intended to encourage parties to aim for gender parity within their structures and did not lay down a requirement to achieve that result. Nevertheless, the current wording of the provision may give rise to confusion and ought to be altered.

D. Chapter IV: The funding and oversight of political parties

1. Section 1: The funding of political parties

35. The operative part of the draft law on the financing of political parties (Articles 32 et seq.) largely corresponds to Articles 17 et seq. of Legislative Decree no. 2011-87, currently in force, with some amendments and additions. On the whole, this legal framework can be considered adequate: it contains provisions on admissible and prohibited sources of financing, the capping of donations,[51] the allocation of public appropriations and the publication of financial information.

36. It is commendable that the rules on private contributions, relating to certain prohibitions and ceilings, should apply to all aid, gifts, donations, bequests in kind and to voluntary services,[52] which is in line with international standards: for example, Article 2 of Rec(2003)4[53] states that the definition of donation should include "any deliberate act to bestow advantage, economic or otherwise, on a political party". It is also to be welcomed that any political party is required to have a single bank or postal account to carry out all its financial transactions, and that all its financial transactions of a value greater than TND 500 (approximately €165) shall be made by bank transfer or by bank or post office cheque.[54] Finally, the draft law[55] provides for limits on donations to parties, which is encouraged by international standards,[56] and also for membership fees and party borrowing from banks and financial institutions, which may prevent the circumvention of the limits on donations, in line with international recommendations.[57] The fact that the reform increases the various ceilings (e.g. TND 100 000 – approximately €33 000 instead of TND 60 000 - approximately €19 800 for annual contributions from an individual) does not call for any special observations; in this context, the effects of inflation since 2011 must be taken into account, in addition to the fact

[49] See, for example, opinion CDL-AD(2016)038, paragraph 38; and opinion CDL-AD(2014)035, paragraph 60.
[50] See, for example, *Guidelines*, paragraph 19.
[51] €2 000 for natural persons and €10 000 for legal persons per calendar year.
[52] See Article 35 of the draft law; see also Article 20 of Legislative Decree no. 2011-87.
[53] Recommendation Rec(2003)4 of the Committee of Ministers of the Council of Europe on common rules against corruption in the funding of political parties and electoral campaigns.
[54] See Article 39 of the draft law; see also Article 22 of Legislative Decree no. 2011-87.
[55] See Articles 32 et seq. of the draft law; see also Articles 17 and 19 of Legislative Decree no. 2011-87.
[56] See, for example, Article 3b.ii. of Rec(2003)4 and paragraphs 170 and 175 of the *Guidelines*.
[57] See, for example, Article 3b.iii. of Rec(2003)4 and paragraph 163 of the *Guidelines*.

that contributions to political parties by legal persons are prohibited, which reduces the risk of over-dependence on particular interest groups.

37. It is striking that donations (by individuals) do not appear in the political party's list of resources as provided for in Article 32 of the draft law, unlike the list included in Article 17 of Legislative Decree no. 2011-87, whereas other provisions of the draft law indicate that such donations are to be permitted within certain limits.[58] *For the sake of clarity and consistency, it is advisable to include contributions by individuals in Article 32 of the draft law as well.*

38. Article 32 of the draft law states that "finance laws shall determine the tax benefits granted to political parties." *It would be preferable to clearly identify these tax benefits in the draft law itself.*

39. Article 33 of the draft law prohibits, as does Article 19 of Legislative Decree no. 2011-87, foreign funding, anonymous funding ("direct or indirect funding whose source cannot be proven") and contributions by legal persons. This seems acceptable in principle, but these rules need to be examined more closely.

40. First of all, with regard to foreign funding, its prohibition is, in principle, in line with international standards such as Article 7 of Rec(2003)4, which provides that "states should specifically limit, prohibit or otherwise regulate donations from foreign donors". International standards tend to be restrictive with regard to the funding of political parties and election campaigns from abroad, in order to avoid any undue influence of foreign interests in domestic political affairs.[59] As it has already indicated in this respect,[60] the Venice Commission considers that, in accordance with international standards, donations from foreign states or companies may be prohibited – and this also applies to donations from foreign individuals, but this prohibition should not prevent the payment of donations by nationals of the state concerned living abroad. The authorities have indicated that the prohibition in Article 33 of the draft law[61] was not intended to prevent such contributions.

