The Tunisian Revolution in its constitutional manifestations
The first transitional period (14 January 2011 - 16 December 2011)

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Revolution is, from the legal analysis standpoint, an exceptional event for the existing constitutional framework in a particular country. Its consequences are either limited to the overthrow of the powers operating under the Constitution, or encompass the entire constitutional order, leading to its abolition and then replacement with a new constitutional system. What matters in a revolution is the emergence of the future's legitimacy from the phenomenon of “illegitimacy.” If we assume, in general terms, that a revolution “is not governed by the normal standards of political rationality” and its identity stems from the logic of explosion or the logic of the volcano⁠¹ - this fact would a fortiori be dominant in the legal field. For this reason, some theorists of the positivist school determined that the revolutionary phenomenon cannot in any way be subject to legal analysis.

Even if the effect of the revolution is clear with regard to constitutional legitimacy as it breaches its provisions or totally revokes it, it cannot invalidate the entire legislative system. This system will remain valid, except for the abrogated or amended provisions of the texts that govern it. The revolution impacts the constitutional order much more strongly than it impacts the legislative system. In revolutions, the constitutional order often breaks down, partially or completely, and the legislative system survives with its institutions, except the part of it that is revoked or amended, as in the case of Tunisia.

A revolution is a historic moment with deep consequences. It is characteristically a crucial and unequivocal message in its political and legal implications. But it is just a moment. This means that it is short-lived. Its peaceful or violent manifestations, such as demonstrations, sit-ins, confrontations, and shocks last for a few days and have a “subversive character”, until the fall of the existing system. If this is achieved, the first moment of the revolution ends. Then, it becomes necessary to switch to a “temporary” measure that pushes the political establishment to find a final solution to the crisis. Such a solution lies in establishing another procedural approach: it may be the election of a new parliamentary or presidential authority under the existing constitution; or a popular referendum on a new constitution; or a constituent action aiming to draft a new constitution by a constituent body comprised of appointed or elected representatives after a transition period during which constitutional life is based on regulatory constructive measures, based on political concord, without prior constitutional basis. This is what is called in this article “extraordinary constitutional law.”

In all these cases, this procedure ends the exceptional and transitional period and brings the situation back to normalcy, perenniality, and stability under new and permanent constitutional institutions.

The Tunisian revolution broke out in the period between 17 December 2010 and 14 January 2011 and its first consequence was the flight of the authoritarian president. Since this president monopolised the fundamental powers - from the political, and even the constitutional viewpoint - his downfall led to the collapse of a significant portion of the regime. Therefore, it was replaced by a new entity. In this context, it should be noted that the Tunisian revolution faced many paradoxes. One of these paradoxes is the conflict between, on the one hand, revolutionary legitimacy - as a message without a leadership accompanying it - and on the other hand, the logic of order and political-administrative transitional institutions belonging to the old system. Rather than identifying with the revolution, they were often hostile to it. This paradox showed up on several occasions, and shall be explained below. The second paradox appeared in the vast gap between “the people of the revolution” and the people of the election. The former raised the slogans of a temporal revolution and a civilian state, without adopting any religious reference, and the latter produced a parliamentary partisan majority with religious, legal, and doctrinal reference.

The Tunisian experience represents, from the historical and legal perspective, a great and rare event. Indeed, it has raised the issue of the relationships between revolutions and existing legal systems from several aspects: What are the effects of the revolution on the existing legal, constitutional, and legislative system? How and to what extent does the pre-existing system disappear, and how does the new legal system come to life? How does the transition from the revoked constitutional order to the new constitutional order take place? The author will try to answer these questions by analysing the fundamental phases experienced by the Tunisian revolution and the lessons learned. First, the lessons from the fall of the authoritarian regime to the rescinding of the 1959 Constitution, with highlights on the impact of the revolution on the 1959 Constitution. Then, the challenges faced through the initial consensual Provisional Organization of the Public Authorities. Finally, the author will discuss the issues surrounding the preparation of the electoral framework.

Section I: The effects of the Revolution on the Constitution of 1959

In this section the author will analyse the constitutional situation after the fall of the authoritarian regime on 14 January 2011 and the country’s entry in an exceptional constitutional period during which a provisional constitutional structure was established culminating in the adoption of Decree-Law No. 2011-14 on the Provisional Organization of Public Authorities, and also during which a constituent assembly was elected.

Ben Ali’s flight and the issue of the mandate to the Prime Minister

Late on the evening of 14 January 2011, after breaking news of the departure of the President of the Republic from Tunisia and in the presence of the President of the Assembly and the President of the House of Councillors, in an extreme state of turmoil, Prime Minister Mohamed Ghannouchi delivered the following address to the Tunisian people on the national

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3 Yadh Ben Achour, an interview with the Moroccan newspaper "Akhbar Al Yaoum", Tuesday, 31 January 2012, p.14
television channel: “In accordance with Article 56 of the Constitution, which stipulates that in case of temporary disability, the President may delegate his powers to the Prime Minister and considering the temporary inability of the President of the Republic to exercise his duties, I assume from now the exercise of the powers of the President of the Republic ...”

Consequently, this procedure was loudly denounced for the simple reason that invoking Article 56 on temporary vacancy meant that the former president was expected to return. The consequence of such return would mean the repression of demonstrators and the increase in the number of victims. Besides, there was a procedural irregularity as the decision was not made by former president as stated later in the decision of the Constitutional Council of 15 January 2011. Commenting on the message of the Prime Minister, the Constitutional Council says in the preamble to its decision: “Whereas it has been determined especially from the said letter that President Zine El Abidine Ben Ali left Tunisia without delegating his powers to the Prime Minister in accordance with Article 56 of the Constitution.”

The following day, i.e. Saturday 15 January 2011, after closing the door to a possible return of the president, who was henceforth called the “deposed president”, the Government reversed its position and announced the application of Article 57 on definitive vacancy and addressed a letter to that effect to the Constitutional Council.

Declaration of the state of emergency

Since the Martyr Mohamed Bouazizi set himself on fire on 17 December 2011, the country entered into a series of protest events against the regime—and all its symbols—which was eventually toppled on 14 January 2011. The protests led to a repressive state response utilizing force, resulting in the death of hundreds of victims, and subsequent looting and robberies. As a result, a state of emergency was announced on 15 January by Order No. 184, but was only published in mid-February along with Order No. 185 of 14 February 2011, which extended the state of emergency. The tense security situation caused the suspension of normal constitutional procedures, which would have provided the framework for the holding of presidential elections to replace the former president.

