

THE CARTER CENTER



TUNISIA

NGO Submission to the U.N. Human Rights Committee

The Carter Center
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This submission summarizes the findings of the Carter Center's election observation mission to the elections in Tunisia in 2019. It is submitted for inclusion in the review of Tunisia's 6th state report by the UN Human Rights Committee during its 128th session, 2-27 March 2020.

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About The Carter Center

The Carter Center is a not-for-profit, nongovernmental organization that has helped to improve life for people in more than 80 countries by resolving conflicts; advancing democracy, human rights, and economic opportunity; preventing diseases; and improving mental health care. The Carter Center was founded in 1982 by former U.S. President Jimmy Carter and his wife, Rosalynn, in partnership with Emory University to advance peace and health worldwide.

The Carter Center’s Democracy Program works globally to promote democratic elections and governance consistent with human rights. The Center has monitored more than 100 elections in 39 countries since 1989, forging many of the techniques now common to the field. Recognizing that democratic transitions involve much more than elections, the Center also conducts long-term monitoring of political transitions and works to strengthen civil society organizations to support democratic governance. The Democratic Election Standards (DES) initiative aims to build consensus on standards for democratic elections, based on state obligations under public international law.

About The Carter Center in Tunisia

The Carter Center has had a permanent field presence in Tunisia since 2011. It’s observation of the 2019 Tunisian elections consisted of three separate missions to observe the first and second round of the presidential elections and the legislative elections. The Center was accredited by the High Independent Authority for Elections (ISIE) and deployed a core team in May 2019, supplementing its long-term field presence. In mid-July, the Center deployed 16 long-term

observers throughout Tunisia. The Center’s observation mission remained in Tunisia to observe the final tabulation process and resolution of electoral complaints. Prior to the 2019 electoral processes, The Center also observed the 2011 National Constituent Assembly elections, the 2014 presidential and legislative elections, as well as the constitution-making process that culminated in the adoption of the constitution in January 2014.

The objectives of the Center’s observation mission in Tunisia was to provide an impartial assessment of the overall quality of the electoral process, promote an inclusive process for all Tunisians, and demonstrate support for its democratic transition. The Carter Center assesses Tunisia’s electoral process against the Tunisian constitution, the domestic electoral legal framework, and obligations derived from international treaties and international election standards. The Center's observation mission is conducted in accordance with the Declaration of Principles for International Election Observation.¹

This submission is based on data collected by the Carter Center’s 2019 election observation mission to Tunisia and its long-term field staff. It addresses gaps in the legal framework for elections in Tunisia, as well as issues observed during the 2019 electoral process. It offers an update on Tunisia’s adherence to the obligations of the ICCPR in regard to the 2019 elections. Recommendations follow the Center’s analysis below.

Article 2

Constitutional and legal framework within which the Covenant is implemented

The need for the new parliament to urgently establish a functioning Constitutional Court (Court) was highlighted when President Beji Caïd Essebsi’s died in office on July 25, 2019.

The absence of a functioning Court posed a potential constitutional crisis as the Constitution names the Court as the only body with the mandate to acknowledge the vacancy of the presidency and to oversee the transfer of power to an interim president until new elections are held. A constitutional crisis was averted when the Interim Authority on the Constitutionality of Draft Laws (Interim Authority) stepped in to acknowledge the president’s death and notified Parliamentary Speaker Mohamed Ennaceur of the permanent vacancy.

Although the Interim Authority moved to avert the constitutional crisis, it does not have the legal mandate to assume this function. The authority was created under the Transitional Provisions section of the constitution, and its mandate is limited to “determining the constitutionality of laws.”

The 2014 Constitution mandated that the court be constituted within one year of the date of the first parliamentary elections, held in October 2014. Under the constitution, the Court is composed of 12 members, four appointed by the parliament, four by the president and four by the Supreme Judicial Council. According to the Law on the Constitutional Court passed in 2015, the parliament should appoint its members followed by the Supreme Judicial Council and then by the president. In order to appoint members, the parliament needs the approval of

¹ https://www.cartercenter.org/resources/pdfs/peace/democracy/des/declaration_code_english_revised.pdf.

two thirds of its members. To date, the parliament has only succeeded in appointing one member to the court.