41. With regard to the prohibition of funding whose source cannot be proven, the Venice Commission has previously stated that while such a prohibition is not in itself contrary to international standards, allowing anonymous donations up to a certain threshold - e. g. the threshold for cash donations - "would seem logical".[62] In Tunisia's case, the strict prohibition of anonymous donations, combined with the obligation to publish the identity of all donors (see Article 36 of the draft law), might seem excessive in view of international standards such as Article 12b of Rec(2003)4: this article recommends the identification of the donor in the event of "donations over a certain value".[63] And the *Guidelines* state that "while transparency may be increased by requirements to report the identity of donors, legislation should balance such a requirement with considerations of privacy and protection from intimidation." In another opinion, *the Venice Commission consequently recommended* rather than authorising anonymous donations *but making provision in the case of clearly defined small donations for the identity of donors not to be disclosed to the public, but only to the supervisory body.*[64] *Such a solution would be welcome here too, for example for donations that can be made in cash.*[65]

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[58] See Article 33 of the draft law.
[59] See, for example, Article 7 of the aforementioned Rec(2003)4; see also paragraph 172 of the *Guidelines*, which also emphasises the fact that "this is an area that should be regulated carefully".
[60] See the Code of Good Practice in the field of political parties, CDL-AD(2009)021, paragraph 160; see also the Guidelines and report on the financing of political parties (CDL-INF(2001)008), paragraphs 6 and 10.
[61] The term "foreign funding" is defined in Article 2 of the draft law as funding "whose origin is regarded as foreign under tax legislation, regardless of the nationality of the person providing the funding."
[62] See the opinion CDL-AD(2016)038, paragraph 45.
[63] See *Guidelines*, paragraph 202.
[64] See the opinion CDL-AD(2017)027, paragraph 49.
[65] In other words for donations not exceeding TND 500 (approximately €165).

42. Lastly, as regards the prohibition of donations from legal persons, the Venice Commission has acknowledged that "the banning of corporate donations exists in a number of models"; when such a model is "combined with significant state financing of political parties, [it] aims to decrease the pressure exerted by big business on the political process. It is a legitimate choice for a country to make. *However, it should be borne in mind that corporate bans may be circumvented in a number of ways, through channelling of corporate money through individual donations"*[66] *or by loans that are granted at advantageous conditions or written off by the creditor. Ideally, therefore, Article 33 (third indent) of the draft law should be worded more precisely to avoid any such possible manipulations.*

43. Article 34 of the draft law, as does Article 18 of Legislative Decree no. 2011-87, stipulates that political parties are prohibited from granting any benefits in cash or in kind to citizens. On the one hand, given Tunisia's socio-economic situation, this rule is commendable insofar as it can prevent abuses of the system, particularly economic pressure by parties on voters. On the other hand, such a general prohibition, which seems to imply in particular that parties cannot financially support charities, scientific research etc., represents an interference with freedom of association that is difficult to justify. *Article 34 should be reworded to exclude such support from the prohibition of financing by parties. In addition, consideration could be given to extending the prohibition in Article 34 to legal persons, in order to prevent circumvention of the rule via companies or associations.*

44. As already stated in Part A above, public funding of political parties is already provided for in Article 21 of Legislative Decree no. 2011-87, but has not yet been applied in practice (apart from public funding of electoral campaigns as provided for in the Electoral Law). Articles 37 et seq. of the draft law introduce more detailed provisions that will enable the payment of annual allowances to parliamentary parties, and also to parties not represented in parliament, provided that the latter have run in at least five constituencies and have obtained a number of votes at national level.[67]

45. In this respect, it should be recalled that international standards clearly advocate (partial) public support for political parties,[68] including parties not represented in parliament, "as a potential means of preventing corruption, to support the important role played by political parties and to remove undue reliance on private donors", provided that the legislature seeks to create "a balance between public and private contributions as the source for political party funding".[69]

46. As regards the allocation of public funding, the *Guidelines* describe several possible approaches, emphasising the fact that "there is no universally prescribed system" in this field.[70] The apportionment of public funds to parliamentary parties as provided for in Article 37 of the draft law seems to be appropriate: a fixed amount of around TND 50 000 (approximately €16 500) is granted to each party represented in parliament, to which is added a variable component of around TND 10 000 (approximately €3 300) per member of parliament. *However, the rule that for parties not represented in parliament, "the method of calculating the allowance and the number of votes to be obtained for the said allowance to be paid shall be determined by government decree promulgated following each*