Definitive vacancy of the Presidency of the Republic and invocation of Article 57

This time, the proceedings provided for in Article 57 of the Constitution were enforced and the Constitutional Council met immediately on 15 January 2011 to establish the definitive

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4 Article 56 (Paragraph 3 was amended by Constitutional Law No. 2002-51 of 1 June 2002): "In case of temporary disability, the President may, by decree, delegate his powers to the Prime Minister, to the exclusion of the power of dissolving the Chamber of Deputies. During such temporary disability of the President of the Republic, the Government shall remain in place until the end of that disability, even if it is subject to a motion of censure. The President of the Republic shall inform the President of the Chamber of Deputies and the President of the Chamber of Councillors regarding such temporary delegation of his powers."

5 Article 57 (paragraphs 1, 2, and 5 were amended by Constitutional Law No. 2002-51 of 1 June 2002): "Should the office of President of the Republic become vacant because of death, resignation, or absolute disability, the Constitutional Council meets immediately and certifies the definitive vacancy by an absolute majority of its members. It addresses a declaration to that effect to the President of the Chamber of Councillors and to the President of the Chamber of Deputies who shall immediately be vested with the functions of Interim President of the republic for a period ranging from 45 to 60 days."
vacancy of the Presidency of the Republic. In its binding decision, the Council determined that, “whereas the departure took place in the circumstances prevailing in the country, and following the announcement of the state of emergency, whereas ... such absence of the President of the Republic prevents the exercise of the obligations of his duties, which is a state of total inability to exercise his duties within the meaning of Article 57 of the Constitution ...” On the basis of these material facts, legally described as, “a state of total inability ...”, the Council hereby declares:

“First:
The definitive vacancy on the post of President of the Republic.
Second:
that the constitutional conditions are met for the President of the Chamber of Deputies to assume immediately the functions of head of state on a temporary basis.”

On this basis and on the same day Mr. Fouad Mebazaa, President of the Chamber of Deputies, assumed the first temporary presidency of the Republic. It should be noted that this presidency is provisionally within the meaning of Article 57 of the Constitution of 1959 and is restricted by its fundamental material conditions, as well as procedural and jurisdictional ones.

These conditions are the following:

Fundamental conditions: These conditions are the existence of a state vacancy and the impossibility for the Interim President to be a candidate for the presidency of the republic.
Procedural conditions: These conditions include the formal declaration of the state of vacancy by the Constitutional Council, the announcement of such vacancy in a statement addressed by the Constitutional Council to the President of the Chamber of Councillors and the President of the Chamber of Deputies, and finally the swearing-in of the Interim President before the Chamber of Deputies and the Chamber of Councillors sitting in a joint session, and, where appropriate, the Bureaus of both Chambers.
The jurisdictional conditions include time conditions - the Interim President exercises his / her competence within “a minimum period of forty-five (45) days and a maximum of sixty (60) days”, personal conditions - in the form of limitations of competence, as the Interim President is

If the definitive vacancy coincides with the dissolution of the Chamber of Deputies, the President of the Chamber of Councillors is vested with the functions of Interim President of the republic for the same period. The Interim President of the republic shall take the constitutional oath before the Chamber of Deputies and the Chamber of Councillors meeting in common session, and, if need be, before the two bureaus of the two chambers. If the definitive vacancy coincides with the dissolution of the Chamber of Deputies, the Interim President of the republic takes the constitutional oath before the Chamber of Councillors and, if need be, before its bureau. The interim President of the Republic may not stand as candidate to the Presidency of the Republic, even in case of his resignation. The interim President of the Republic exercises the powers of the President of the Republic, without, however, the possibility of resorting to referendum, dismissing the Government, dissolving the Chamber of Deputies, or taking the exceptional measures provided for in Article 46. During the period of interim presidency, no modification of the Constitution may take place, and no motion of censure may be presented against the Government. During the same period, presidential elections shall be held to elect a new President for a five-years term of office. The new President of the Republic may dissolve the Chamber of Deputies and hold early legislative elections in accordance with the provisions paragraph 2 of article 63.”
not entitled to call a referendum, to dismiss the Government, to dissolve the Chamber of Deputies, or take exceptional measures as provided for in Article 46.

**Mandate granting legislative powers to the President of the Republic and adoption of “extraordinary constitutional law”**

Opinion of the Constitutional Council on the mandate

The Constitutional Council met on Thursday 3 February 2011 to consider the bill on the delegation submitted to it by the President of the Republic. This last session was a “farewell meeting” held for the Revolution in the best possible way. It determined that the bill was compliant with the Constitution. Consequently, it declared that all the conditions were met, taking into account “the requirements of the current transitional phase.” The opinion was worded as follows:

“8 - Whereas Article 1 of the Bill submitted to the Constitutional Council provides that the mandate to be given to the interim President of the Republic starts from the date of its publication in the Official Gazette of the Republic of Tunisia and ends with the termination of the functions of the interim President of the Republic;
9 - Whereas the condition on the determination of the duration of the mandate is met within the meaning of Article 28 of the Constitution;
10 - Whereas Article 28 provides for the obligation to specify the purpose of the mandate to be given to the interim President of the Republic;
11 - Whereas Article 1 of the Bill specifies the scope of the mandate, which includes general amnesty, human rights and fundamental freedoms, electoral regulations, the press, the organization of political parties, associations, and non-Governmental organizations, the fight against terrorism, the prevention of money laundering, economic development, social advancement, finances and taxation, property, education and culture, the response to disasters and hazards, international conventions on state financial commitments, international agreements on trade, taxation, economy, and investment, international agreements on labour and social affairs, and international agreements on human rights and fundamental freedoms;
12 - Whereas the scope of the mandate is broad and no constitutional provision prevents that as the purpose has been adequately specified as required by Article 28 of the Constitution, especially given the requirements of the current transitional phase;
13 - Whereas, the interim President of the Republic may, in view of the above, and on the basis of the said bill, adopt decrees in the specified areas and for the said period, as long as this is done in compliance with the Constitution;
14 - Whereas it appears in view of all the above that the bill does not violate the Constitution and is harmony with it, ...”

Another “closing session” was held by the Chamber of Deputies on Monday 7 February 2011 to vote on a bill authorizing the Interim President to adopt decrees in broad areas that fall within the jurisdiction of the legislative authority under Article 28 of the Constitution. This mandate is actually a total relinquishment of the legislative power in view of the vast scope it encompasses. The same scenario was repeated on 9 February at the Chamber of Councillors,
which had to hold its own “closing session” just like its counterpart compromised with the former regime, and caved in to the Revolution and its sweeping wave. Accordingly, Law No. 5 of 9 February 2011 mandating the Interim President of the Republic to promulgate decrees pursuant to Article 28 of the Constitution was issued. It was the last law passed in the era of the First Republic.