Articles 2, 14, 21 and 25

Arrest and detention of a presidential candidate:

Judicial actions in the lead up and during the presidential campaign regarding a prominent presidential challenger raised concerns regarding the independence and impartiality of Tunisia's judiciary.

On August 23, based on a warrant issued by an appeals court, authorities detained presidential candidate Nabil Karoui on charges of money laundering and tax evasion that had been pending since 2016. Karoui was one of the presumed targets of amendments to the electoral law that were proposed in 2019 that would have effectively barred owners of media outlets and charity organizations from running for office. Their passage failed. Karoui is the co-owner of Nessma TV station.

The timing of the detention raised questions about the independence of the judiciary, given that a lower court had allowed Karoui to remain free while the investigation was ongoing. The original complaint was based on information supplied by I Watch, a domestic civil society organization (CSO), which also provided information targeting presidential candidate and current prime minister, Youssef Chahed, and former Ennahda Shoura Council member and current presidential candidate Hatem Boulabiar, neither of whom had been detained.

The arrest of Karoui had no bearing on his official candidature as he remained on the ballot. But the timing of the arrest raised the perception of political motivations and cast a cloud over the process. His detention meant that, unlike all other candidates, Karoui was at a disadvantage because he could not take part in the campaign or the first presidential debate. Karoui's detention undermined the process because the timing of Karoui's detention appeared to be politically motivated.

Karoui remained in detention throughout the first-round and parliamentary campaigns, despite several calls for his release by the High Independent Authority for Elections (ISIE) and most of the political establishment. Karoui was detained for approximately seven weeks and was released on Oct. 9, the day of the announcement of the preliminary results of the parliamentary elections, with only two days left in the presidential campaign period.

In its order releasing Karoui, the Court of Cassation concluded that although Karoui had lodged an appeal against the order freezing his assets and banning him from travelling, the court of appeals abused its power and violated basic procedural requirements by issuing an additional order of pretrial detention even though the prosecutor had not requested his detention. The Court of Cassation found that the court of appeals had violated Karoui's rights and declared the warrant null and void.

Transparency of the electoral dispute resolution process and right to an effective remedy:

In general, the Tunisian electoral law provides for a timely remedy for aggrieved parties challenging results and respects the right of judicial review, guaranteeing an independent

oversight in accordance with international standards.² During the 2019 election period, the courts conducted their responsibilities in a timely, if sometimes overly strict manner, in all three elections.

The Administrative Court in Tunis, which is responsible to hear appeals in election dispute cases and all challenges to the results, allowed The Carter Center to attend all hearings and after repeated request, supplied the Center with some written copies of judgements. Court hearings attended by the Center were orderly, and the parties were given the opportunity to present their cases within the limited time allowed. However, the courts did not comply with international obligations aimed at ensuring a transparent dispute resolution process that requires judgments, findings, and legal reasoning for the judgments be made public in all cases.³ The courts did not release complaints or decisions in a timely fashion.

The ISIE election dispute-resolution process remains opaque. The ISIE did not share all information collected by its 1500 campaign monitors, nor did it publicly announce how it would resolve election complaints.

The electoral law imposes many technical procedural requirements that were criticized by many candidates and their lawyers. The Administrative Court was very strict in applying these technical and procedural requirements, and did not tolerate any procedural mistakes, regardless of whether or not the mistake effected the substance of the challenge, effectively denying the appellants to an effective remedy.⁴

Article 25

Participation of military and internal security

Although the electoral code was amended in 2017 to allow military personnel and agents of the internal security forces to register to vote in municipal and regional elections, they continue to be prohibited from registering to vote in presidential and parliamentary elections.

Participation of prisoners and hospitalized, infirm and detained persons

Citizens in health care facilities, penitentiaries, and detention centers were not able to exercise their right to vote because no mechanism to do so exists in the law, contrary to Tunisia's constitution and international commitments.⁵ The ISIE announced that they were willing and ready to implement the necessary mechanisms, such as mobile voting or setting up special polling stations, to facilitate voting. However, without the cooperation of the relevant ministries or an explicit mechanism detailed in the electoral code, they were unable to implement these plans during the 2019 electoral process.

² ICCPR Art. 14 (1); U.N., ICCPR, art. 2; AU, AfCHPR, art. 7; ICCPR, General Comment 32, para.58.