[66] See the joint opinion on the draft law on amendments and additions to the organic law of Georgia on political unions of citizens, CDL-AD(2011)044rev, paragraph 13.
[67] It should be noted that, under Article 66, "the provisions relating to the granting of public funding to political parties shall enter into force with effect from the parliamentary elections following the promulgation of this Law"; the next parliamentary elections are scheduled for the end of 2019.
[68] See, for example, Article 1 of Rec(2003)4 and *Guidelines*, paragraphs 176 et seq.; see also, the opinion of the Venice Commission CDL-AD(2015)025, paragraph 22.
[69] See *Guidelines*, paragraph 176.
[70] See *Guidelines*, paragraph 185.

parliamentary election", is not particularly convincing; these matters must be addressed in the law itself.[71] *In addition, consideration could be given to providing for the allocation of public funds also for parties represented on a number of municipal councils.*

47. Lastly, in this same context, it should be noted that if the draft law is passed, there will be two public political funding systems, one governing the financing of election campaigns and the other concerning the regular funding of political parties, as described above. In such situations, the Venice Commission and the OSCE/ODIHR have taken the position that the relevant legislation "should include clear and precise guidelines for the appropriate use and allocation of funds for these different reasons" and that "guidance should also be given with regard to how to classify expenses which are necessary for a campaign but still required outside of electoral periods".[72] *It is therefore recommended that provision be made for such legislative amendments (e.g. in the Electoral Law).*

48. The draft law strengthens the obligations to publish financial information. While Article 26 of Legislative Decree no. 2011-87 already requires political parties to publish their financial statements together with the auditor's report in a daily newspaper and on the party's website "if one exists" within one month of their approval, Article 47 of the draft law goes further by requiring all parties to publish these documents on the online platform within a specified deadline, i.e. by 30 June the following year at the latest. The Venice Commission considers that these amendments constitute a step forward, provided that the parties fulfil their obligations in practice; it would appear that so far only a small minority of the parties have presented and published their financial reports. The Code of Good Practice in the field of Political Parties states in this regard that "publishing financial reports improves transparency and public confidence in political parties".[73] *Nonetheless, it would be preferable to further specify in the law that financial reports and information should remain accessible on the platform for an extended and clearly defined period of time, in line with the Venice Commission's previous recommendations*.[74]

49. A further innovation in this regard is to be found in Article 36 of the draft law, which requires political parties to publish all donations and other receipts from private sources on the online platform within one month of their receipt, indicating their values, the identity of the donors and the date on which they were received. The Venice Commission considers that this is, in principle, a step in the right direction: regular disclosure of financial information will make it possible to carry out continuous monitoring, over and above the post-event spot checks of the parties' financial statements, which have so far proved insufficient.[75] *Nevertheless, it is worth repeating the recommendation made above to make this publication system more flexible for small donations, in view of the relevant international standards.*[76]

2. Section 2: Oversight of political parties

50. This section covers the provisions on political party accounting, the annual financial audit and external oversight by the administration, see Articles 39 to 48 of the draft law. Some of these provisions are already found in different chapters of Legislative Decree no. 2011-87, and several positive aspects have already been mentioned above, such as the obligation for each party to maintain a single bank or postal account for all its financial transactions, which must be made by bank transfer or bank or postal cheque whenever their

[71] See paragraphs 188 et seq. of the *Guidelines*.
[72] See *Guidelines*, paragraph 162.
[73] CDL-AD(2009)021, paragraph 28.
[74] See, for example, opinions CDL-AD(2018)016, paragraph 37; CDL-AD(2017)027, paragraph 61; CDL-AD(2015)025, paragraph 60; and CDL-AD(2014)035, paragraph 38.
[75] For further details, see below, under Part D 2.
[76] See Article 12b of Rec(2003)4 which recommends that donors be identified in the event of "donations over a certain value"; see also *Guidelines*, paragraph 202.

value exceeds TND 500 (approximately €165); and the obligation to publish the various financial reports on the online platform. It should also be noted that each party must appoint a single financial officer to draw up its financial statements and one or two auditors[77] to carry out the annual audit.