This recourse to Article 28 did fit into its normal procedural framework, as all the conditions provided for in Article 28 could not be met, contrary to the wording of the decision issued by the Constitutional Council. Everyone knows that the two chambers were on the verge of dissolution, which makes ratification impossible, and that the “purpose” of the mandate was not expressly defined as mentioned above, and the duration of the mandate remained unspecified. This was noted by many analysts who stick to the known traditional approach of analysis of normal constitutional situations, ignoring the specificities of the period and its revolutionary character. This recourse to Article 28 falls completely within the so-called “extraordinary constitutional law”, which is governed by necessity and paves the way for the coming provisional organisation of public authorities. This latter is subject to the logic of revolutionary legitimacy, which is in essence “an illegitimate legitimacy”, free from the procedural limitations of the system it aimed to bring down, and takes into account the supreme interest of the country, which is, in the said exceptional circumstances, higher than the Constitution. That is the reason of the failure of those who stuck to the letter of the Constitution, as if nothing had happened.

Decrees adopted under Article 28 of the Constitution of 1959

The first noticeable thing is the difference between the decrees issued under Article 28 of the Constitution of 1959 before the issue of the Decree on the Provisional Organization of Public Authorities and those after. The first ones stem from a mandate from the legislature to the executive; whereas the second ones represent the exercise of authentic legislative power. Therefore, such decrees are laws in the fullest sense of the word.

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7 Decree No. 5:
Article 1:
Pursuant to Article 28 of the Constitution, the interim President of the Republic is authorised to adopt decrees as of the date of publication of this Law in the Official Gazette of the Republic of Tunisia until the termination of his functions in the following areas:
Article 2:
The ratification of the decrees adopted pursuant to Article 1 of this Law shall take place in conformity with Article 28 of the Constitution.
This Law shall be published in the Official Gazette of the Republic of Tunisia and shall be executed as one of the laws of the State.
Tunis on 9 February 2011.
The Interim President of the Republic.
Fouad Mebazaa

8 The exceptional constitutional law here is not related to the exceptional constitutional law provided for in the Constitution, which allows public authorities to breach constitutional provision temporarily to deal with a specific crisis.
The decrees issued under the mandate of the legislative power to the President of the Republic on the basis of Article 28 are the thirteen decrees issued between 9 February 2011 and 23 March 2011. They have an immediate, revolutionary and liberation character and deal with sensitive issues such as general amnesty,\(^9\) accession to the Optional Protocol to the International Covenant on Civil and Political Rights,\(^10\) to the Rome Statute of the International Criminal Court,\(^11\) and to the Optional Protocol to the Convention against Torture,\(^12\) and then the establishment of the High Authority for the Fulfilment of the Objectives of the Revolution,\(^13\) the Fact-Finding Committee on Corruption and Malpractice,\(^14\) the National Fact-Finding Committee on abuses during the period from 17 December 2010 until the end of its mandate,\(^15\) and the establishment of National Independent Commission for Information and Communication Reform.\(^16\)

**The Difficult Path Ahead and the Choice of Electing a Constituent Assembly**

In late February 2011, a few days before the fall of the Ghannouchi Government, we were at crossroads. We had to choose one of the four scenarios. These scenarios were presented and debated in a closed session at the Carthage Palace on Monday 21 February 2011, a few days before the resignation of Prime Minister Mohamed Ghannouchi, in the presence of a small number of top state officials. The four scenarios are as follows:

1) Holding of presidential elections under Article 57 of the Constitution of 1959. However, this option was impossible to achieve in the time period provided for in the said article because of the state of emergency, on the one hand, and the need to set up an electoral process that marked a departure from previously held rigged elections, on the other hand. It required thus a reasonable time that exceeded the two month deadline. Consequently, this option was inevitably accompanied by the need to extend the deadline by a few months, on the grounds of force majeure, exceptional circumstances, and necessity, to provide adequate time. After assuming the interim presidency, in the face of *res judicata* related to extension, and for personal reasons related to his self-willingness to exercise his duties, the President of the Republic proposed that the presidential election be held before the month of Ramadan, around Sunday 24 July 2011.

\(^10\) Decree No. 2011-3 of 19 February 2011 approving the accession of Tunisia to the Optional Protocol to the International Covenant on Civil and Political Rights, Official Gazette of the Republic of Tunisia, No. 12, p. 184.
\(^12\) Decree No. 2011-5 of 19 February 2011 on approval of the accession of the Republic of Tunisia to Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Official Gazette of the Republic of Tunisia, No. 12, p. 181.
\(^14\) Decree No. 2011-7 of 18 February 2011 on the establishment of the National Fact-Finding Committee on Corruption and Malpractice, Official Gazette of the Republic of Tunisia, No. 13, p. 201.
\(^15\) Decree No. 2011-8 of 18 February on the establishment of the National Fact-Finding Committee on abuses during the period from 17 December 2010 until the end of its mandate, Official Gazette of the Republic of Tunisia, No. 13, p. 203.
2) The holding of presidential elections on the date above, followed, after the Eid al-Fitr (after the holiday marking the end of Ramadan) by elections for a constituent assembly on the initiative of the president-elect and after the suspension of the Constitution and a provisional organization of public authorities.

3) The announcement of the impossibility of holding presidential election under Article 57 of the Constitution of 1959, the suspension of the Constitution after the two-month period ending on 17 March 2011, and the adoption of a regulation organizing public authorities, then the election of a constituent assembly in response to the request of the people.

4) The High Political Reform Commission prepares a draft constitution and the Interim President submits it for a referendum after consulting political forces.

After in-depth discussions, under popular pressure, in particular the sit-in Kasbah 2, the third scenario was agreed in the session of 21 February 2011. Prime Minister Beji Caid Essebsi had no role in this choice, contrary to what some newspapers alleged. A few days later, events accelerated, first with the fall of the Ghannouchi Government on 27 February and the appointment of Mr. Beji Caid Essebsi as Prime Minister, and second with the speech of 3 March 2011. In this speech, the interim President declared that, “Political reform makes it imperative to lay down a new constitutional foundation that reflects the will of the people and has popular legitimacy.” He added, “The current Constitution no longer responds to the aspirations of the people after the revolution and is overtaken by events. In addition, it has been distorted by the incorporation of many amendments that prevent real democratic life and are an obstacle to the holding of transparent elections and the establishment of a political climate in which every individual and every group enjoys freedom and equality.” Building on the people's calls and the comprehensive consensus among political forces and the core of civil society, the Interim President called for the election of a national constituent assembly on 24 July governed by a special electoral system prepared by the High Authority for the Achievement of the Goals of the Revolution. The President's decision was approved by a vast majority of political forces and Mr. Beji Caid Essebsi was appointed Prime Minister. Then, the suspension of the Constitution of 1959 was legally established by Decree-Law No. 2011-14 of 23 March 2011.