³ ICCPR, Art. 14 (1); The Administrative Court, provided to the Carter Center around 155 judgements only one week before the conclusion of the observation mission in Mid-November 2019, which prohibited the mission from fully analyzing the Elections Dispute Resolution process.

⁴ A total of 102 challenges were filed at the Appeals Circuits of the Administrative Court which dismissed 40 challenges on procedural grounds, and 59 on the merits.

⁵ Right to universal suffrage on the basis of equal treatment before the law: ICCPR, Article 25(b); African Charter on Democracy, Elections and Governance, Article 3(3).

Restrictions on candidacies for president

According to Article 74 of the 2014 Tunisian Constitution, "candidacy for the presidency of the Republic is a right for any elector or voter of Tunisian nationality by birth and Muslim by religion." This provision is discriminatory since it prohibits any voter of Tunisian nationality who is not a Muslim to present him/herself as a candidate for president. Such discrimination is in contrary to Articles 21 and 34 of the constitution and is a violation of Tunisia's commitments under Articles 2 and 25 of the ICCPR.

Articles 2, 3 and 25

Participation of Women and Equality Between Women and Men

The results of the 2019 parliamentary elections highlight the need to implement further changes to increase the representation of women in parliament. Despite aspirational measures in the constitution that mandate equality between men and women, and a requirement in the electoral law mandating vertical parity on party lists between the genders, the number of women elected to parliament in 2019 decreased substantially from 2014.⁶

Article 24 of the election law requires that all electoral lists must alternate female and male candidates. However, the law does not mandate horizontal parity, meaning there is no requirement that a female candidate appear at the top of a list. As a result, few parties placed women at the head of their lists. Of the 17 lists that only garnered one seat, 16 of the successful candidates were male.

Tunisians should work to fulfill the constitution's aspirational goals of gender equity by amending the electoral law to include not only vertical parity (alternating between the genders) but also horizontal parity, guaranteeing the placement of women at the top of lists and promoting women's representation.

In the 2019 elections, 54 women were elected representing 24.8 percent of the 217 members of parliament. This represented a decrease from the 2014 parliamentary elections, when women constituted 35 percent of the parliament, with 78 members elected. Of the 1,504 candidates lists (country wide) in the 2019 elections, only 214 (14.22 percent) were headed by a woman. Of these, 24 women were elected.

Women's representation in parliament is concentrated in the north and east of the country. There are three constituencies (Siliana, Kasserine and Tozeur), all in the west of Tunisia, without any women represented in parliament. In the south, there are four constituencies that have only one woman member for each constituency (Gafsa, Kebili, Gabes and Tatouine).

The newly elected parliament has representatives from 20 political parties and coalitions, and 11 independents lists. Sixteen of these lists gained only one seat. The disbursement of votes among the high number of lists in the 2019 election and the fact that only the head was elected from 17 lists, highlights the need to consider additional measures to support greater women's inclusion.

⁶ Tunisian Constotution, Article 46.

Recommendations

- The newly elected parliament should appoint members to the Constitutional Court within the next six months. If the necessary votes for appointment remains an issue, then consideration should be given to changing the Law on the Constitutional Court to revise the procedures for identifying and selected members of the court, including the possibility of lowering the required majority to appoint members to the court;
- The Supreme Judicial Council should reinforce the constitutional requirement regarding the independence of the judiciary and investigate situations where this independence appears to be threatened;
- In order to increase transparency in the electoral dispute resolution process, the courts should make all complaints and judgements public in a timely and easy to access manner;
- The courts should hear the substance of election-related complaints even in cases in which the procedural and technical requirements are deficient to ensure all candidates the right to an effective remedy;
- Parliament should amend the electoral code to allow military and security personnel to vote in all elections;
- Parliament should amend the electoral law to include specific mechanisms that allow citizens in prisons, hospitals, nursing homes and the infirm to exercise their right to vote. This should include allowing for mobile voting and the setting up of polling stations in institutions where these citizens reside;
- Parliament should consider amending the constitution to remove the requirement of religious affiliation as a criterion for candidates for president;
- Parliament should consider measures to increase the representation of women in elected bodies. One possible measure would be to extend the requirement of horizontal parity of the genders to parliamentary elections.