51. Compared with the current system, the provisions of the draft law contain some commendable clarifications and additions, including the obligation for political parties to publish the appointment of auditors and their audit reports; the time limitation on the term of office of the auditors (three-year term, renewable once) and the rule that they must not be members of the party in question, in compliance with the recommendations previously made by Council of Europe experts;[78] and the obligation for the auditors to notify the relevant persons in the party - and, where appropriate, the public prosecutor - of any irregularities.

52. In contrast, the Venice Commission notes that another recommendation made by the aforementioned Council of Europe experts has not been implemented, namely to "clarify the extent to which the direct or peripheral economic activities of political parties are taken into account, first by drawing up rules on the scope of the accounts (in particular as regards local party representations where they exist in municipalities for example) and second by introducing more precise transparency rules with regard to the financing of associations[79] and press and communication organs (...).[80] It should be noted in this respect that Rec(2003)4 also advocates taking into account "all entities which are related, directly or indirectly, to a political party or are otherwise under the control of a political party", in the rules on donations, including accounting and transparency rules.[81] *It is therefore recommended that the draft law clarify that the direct or peripheral economic activities of political parties should be taken into account in their accounting and that the reporting scope should be specified, in particular with regard to local representations of a party and entities linked to a party or under the control of a party.*

53. With regard to the external oversight of the funding of political parties, the draft law says very little: Article 48 stipulates that "the administration" (according to Article 2, the ministry with responsibility for political party affairs, i.e. the Human Rights Ministry) may request information and clarification from the parties; moreover, it appears from Articles 62 et seq. that the administration is also competent for prosecuting cases of violations of rules and imposing penalties in the form of withholding public funding. It would therefore appear that the draft law gives a key role to the Human Rights Ministry. This poses problems in the light of international standards which require that the oversight of political parties in general and their funding in particular be carried out by a non-partisan body that satisfies the criteria of independence and impartiality.[82] This principle has been stressed many times by the Venice Commission.[83] Although it has acknowledged that it is in principle up to states to decide to which body they wish to entrust this task, the Commission has recommended that an independent and impartial body be given the task of monitoring the funding of parties and electoral campaigns, for example if the Minister of Justice were to play a key role in this field "because he is part of the executive, and has been appointed for political reasons".[84]

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[77] Where the party's annual resources are in excess of TND 1 000 000 (approximately €330 000).
[78] See the Assessment of the Tunisian legislative and institutional anti-corruption framework, paragraph 733 (available in French only).
[79] See also the comments in part B above on the problematic links between the voluntary sector and political parties.
[80] See the Assessment of the Tunisian legislative and institutional anti-corruption framework, paragraph 713 (available in French only).
[81] See Article 6 of Rec(2003)4.
[82] See, for example, Article 14 of Rec(2003)4 and paragraphs 212 and 218 et seq. of the *Guidelines*.
[83] See, for example, opinions CDL-AD(2018)016, paragraph 27; CDL-AD(2016)038, paragraph 46; CDL-AD(2015)025, paragraphs 36 et seq.; and CDL-AD(2014)035, paragraph 39.
[84] See CDL-AD(2014)035, paragraphs 9 and 39 et seq.

54. Another problem is that the exact powers and responsibilities of the Human Rights Ministry and other bodies remain unclear. The above-mentioned provisions of the draft law do not clearly indicate whether the Ministry is entrusted with a real function of supervision and financial monitoring of political parties or at least a co-ordination role with other competent authorities. During the interviews in Tunis, the authors of the draft law explained, first, that they had expressly removed from the draft law the provisions on the financial monitoring mechanism (which in its current form has not proved its worth) and that the emphasis had been placed more on transparency rules; and second, that the Court of Auditors, because of its general jurisdiction, could always investigate cases in the event that irregularities in the accounts of political parties were suspected.