From the High Political Reform Commission to the High Authority for the Achievement of the Goals of the Revolution

The Political Reform Commission

The setting up of a High Commission on Political Reform was announced by Prime Minister Mohamed Ghannouchi in the speech he delivered on 17 January 2011 after a meeting he held on 15 January with some lawyers who openly opposed the Ben Ali regime, who were few, and some neutral figures who were not unconditional supporters of Ben Ali. The aim of setting up this commission was to reconsider the legal system, in the first place the Constitution, and to revise major laws that organised political life and public freedoms and to make them compliant with the standards of democracy and the rule of law. The President of the

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17 El Muharrir, “The referendum option was no longer likely and the problem remained the same, 11 September 2011, p.5
18 I was present at this meeting with Mr. Sadek Belaid. The Prime Minister announced that the Commission on corruption and malpractice would be chaired by Mr. Abdelfattah Amor, and the Fact-finding Committee would be chaired by Mr. Lazhar Karoui Chebbi (then, finally by Mr. Taoufik Bouderbala), and the Committee for Political Reform would be chaired by Mr. Yadh Ben Achour.
Commission held preliminary consultations on the composition of the Commission and the reflection on its legal framework.

In the first stage, a draft was prepared in the form of a presidential order establishing an independent public body of an advisory nature that would deal with political reform. Pending the publication of the legislation establishing it, the Political Reform Committee started its activity by setting up five (5) sub-committees that began to function immediately. Then it participated in the “Dialogue with the Youth of the Kasbah sit-in”, and organized a “National Forum” twice a week to hear the views of representatives from institutions, professional bodies, trade unions, political parties, and associations, starting on 4 February 2011. The Commission received many representatives from these institutions, except those that rejected the existence of the Commission, such as the National Lawyers Commission, which issued a communiqué on the matter on 29 January 2011 stating that, “Political Reform Commissions (sic), fact-finding commissions and commissions on investigation of abuses and the fight against corruption and malpractice do not reflect the will of the people, especially that they were set up by a decision of the ousted president. In addition, they lack powers and mechanisms that only an independent judicial authority would have.” Despite this hostile climate, the Committee succeeded in organizing several meetings with judicial institutions, such as the Administrative Court and the Court of Auditors; parties, such as the Renewal Movement, the Social Democrats Movement, the Congress for the Republic, the Patriotic Democratic Labour Party, the Democratic Progressive Party; professional and civil society organisations, such as the National Union of Journalists, the National Association of Certified Accountants, the General Union of Tunisian Students, the Association of Tunisians Abroad, the Tunisian Association of Democratic Women and the National Union of Physicians. The Chairman of the Committee also received a delegation of the Ennahdha Movement. The Committee went to hear the Tunisian League for the Defence of Human Rights on 12 February 2011. It is worth mentioning that the Political Reform Commission later became the Committee of Experts of the High Authority for the Fulfilment of the Objectives of the Revolution.

The National Council for the Protection of the Revolution

However, in the meantime, some activists that supported the Revolution, including parties, bodies, associations, and unions agreed to set up a “National Council for the Protection of the Revolution”. They issued the following communiqué on 11 February 2011:

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19 It was initially composed of 12 members (statement published by the Commission on 28 January 2011), then its definitive composition included the following members: Yadh Ben Achour, Chairman of the Committee, Mohamed Salah Ben Aissa, Ghazi, Ghrairi, Mohamed Reda, Farhat Horchani, Slim Laghmani, Mustafa Ben Latif, Hafidha Chekir, Mohammed Chafik Sarsar, Mounir Senoussi, Amine Mahfoudh, Asma Nouera, Omar Boubekri, Najet Yakoubi, Wassila Kaâbi, Hamadi Zribi, Moataz El Karkouri, Lamia Naji, Yosra Frawes, Selma Soumeiri, Slim Kamoun

20 Constitutional Committee, Judicial Committee, Electoral Committee, Freedoms Committee, and Committee on the press and media.

21 In this regard, no one knows what is the relationship of the Political Reform Commission with the judiciary.

22 Some parties, associations, and national figures refused or withdrew from the initiative, such as the Renewal Movement, the Democratic Progressive Party, the Tunisian Association of Democratic Women, and the National Union of Journalists.

Communiqué:
A meeting of the representatives of the bodies, parties, associations, and organisations, undersigned, was held on Friday 11 February 2011 at the headquarters of the National Lawyers Association at the Court of Justice, Bab Bnat Tunis.

The participants discussed the proposals for the establishment of a national authority to: protect the revolution out of loyalty to the martyrs' blood; fulfil the aspirations of the people; enshrine the principles of the revolution; ward off the risk of counter revolution; and avoid a situation of vacuum.

Despite differing opinions regarding the current Government, which is accepted by some and rejected by others, the participants agreed on the importance of establishing such a body, called the “National Council for the Protection of the Revolution” which would be based on the following principles:
The body will have decision-making authority. It will monitor the drafting and approval of legislation relating to the transition period (abrogation of anti-freedom laws, etc.);
It will monitor the functioning of the transitional Government, which carries out day to day governance activities, and approve the nominations of high officials;
It will review the mandate and composition of committees that have been set up, which will require consensus. The work of these committees shall be automatically submitted to the Council for approval;
It will take initiatives to ease the situation brought about by the political transition in all areas, particularly the judiciary and the media;
The body will be composed of representatives of the political parties, associations, organisations, and bodies undersigned, as well as representatives from the opposition, by consensus;
The establishment of the body shall be approved by decree issued by the Interim President.

However, the Prime Minister and the Interim President of the Republic refused to embark on such a dangerous path and the Interim President refused to issue a decree for the requested purpose. The unity of the state was at risk. It should be noted that some political parties and associations, such as the Renewal Movement, the Democratic Progressive Party, the Tunisian Association of Democratic Women, and the National Union of Journalists rejected this initiative in principle, or withdrew later, because of its inherent flaws, weaknesses, and contradictions.

The Government proposed that the various representatives who initiated this project join the Committee for Political Reform in order to establish a unified body. Therefore, Prime Minister Mohamed Ghannouchi played a historic and crucial role in negotiating with the most important members of the National Council for the Protection of the Revolution.

Decree No. 2011-6 on the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform, and Democratic Transition


Mr. Ahmed Mestiri, is among the national figures who led the initiative, then pulled out of it. See the critical article wrote by Mr. Fakher Gafsi, "From the Discourse of Protection to the Exercise of Guardianship."
The creation of the National Council for the Protection of the Revolution had a direct impact on the project to set up a Political Reform Commission. The latter, working with Prime Minister Mohamed Ghannouchi and at his behest, prepared a second draft, in the form of a decree, taking into consideration the new data that was now available. This led to the transformation of the Commission into an institution with a dual character: representative and technical, composed of deputies and experts. It was expanded and its mission changed.26

26 Text of the Decree:

Decree No. 2011-... of ... February 2011 establishing the High Commission on Political Reform

The President of the Republic,

On the proposal of the Prime Minister,

Considering Law No. 2011-5 of 9 February 2011 mandating the Interim President of the Republic to promulgate decrees pursuant to Article 28 of the Constitution,

Hereby promulgates the following decree:

Article 1:
There is hereby established a public independent body called “The High Commission on Political Reform”.

Article 2:
The Commission undertakes to examine legal provisions relating to political organization. It may propose partial or total amendment of such provisions. It may propose new formulations for that purpose to create favourable conditions for the organization of free, democratic, pluralistic, transparent, and fair elections that achieve the democratic transition of power in accordance with the popular will.
The Commission may also propose the adoption of appropriate measures in this regard.

Article 3:
The Commission presents the results of its work to the President of the Republic in one of the following formats:

a - draft decree; b - draft measure; recommendation.

Each of the above documents shall be accompanied by an explanatory report showing the objectives, options, positions, and the final opinion of the Commission.

Article 4:
The Commission is composed of Member Deputies and Member Experts.

a - Member Deputies:
Are members appointed from among: national figures with proven competence, integrity, and independence, to represent parties, political leanings, organisations, and associations concerned by public affairs.

b - Member Experts:
Are members appointed from among specialists in public law.

Article 5:
The Commission includes a President, a Vice-President, a General Rapporteur, a Panel of Experts, and a Board.

Article 6:
The President of the Commission is selected from among national figures with proven competence in public law, integrity, and independence.

Article 7:
The President of the Commission ensures the proper functioning and confidentiality of the work of the Commission. His / her responsibilities include:

Proposing the appointment of Member Experts;

Check the texts of laws that require study for amendment and revision;

Circulating the legal texts under study among the Members;

Convening, chairing the meetings of the Panel of Experts and coordinating its work;

Convening and chairing the meetings of the Board; coordinating its work, facilitating and closing its debates, and maintaining order thereat;

Keeping the documents of the Commission;

Submitting periodic reports to the President of the Republic on the progress of work of the Commission in addition to the provisions of Article 3 of this Decree;

Ensuring the publication of the reports of the Committee;

Representing the Commission and acting and its spokesperson.

Article 8:
The Board meets upon the invitation of the President of the Commission on the date and at the venue designated for it, when the quorum is reached by the presence of an absolute majority of Members.

Article 9:
However, the “National Council for the Protection of the Revolution” took the initiative to prepare a draft decree in alignment with the ideas contained in the communiqué referred to previously. Eventually, the two texts were combined to produce the final text of Decree No. 2011-6 of 18 February 2011.

The meetings of Board and the Panel of Experts are held behind closed doors. The reports on the proceedings of the Commission shall be made public.

Article 10:
The expenses relating to the work of the Commission, including travel and accommodation costs of its members, shall be funded from the budget of Presidency of the Republic.

Article 11:
This Decree shall be published in the Official Gazette of the Republic of Tunisia and shall come into force from the date of its publication.

Done at Tunis on ...

which reads as follows: Decree-law establishing the High Authority for the Protection of the Revolution and Democratic Transition.
The Interim President of the Republic,
On a proposal of the Prime Minister,
Considering Articles 28 and 57 of the Constitution,
Considering Organic Law n° 2004-48 of 14 June 2004 organizing the work of the Chamber of Deputies and the Chamber of Councillors and determining the relationships between both Chambers, as supplemented by Organic Law n° 2006-32 of 22 May 2006 and in particular Article 32 thereof,
Considering the Public Accountancy Code promulgated by Law n° 73-81 of 31 December 1973, as amended subsequent texts,
Considering Law No. 2011-5 of 9 February 2011 mandating the Interim President of the Republic to promulgate decrees pursuant to Article 28 of the Constitution,
Considering Decree n° 69-400 of 7 November 1969, establishing a Prime Ministry and determining the powers of the Prime Minister,

Hereby promulgates the following decree-law:

Article 1:
There is hereby established an independent public authority called “the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition.”

Article 2:
The Authority is in charge of studying legislative texts relating to the political organisation and proposing reforms likely to materialise the objectives of the Revolution with regard to the democratic process. It may also, in consultation with the Prime Minister, issue an opinion on Government activity.

Article 3:
The Authority is composed of:
A President appointed by decree from among independent national figures with proven competence in the legal and political areas;
A Vice-President appointed from among political personalities and civil society members taking part in the Authority;
A Board composed of national political personalities, representatives of various political parties, authorities, organisations, associations, members of civil society concerned by public affairs in the capital and in the regions, appointed upon a proposal of the concerned bodies. This Board is in charge of formulating the orientations likely to adapt the legislations relating to political life so that they meet the requirements of the realization of democratic transition. It may also present proposals aiming to ensure the continuity of public service and the achievement of the objectives and requirements of the Revolution.
A Panel of Experts composed of at least ten (10) specialists entrusted with the drafting of bills in accordance with the orientations of the Authority.
A General Rapporteur in charge of drafting the minutes of the work of the Authority. The General Rapporteur shall be appointed upon the proposal of the Authority;
A spokesperson for the Authority appointed by this latter from among its members for a specific period to ensure rotation.

Article 4:
A simple comparison between the draft decrees, and the final text of Decree No. 6 on the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition, would show that the final text that created this public independent body is a combination of both texts. This explains some of its complexities and ambiguities, and the length of its title, considered by many people as strange.\(^29\)

The President of the Authority shall ensure its proper operation, chair its meetings, keep its documents, and represent it with third parties.

**Article 5:**
The Authority shall take its decisions by consensus, and failing this, by the majority. In the event of a tie, the President shall have a casting vote.

**Article 6:**
The President of the Authority may, if necessary, after consultation with the Authority, set up specialized sub-committees on particular subjects that fall within its powers.

**Article 7:**
The Authority meets on convocation of its President or at the request of two thirds of its members. Its deliberations take place behind closed doors.

**Article 8:**
The expenditures relating to the operation of the Authority, including travel and accommodation expenses of its members, shall be funded from the budget of the Prime Ministry.

**Article 9:**
The President of the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition shall submit to the President of the Republic and the Prime Minister the opinions and proposals of the Authority as well as a report on its work and its achievements as part of its powers.

**Article 10:**
The Prime Minister is entrusted with the execution of this Decree-Law, which shall be published in the Official Gazette of the Republic of Tunisia and take effect immediately.

Done at Tunis on ... Official Gazette of the Republic of Tunisia — 1 March 2011, No. 13, p. 200.

\(^28\) To facilitate comparison, this is the full text of Decree No. 6:

\(^29\) Decree No. 2011-6 of 18 February 2011 establishing the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform, and Democratic Transition

The Interim President of the Republic,

On a proposal of the Prime Minister,

Considering Articles 28 and 57 of the Constitution,
Considering Organic law n° 2004-48 of 14 June 2004 organizing the functioning of the Chamber of Deputies and the Chamber of Councillors and determining the relationships between both Chambers, as supplemented by Organic Law n° 2006-32 of 22 May 2006 and in particular Article 32 thereof, Considering the Public Accountancy Code promulgated by Law n° 73-81 of 31 December 1973, as amended and supplemented by subsequent texts,
Considering Law n° 2011-05 of 9 February 2011 entitling the Interim President of the Republic to promulgate Decrees-laws in accordance with Article 28 of the Constitution,
Considering Decree No. 69-400 of 7 November 1969 establishing the Prime Ministry and determining the powers of the Prime Minister.