55. It should be noted in this respect that currently the Court of Auditors is competent to exercise supervision over the financing of electoral campaigns[85] and also over the funding of political parties.[86] This latter competence is stipulated in the Law on the Court of Auditors; in addition, Article 27 of Legislative Decree no. 2011-87 specifies that parties must submit an annual report to the Court of Auditors. While the latter provision is no longer in the draft law, it was indicated to the rapporteurs that a new law on the Court of Auditors is being drafted which will once again determine the general jurisdiction of the Court of Auditors. It would therefore seem that on this legal basis, the Court of Auditors will continue to have jurisdiction to audit the parties' financial statements*, but it is strongly recommended that this be clearly expressed in the draft law as well and that the division of tasks between the Court of Auditors and the Human Rights Ministry and their mode of co-operation and co-ordination be precisely defined.*

56. The current situation is further complicated by the provisions of Article 26 of Legislative Decree no. 2011-87, pursuant to which political parties must also submit the audit report to the Prime Minister and to a committee chaired by the first president of the administrative court; this committee then approves or rejects the parties' financial statements. It is to be welcomed that this mechanism is no longer included in the draft law: as previously stated by Council of Europe experts,[87] supervision "is still lacking", the remit of the various bodies "should be better defined", and "the existence of two overlapping supervisory bodies is no guarantee of efficiency", the supervisory committee has "apparently" not yet been operational and the Court of Auditors' initiative "to fulfil this role nevertheless appears limited".

57. The information obtained by the rapporteurs seems to indicate clearly that these observations remain relevant. The special committee chaired by the first president of the administrative tribunal has apparently never been operational or even existed; and the Court of Auditors has so far focused on examining the financing of electoral campaigns. Its work in this area was praised by the various people with whom the rapporteurs spoke, but the representatives of the Court of Auditors pointed out that they lacked the resources and legal skills to carry out proper investigations and to extend their monitoring to regular party funding. For these reasons, they would be in favour of setting up a new independent body to monitor political funding. However, it would appear that this proposal has not been supported by decision-makers, and the authorities have indicated to the rapporteurs that the setting-up of a new body was not currently being considered.

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[85] See Articles 89 et seq. of the Electoral Law.

[86] Law No. 68-8 of 8 March 1968, on the organisation of the Court of Auditors as amended and supplemented in particular by Institutional Law No. 90-82 of 29 October 1990 and Institutional Law No. 2008-3 of 29 January 2008. Legislation on the Court of Auditors is available on the website http://www.courdescomptes.nat.tn/Fr/references-legales_11_43, but it does not provide a complete and consolidated version. The same site indicates that the Court of Auditors has jurisdiction to audit the finances of political parties: http://www.courdescomptes.nat.tn/Fr/competence-de-la-cour-des-comptes_11_40

[87] See the Assessment of the Tunisian legislative and institutional anti-corruption framework, paragraphs 726 et seq. (available in French only).

58. While simplification of the procedure is to be welcomed, it is unfortunate that the draft law introduces no new measures to establish genuine monitoring of the funding of political parties. The Venice Commission has consistently recommended giving the supervisory body a number of additional powers – such as calling witnesses, seeking the assistance of other public bodies (for example, the tax authorities or anti-corruption agencies)[88] in carrying out its tasks and to investigate possible irregularities – to give it more precise terms of reference and sufficient resources.[89] Such measures should also be considered in Tunisia's case. The various people with whom the rapporteurs spoke, including representatives of political parties, were convinced that irregularities in party funding (e.g. cases of foreign funding) did exist in practice but could not be clearly identified and proven. *In short, it is recommended that the Court of Auditors – or another designated, independent and impartial body with sufficient resources – be given precise terms of reference, appropriate powers and a clear obligation to check the financial statements of political parties, to verify the accuracy of the information submitted, to investigate any irregularities and to be given enhanced powers to ensure co-ordination with the law enforcement agencies and other relevant bodies.*

E. Chapter V: Sanctions

59. Lastly, it remains to be assessed whether the draft law provides for effective, proportionate and dissuasive sanctions as required by international standards.[90] First of all, it should be mentioned that Articles 28 et seq. of Legislative Decree no. 2011-87 provide, as regards most offences, for a range of graduated sanctions, including formal notice, suspension of the activity of the political party and its dissolution; for certain offences relating to the funding of political parties (Articles 18 and 19) it provides for fines, and for the offence of foreign or anonymous funding, imprisonment.