Hereby promulgates the following decree-law:

**Article 1:** There is hereby established a public independent body called “The High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform, and Democratic Transition.”

**Article 2:** The Authority is in charge of studying legislative texts relating to the political organisation and proposing reforms likely to materialise the objectives of the Revolution with regard to the democratic process. It may also, in consultation with the Prime Minister, issue an opinion on Government activity.

**Article 3:** The Authority is composed of:
- A President appointed by Order from among independent national figures with proven competence in the legal and political areas;
- A Vice-President appointed from among political personalities and civil society members taking part in the Authority upon a proposal of the Authority;
- A Board composed of national political personalities, representatives of various political parties, authorities, organisations, associations, and members of civil society concerned by public affairs in the capital and in the regions
On the basis of this decree, the President of the Authority was appointed by Order. Then, the members of the Authority were appointed by Order of the Prime Minister of 14 March 2011 (12 representatives of parties, 17 representatives of bodies, organisations, associations, and members of civil society, and 42 national figures). The High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform, and Democratic Transition met for the first time on Thursday, 17 March 2011 at the former seat of the Economic and Social Council under the supervision of the Interim President of the Republic. In view of the criticism about the composition of its members, especially with regard to the representation of regions, youth, women, and the families of the martyrs, a second Order was promulgated by the Prime Minister on 5 April 2011 and raised the number of members as follows:

I - Representatives of parties: 36;
II - Representatives of bodies, organisations, associations, members of civil society: 33;
III - National figures: 72;

who took part in the Revolution and supported it, appointed by Order of the Prime Minister upon the proposal of the concerned bodies. This Board is in charge of formulating the orientations likely to adapt the legislations relating to political life so that they meet the requirements of the realization of democratic transition. It may also present proposals aiming to ensure the continuity of public service and the achievement of the objectives and requirements of the Revolution.

- A Panel of Experts composed of at least ten (10) specialists appointed by the President of the Authority entrusted with the drafting of bills in accordance with the orientations of the Authority. The bills drafted by the Panel shall be submitted to the Authority for approval before their submission to the President of the Republic;
- A General Rapporteur in charge of drafting the minutes of the work of the Authority. The General Rapporteur shall be appointed upon the proposal of the Authority;
- A spokesperson for the Authority appointed by the latter from among its members for a specific period to ensure rotation.

Article 4: The President of the Authority shall ensure its proper operation, chair its meetings, keep its documents, and represent it with third parties.

He may delegate all or part of his / her powers to the Vice president or to one of the authority members.

Article 5: The Authority makes its decisions by consensus, and failing this, by the majority. In the event of a tie, the President shall have a casting vote. The members of the Panel of Experts shall take part in the work of the Authority without having the right to vote.

A periodical meeting shall be devoted to follow-up. The observations and decisions of the Authority formulated at these meetings shall be recorded in a report that shall be presented to the President of the Republic and to the Prime Minister.

Article 6: The President of the Authority may, if necessary, after consultation with the Authority, set up specialized sub-committees on particular subjects that fall within its powers.

Article 7: The Authority meets on convocation of its President or at the request of two thirds of its members. Its deliberations take place behind closed doors. Its meetings are only legal if the quorum is reached by the presence of more than half of its members.

Article 8: The expenditures relating to the operation of the authority, including travel and accommodation expenses of its members, are funded from the budget of the Prime Ministry.

Article 9: The President of the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform, and Democratic Transition shall submit to the President of the Republic and the Prime Minister the opinions and proposals of the Authority as well as a report on its work and its achievements as part of its powers. The authority shall ensure, in coordination with the Prime Minister, follow-up on the implementation of its proposals to materialise the objectives of the Revolution, to ensure the proper operation of public service, and to realize democratic transition.

Article 10: The Prime Minister is entrusted with the execution of this Decree-Law, which shall be published in the Official Gazette of the Republic of Tunisia and take effect on 18 February 2011.

Done at Tunis on 18 February 2011.
The Interim President of the Republic, Foued Mebazaa.

30 Order No. 2011-234 of 19 February 2011 appointing Mr. Yadh Ben Achour President of the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition.
IV - Representatives of regions: 12;
V - Representatives of the families of martyrs: 2;

There is no doubt that this composition, which was later expanded by a few members before stabilising, turned the Authority into a pluralistic structure representing almost the entire Tunisian political and social spectrum, which has contributed to the enrichment of deliberations and different attitudes.

The Authority was, in practical terms, the first free and democratic public community institution in the history of the country. However, because of conflicts of interest it was almost disrupted when Habib Essid was appointed Interior Minister. Some of the members of the Authority (75) signed a motion calling for a suspension of the debate on the electoral decree during a period in which we were fighting a desperate race against the clock to ensure the success of the elections of 24 July. As a result, the session of Wednesday 30 March 2011 was adjourned and the President almost resigned before the situation returned to normal again.  

The Work of the Authority

Although the Authority was not elected, and its functions were limited to providing advice and issuing proposals, it performed a “semi-parliamentary-legislative function” in the political arena. On the one hand, it organised a dialogue characterised, from time to time, by tensions with the members of the Government and the Prime Minister, and by accountability issues. On the other hand, it voted, by show of hand, after preparation and discussion, the most important legal texts on freedom in the first transitional period, from the electoral law of the Constituent Assembly and the decree on the Independent High Authority for Elections to the decrees on political parties, associations, freedom of audiovisual communication, and freedom of the press. All the revolutionary texts ratified by the Authority were in the form of legislative decrees, albeit after altercations with the Government, as occurred with regard to Article 8 of the Decree on the Independent High Authority for Elections or Article 15 of Decree No. 2011-35 of 10 May 2011 on the election of the National Constituent Assembly and its implementing regulations, as we shall explain later.

The second transitional period and the elections would not have succeeded without the work carried out by the High Authority, even though it did not manage to organize its proceedings with rules of procedures. Perhaps its success was due to that very fact. In addition to the initial criticism faced by the Authority, this “legislative” character raised strong criticisms

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31 “Essarih”, Thursday 31 March 2011, p.5
32 Mr. Beji Caid Essebsi did not initially approve the Authority. On the contrary, he considered that Mr. Mohammed Ghannouchi had made a mistake by accepting it.
33 Decree No. 2011-35 of 10 May 2011 on the election of the National Constituent Assembly, as amended by Decree No. 2011-72 of 3 August 2011.
35 Decree No. 2011-87 of 24 September 2011 on the organisation of political parties.
36 Decree No. 2011-88 of 24 September 2011 on the organisation of associations.
37 Decree No. 2011-116 of 2 November 2011 on freedom of audiovisual communication, the establishment of an Independent High Authority for Audiovisual communication.
such as the one expressed by the Ennahdha Movement and those who orbit around it, following its withdrawal from the Authority because of the postponement of the elections. They accused it of having exceeded its powers, snatching its legitimacy unlawfully, and turning into a Parliament. We will not address in this research the violent attacks that the Authority sustained from all sides; some of them were of very bad taste and others of lowly thinking. Those who criticized the Authority included some professors in law, such as Prof. Sadok Belaid, who squeezed out his pen to the last drop of ink every day of the week in the columns of the newspaper La Presse to denounce the Authority. Ultimately, he called for its definitive dissolution, relying on a statistic of his making according to which 70% of Tunisians did not trust the Authority. However, he did not find much support for his claims.

It would take a lot of time to talk about the results of the Authority and the role played by the Panel of Experts in leading it towards the liberation of the country from the laws of despotism. If we forget or try to forget, it would be sufficient to remember the electoral decree. Even if we assume that no “miracle” occurred, it brought down all prohibitive barriers set up here and there, within or outside the Authority, to create the first opportunity that enabled the country to break into the path of political freedom. It adopted an unprecedented revolutionary rule: the mandatory alternating between men and women for the registration of electoral lists. It rid the electoral process from the scourge of electoral fraud, which was the domain of the Interior Ministry. In its stead, it set up the Independent High Authority for Elections, and adopted a fair and pluralistic voting procedure, which did not diminish the share of the most popular political parties and did not overburden the smallest ones, as the results show. However, even these achievements have been denied by some. The day of the ratification of the electoral decree, Mr. Kais Saied, teacher at the Faculty of Legal Sciences, was qualified as “a black day in the history of constitutional law in Tunisia,” as he said, adding, “We are witnessing the return of some despotic attitudes and exclusionary practices and these are committed by the Authority.” Mr. Sadok Belaïd, for his part, saw this as a “a conspiracy against the sovereignty of the people,” a confiscation of their will, and an evil imposition. These theses have been proven false by history.

Section II: Provisional Constitutional Organisation of Public Authorities

When it appeared that it was impossible to hold presidential elections under Article 57 of the Constitution of 1959, there was a need to organise the public authorities in the...
revolutionary transitional period. This was subsequent to the resignation of the Prime Minister because of the general political situation and the sit-ins calling for the “execution of Ghannouchi”\textsuperscript{49} on the national television channel, and following the communiqué issued by the Presidency on 3 March 2011. That was done with the promulgation of the famous Decree-Law No. 2011-14, which organised the public authorities, revoked the institutions compromised with the despotic regime, and gathered the authorities in the Presidency of the Republic.

\textit{“Constitutional” Decree-Law No. 2011-14 of 23 March 2011}

This decree was issued after the Interim President of the Republic announced in the speech on 3 March 2011 that the Constitution no longer had any credibility. The situation resulted from the following reasons: First and foremost, thanks to its active forces, the Revolution overrode the Constitution and called for its revocation along with the institutions that had been compromised with the despotic regime, such as the elected councils and the Constitutional Council. The Revolution required the Interim President to announce these decisions and to maintain in office for the public interest in order to avoid the collapse of the state, even though he belonged to the old regime. Second, because exceptional circumstances and the disturbance of public order prevented the organisation of presidential elections, as provided for in Article 57, the continuation of the implementation of the Constitution became impossible. Third, because the Constitution had been distorted and corrupted by the many amendments that disturbed its ability to balance power, it became a manifestation of corruption and despotism.

It should be emphasized that this “decree” was not at all linked to previous ordinary decrees not to subsequent ones. It was an original, structural, and constitutional decree, with no previous legal basis, except for the revolutionary legitimacy that overturned the pre-revolution system, the rule of necessity, the agreement of existing political forces, and the acceptance from society as a whole.

During the phase of preparation of Decree-Law No. 2011-14, there was a desire to give it an unusual name, such as “Signature”, “Dahir”, “Constitutive Decision”, or “Constitutional decree” to emphasize its unusual character in the ordinary sense of public law. However a traditional administrative mentality prevailed, and therefore, it remained a “decree” and was not given its due importance. The decree clearly expressed its constitutional character in different ways, such as the right of the people after the revolution to recover sovereignty through elections, their right to establish a new Constitution, the necessity of continuity of the State, and the revocation of the Constitution of 1959.

Its preamble reads:

\textit{“Whereas the Tunisian people are sovereign and exercise their sovereignty through their representatives elected through direct, free, and fair elections,}

\textit{Whereas the people expressed during the Revolution of 14 January 2011, their will to exercise their full sovereignty within the framework of a new Constitution,}

\textit{Whereas the current situation of the State, after the definitive vacancy of the Presidency of the Republic on 14 January 2011, established by the Constitutional Council in its declaration}

\textsuperscript{49} It was, in my opinion, the straw that broke the camel's back. The Prime Minister announced at the time that is was a "Revolution".
It is obvious that all these linguistic structures refer to one single idea, which is that the decree was not an ordinary one and that it was in fact a provisional constitution intended to build on the results of the revolution. It suspended the Constitution of 1959, dissolved the institutions compromised by the despotic regime, opened up a first transitional period that would end when the National Constituent Assembly assumes its duties. It expressed this idea directly in Article 1: “The public authorities in the Republic of Tunisia shall be provisionally organized in accordance with the provisions of this decree-law, until a national constituent assembly elected through universal, free, direct and secret ballot according to an electoral system chosen for this purpose, assumes its functions.”

Invalidation of the institutions compromised with the despotic regime

All constitutional institutions were dissolved under Article 2 of Decree Number 14:
“The following bodies shall be dissolved under this Decree-Law:
- The Chamber of Deputies;
- The Chamber of Counsellors;
- The Economic and Social Council; and
- The Constitutional Council.”

In Articles 3 and 17, the decree-law made an exception about the Administrative Court, the Court of Auditors,\(^{50}\) and the judicial system.\(^{51}\) There is no doubt that these procedures were not well received by the specialists of public law who favoured traditional analyses. They considered it as a “decree,” and applied to it the standards of ordinary decrees, ignoring the fact that the time of the revolution had an exceptional “legitimacy” that was not governed by the normal standards. In this regard, the first thing to notice is that the President of the Republic exercised the constitutional function by issuing Decree-Law No. 2011-14, which is the most significant proof of the existence of an exceptional constitutional law inherent in revolutionary legitimacy. The relationship between public law, in particular constitutional law, and the revolution, cannot be stable, rather it is a troubled dialectical relationship, fluctuating between separation and connectedness, legitimacy and revolution, determined by the circumstances.