60. In contrast, Articles 49 et seq. of the draft law place greater emphasis on fines of different levels, according to the type of offence. Imprisonment is maintained for foreign or anonymous funding, while formal notice and suspension of the party's activity are no longer included in the range of sanctions; dissolution of the party (by judgment) is provided for in respect of a more limited number of offences, such as receipt of foreign funding, violation of Article 7 (ban on inciting violence etc.), and the failure to publish financial statements and auditors' reports; finally, the draft law introduces the penalty of the withholding of public funding for certain offences, in particular the violation of the obligation to organise periodic conferences and certain financial offences such as the failure to appoint a financial agent or to publish financial reports.

61. The Venice Commission agrees with the previous observations of the Council of Europe experts[91] that the range of sanctions applicable under Legislative Decree no. 2011-87 "is limited and leaves in practice little flexibility for modification" and "could be extended and supplemented by fines more in keeping with the nature of the offence", and one may "wonder in this case about the proportionality of" the sanction of dissolution of the political party in relation to the offence – since in the "countries where the dissolution of a political party is authorised, it is pronounced by the Constitutional Court and penalises not a violation of the legislation on the financing of political parties but a violation by the political

[88] See, for example, opinions CDL-AD(2018)016, paragraph 61; CDL-AD(2017)027, paragraph 15; CDL-AD(2016)038, paragraph 46; CDL-AD(2014)035, paragraph 43.
[89] The representatives of the Court of Auditors informed us that in the case of Tunisia, the co-operation of other bodies such as the Central Bank, the Post Office and the Ministry of Finance was necessary, and that there was currently no legal obligation for these bodies to forward suspected violations of the law to the Tunisian Financial Analysis Commission, nor any follow-up system
[90] See, for example, Article 16 of Rec(2003)4 and paragraphs 215 et seq. and 224 et seq. of the *Guidelines*.
[91] See the Assessment of the Tunisian legislative and institutional anti-corruption framework, paragraphs 736 and 744 et seq. (available in French only).

organisation of the country's constitutional values". Seen in this light, it should therefore be noted, as a positive development, that the draft law no longer provides for the suspension of the party's activity, that it reduces the list of offences that may be penalised by the dissolution of the party, that it introduces a range of graduated fines, and that it provides penalties both for the party itself and for the individuals responsible.[92] This last point complies with the requirements made by the Venice Commission in other opinions;[93] *it is nevertheless recommended that it should go further and make it clear that financial agents or other party officials may also be individually penalised for certain offences such as the submission of incorrect or incomplete data, e.g. in financial reports.*

62. Furthermore, the fact that there is still provision for dissolution of the political party for funding-related offences (such as the failure to publish its financial report) would appear to be very problematic. In this connection, the *Guidelines*[94] observe that in Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe (PACE) on restrictions on political parties in Council of Europe member states, PACE makes the point in paragraph 11 that "restrictions on or dissolution of political parties should be regarded as exceptional measures to be applied in cases where the party concerned uses violence or threatens civil peace and the democratic constitutional order of the country." Accordingly, the opportunity for a state to dissolve or prohibit a political party from forming should be exceptionally narrowly tailored and applied only in extreme cases. PACE refers to the case law of the European Court of Human Rights, whereby "political parties are a form of association essential to the proper functioning of democracy"[95] and "the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association."[96]

63. The Venice Commission, following a study on national legislation on the regulation of political parties, concluded that "prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution".[97] *Article 61 of the Tunisian draft law clearly goes beyond these situations and should therefore be revised.*

64. In addition, it is of some concern that the draft law has removed the sanction of a formal notice issued to the party at fault. Having regard to the principle of proportionality, *the Venice Commission has previously recommended*[98] *that less severe sanctions such as warnings or small fines would be more appropriate before imposing the most severe sanctions, and that in any case, even before the issuing of a warning, the association "should be offered the possibility to seek clarifications about the alleged violation", and that the possibility to correct errors should be provided for. It is recommended that the draft law be supplemented to this effect, at least with regard to less serious breaches. In addition,*

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[92] See Articles 49, 54, 56 and, with regard to the Auditors, Article 60 of the draft law.
[93] See, for example, CDL-AD(2018)016, paragraph 50; CDL-AD(2017)027, paragraph 77.
[94] See *Guidelines*, paragraph 89.
[95] See, for example, the judgment of the European Court of Human Rights in the *United Communist Party of Turkey and others v. Turkey* case, application no. 19392/92, 30 January 1998 and the Court's judgment in the *Yabloko Russian United Democratic Party and others v. Russia* case, application no. 18860/07, 8 November 2016.
[96] See, for example, the judgment of the European Court of Human Rights in the *Socialist Party and others v. Turkey* case, Application no. 21237/93, 25 May 1998.
[97] See the Guidelines on prohibition and dissolution of political parties and analogous measures, CDL-INF(2000)001, Guideline 3. See also the relevant opinions of the Venice Commission, e.g. CDL-AD(2016)038, paragraph 53; CDL-AD(2014)035, paragraph 17.
[98] Not specifically for political parties but for associations more generally, see CDL-AD(2018)006, paragraphs 51 et seq.

more generally, it is recommended that the draft law specify that all the provisions of Chapter V on sanctions should be applied in accordance with the principle of proportionality.[99]

65. *Consideration could also be given to extending the scope of the new sanction of withholding public funding, which has proved effective in several countries, to a greater number of offences than currently provided for in the draft law. Another way to make sanctions more effective and dissuasive could be to publish the sentences imposed on political parties,*[100] *for example on the new online platform.*

66. Article 56 of the draft law makes it an offence "to engage in partisan propaganda" in the form of speech, pamphlets or any other form within public administrations, places of worship or public services. This provision reflects Article 6 of the draft law, which requires political parties to uphold the neutrality of the public administration, places of worship and public services. However, it lacks clarity, as it does not specify whether it covers only propaganda for a political party, or any political position taken publicly in one of the designated places - which would amount to a worrying restriction on freedom of expression. During the Tunis interviews, the authors of the draft law said that they had intended to target only propaganda for a political party, and added that they were prepared to express it more clearly. *This point should be clarified in Article 56 of the draft law*.

67. Lastly, it should be noted that Article 62 of the draft law stipulates that sanctions are imposed either by the administration (i.e. the Human Rights Ministry, for the withholding of public funding) or by the Tunis Court of First Instance (for other offences). This approach calls for some comments: first, the Ministry's role is problematic in view of international standards requiring that the oversight of political parties be carried out by a non-partisan body that satisfies the criteria of independence and impartiality;[101] second, several people with whom the rapporteurs spoke drew their attention to the fact that the Tunis Court of First Instance had no particular expertise in this field and that the judicial channel did not guarantee the requisite speed in this respect. For these reasons, it was suggested that the Court of Auditors be given the power to sanction political parties, as it already had the power to impose sanctions in the event of financial and electoral offences under Articles 98 et seq. of the Electoral Law. Such an arrangement might indeed seem logical. However, the authorities have expressed doubts as to whether this solution is in conformity with constitutional law. *It is recommended that further thought be given concerning the powers to impose sanctions on political parties and that it be verified whether these powers can be attributed to the Court of Auditors, taking constitutional law into account.*

F. Chapter VI: Transitional and final provisions

68. In the previous parts, some of the transitional provisions have already been referred to, such as Article 65 which requires already lawfully established political parties to be registered on the online platform. For the rest, no particular comments need to be made for this chapter.

V. Conclusions

69. The Draft Institutional Law on the Organisation of Political Parties and their Funding is intended to replace Legislative Decree no. 2011-87, currently in force. The draft is based on this legislative decree, while amending some of its provisions and adding more comprehensive rules, such as those relating to transparency, financial monitoring and

[99] On the principality of sanctions, see, for example, *Guidelines*, paragraph 227. See also, the previous Venice Commission opinions, for example CDL-AD(2014)035, paragraph 45.
[100] See also the recommendation contained in the Assessment of the Tunisian legislative and institutional anti-corruption framework, paragraph 748. (available in French only).
[101] See the comments in part D.2, above.

sanctions. The Venice Commission considers that the draft law is generally clearly drafted, is in line with the constitutional mandate and, if adopted, would be an important step forward in ensuring the transparency of political parties in general and their funding in particular. To this end, the draft law establishes an online platform for the management of political parties' files; it also provides for the introduction of annual public funding for political parties[102] (in addition to the public funding of electoral campaigns, already established by the 2014 Electoral Law as amended in 2017).

70. Such measures can help to prevent corruption, ensure equal opportunities for political parties and prevent excessive dependence on private donors; they are, therefore, in principle, in harmony with international standards. That said, the draft law could be enhanced by some amendments and additions to better achieve these objectives and to ensure the right balance between the freedom of association enjoyed by political parties and their members, on the one hand, and the necessary restrictions and controls, on the other. The Venice Commission points out that, according to Article 11 of the European Convention on Human Rights, restrictions on freedom of association must be prescribed by law, pursue one of its aims and be "necessary in a democratic society".

71. It would appear that the draft law aims to improve the existing system by focusing mainly on the disclosure of information on political parties, financial auditing by auditors and the responsibility of parties to comply with the stricter rules. This is good in itself, but external oversight by an independent body is also a necessary feature. The information obtained by the rapporteurs seems to indicate clearly that the financial oversight of political parties has so far been less than satisfactory; it is therefore recommended that more comprehensive measures be introduced to make the oversight more effective

72. With regard to the sanctions available for violations of the rules, the Venice Commission welcomes the significant overhaul of the existing regime, which introduces, among other things, fines of different levels, according to the gravity of the offence, and the sanction of withholding public funding for certain offences. It is also important that the draft law no longer provides for the suspension of the political party's activities and that it reduces the list of offences that can be sanctioned by dissolution of the party. However, it is worrying that this latter sanction is still in place for offences related to the financing of the party (such as the failure to publish its financial reports); having regard to international standards in this field, such a measure must remain exceptional and can be justified only in cases where the party advocates the use of violence or uses it as a political tool to overthrow the democratic constitutional order.

73. Finally, it should be stressed that the effectiveness of the reform of political party funding in Tunisia depends not only on the enactment of legislation, but also on the existence of political will and the practical implementation of the relevant provisions. It is essential that the new rules are always drawn up with a view to effective implementation.

74. The Venice Commission makes the following main recommendations. At the same time, it should be noted that the other recommendations and suggestions made throughout the text (identified in *italics*) are also important; they are intended, as a whole, to align Tunisia's legal framework for political parties and their funding more closely with Council of Europe and other international human rights standards, and with the recommendations in previous opinions of the Venice Commission:

[102] It should be noted that, under Article 66, "the provisions relating to the granting of public funding to political parties shall enter into force with effect from the parliamentary elections following the promulgation of this Law"; the next parliamentary elections are scheduled for the end of 2019.

A. guarantee, in Article 1 of the draft law, the freedom not only to form political parties, but also to join them and conduct activities within them, and to add the principle of proportionality and necessity in a democratic society with regard to the permitted restrictions of this freedom [paragraph 18];
B. introduce shorter deadlines for deciding on applications for the registration of political parties, and on appeals against refusals to register, in order that expeditious decisions are ensured [paragraph 27];
C. amend Article 36 of the draft law to ensure that the identity of donors is not made public, but only to the supervisory body, in the case of clearly defined small donations [paragraph 41];
D. with regard to the annual public funding of political parties not represented in Parliament, revise Article 38 of the draft law so that the method of calculating the amount of the payment and the number of votes to be obtained for it to be payable are defined in the law itself [paragraph 46];
E. strengthen the system for the financial oversight of political parties. The Court of Auditors, or another designated, independent and impartial body with sufficient resources, should have terms of reference, appropriate powers and a clearly defined obligation to check the financial statements of political parties, verify the accuracy of the information submitted, investigate any irregularities and be given enhanced powers to ensure co-ordination with law enforcement agencies and other relevant bodies [paragraph 58];
F. review the sanctions system. Among other things, it should be ensured that
   - the dissolution of political parties is limited to cases where they advocate the use of violence or use it as a political means to overthrow the democratic constitutional order,
   - in the event of less serious irregularities, less severe penalties such as warnings or small fines are applicable before moving on to the most severe penalties,
   - in any event, even before a warning is officially issued, the party should be able to request clarification of the alleged violation and to correct irregularities, and
   - all provisions be worded in such a way as to include the concept of proportional penalties.

   It is also recommended that further thought be given to the powers to impose sanctions on political parties and that it be verified whether these powers could be attributed to the Court of Auditors, in particular taking constitutional law into account [paragraphs 63, 64 and 67].

75. The Venice Commission remains at the disposal of the Tunisian authorities for any further assistance in this matter.