Concentration of Powers in the Presidency of the Republic

Contrary to what had been in place in the temporary system of the public authorities in the wake of Independence, after the revision of 3 August 1956,\(^{52}\) which assigned hierarchical

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\(^{50}\) Art. 3: The Administrative Court and the Court of Auditors shall exercise their powers according to the laws and regulations in force related to their organization, attributions, and procedures, which are applicable to them.

\(^{51}\) Art. 17: The judicial authority, in all its types, shall be organized and shall operate and exercise its powers in accordance with the laws and regulations in force.

\(^{52}\) Order No. 1956-5 of 3 August 1956 amending the Order of 21 September 1955.
authority to the Prime Minister, the President of the Republic in Decree-law No. 2011-14 has a pluralistic function. He is the legislator, the Head of State, and the Head of the Executive Authority. To prevent these broad powers from paving the way for the permanent installation of the Interim President, Article 11 of the Decree-Law No. 2011-14 stipulates that “The Interim President of the Republic may not be a candidate for membership in the National Constituent Assembly nor in any other election following the promulgation of the new Constitution.” Article 15 provides for the same prohibition with regard to the Prime Minister and the rest of the members of the transitional Government who cannot run for membership in the National Constituent Assembly.

The Legislature

Decree-Law No. 2011-14 stipulates the following: “Legislative texts are promulgated in the form of decree-laws. The Interim President of the Republic promulgates decree-laws after deliberation in the Council of Ministers and ensures their publication in the Official Gazette of the Republic of Tunisia.”

We conclude from this that Interim President of the Republic, in the provisional constitutional order, established by Decree-Law No. 2011-14, exercises legislative power by decree-laws submitted to the Council of Ministers, along the lines of the legislative orders set forth in Article 2 of the Decree of 21 September 1955 on the provisional organization of public authorities, in the period between the conventions on internal autonomy (3 June 1955) and the expected adoption of the Constitution. Article 5 of the Decree-Law No. 2011-14 showed the scope of this legislative authority broadly,53 to the extent that it included “all matters that fall within the scope of law.” Accordingly, all decree-laws, from No. 2001-15 to No. 2011-120, issued after 23 March 2011, have the same legal value. It should be noted that the initiative by the High Authority for the Fulfilment of the Objectives of the Revolution to present some draft decrees, then to discuss and approve them,54 does not change anything, and does not make the High Authority, from the legal viewpoint, a legislative body, or a body that participates in the legislative function, contrary to the opinion of some people who accused it of taking over a power that did not belong to it, such as Mr. Rashed Ghannouchi,55 or of assuming legitimacy, such as Mr. Hamadi Jebali.56

53 Article 5: Legislation on the following areas shall be in the form of decrees: Authorization of ratification of treaties; amnesty, human rights and fundamental freedoms; electoral system, press, media and communication and publishing; organization and financing of political parties, associations, non-governmental organizations and professions; fight against terrorism and money laundering; development of the economy; right to work, social security and health; finances and taxation; property and real rights regulations; education, teaching, and culture; response to disasters and hazards, the adoption of exceptional measures; procedures concerning the different jurisdiction orders and the determination of crimes and offences and the punishments applicable to them as well to the criminal offences punished by custodial sentence; fundamental guaranties granted to civil servants, civil agents and the military; nationality, civil status and obligations; general means of implementation of this decree-law; and, in general, any matter that falls within the scope of the law.
Presidency of the State and Presidency of the Executive Authority

Article 8 of “Constitutional” Decree No. 14 provides that until the National Constituent Assembly assumes its responsibility, the Interim President shall continue to assume presidency, with the consequent representative, arbitral and leadership authorities. The Constitutional Decree has not expressly provided for the arbitral role of the President of the Republic. However, the Interim President intervened repeatedly and with remarkable success by giving advice and operationalising coordination, as he did at the meeting held on 12 November 2011 with political parties, with a view to ensuring the success of the opening session of the National Constituent Assembly and agreeing on the text of the presidential decree calling for it. Moreover, the Interim President intervened to settle some disputes or calm down tensions between the Government and other authorities, such as the High Authority for the Fulfilment of the Objectives of the Revolution or the Administrative Tribunal.

As for the representative role, the Interim President shall represent the State, accredit diplomats abroad, approve the accreditation of representatives of foreign countries, and ratify treaties. Further, the Interim President shall assume the Supreme Command of the Armed Forces, declare war, and conclude peace after the deliberation of the Council of Ministers.

Finally, the explicit text of Article 6 provides, “The executive power is exercised by the Interim President of the Republic assisted by a transitional Government run by the Prime Minister.” The transitional Government and Prime Minister are assisting structures to the President of the Republic, and the Interim President is the head of the executive authority. Being the head of the executive authority, the President of the Republic is in charge of, inter alia, executing legislative decrees by virtue of implementing orders, exercising general regulatory power through orders of regulatory nature, presiding the Council of Ministers, appointing the prime minister and other members of the Government and dismissing the Government or the service of a member thereof, and assigning senior civil and military posts, all of that is upon the proposal of the Prime Minister. Though some of the prerogatives of the President do not give him full independence since they are constrained by the Prime Minister's proposal, they are legally considered core duties for the President of the Republic and subsidiary for the Prime Minister and members of the Government.

The Prime Minister and the Government

Determining the powers of the Government and Prime Minister, Article 13 provides, “The provisional Government shall see to the management of the State affairs as well as to the proper conduct of the public services. The Prime Minister shall run and coordinate the Government’s works, head the administration and the police force, and may, if necessary, act on behalf of the Interim President of the Republic at the head of the Council of Ministers or any other council.” It can be argued that this article is in line with what has been mentioned earlier with respect to the position of the Prime Minister in relation to the President of the Republic. However, in the light of the political reality and practice, and for reasons attributable to the political climate, special circumstances related to the installation of the new powers, and personal factors, the setup of constitutional authority flipped upside down. The “legitimate despot,” i.e. the President of the Republic, became an honorary and arbitral authority, while the Prime Minister, the Constitutional Assistant to the President of the Republic, monopolized the
executive power and the steering of Government activity at the political and legal levels. By way of illustration, we may cite the crisis of the postponement of elections.

Section III: Elections in a Storm

Regardless of the many problems encountered in the electoral process, such as the crisis of the funding of political parties, the crisis of political publicity, some problems emerged and almost hindered or suspended the electoral process, including the problems of electoral decrees, the postponement of elections, and the referendum issue.

The Problems of Electoral Decrees

Article 8 of Decree No. 27

The first problem faced by the High Authority for the Fulfilment of the Objectives of the Revolution arose with regard to the text on the Independent High Authority for Elections, specifically Article 8 thereof. The original text of Article 8, approved by the High Authority for the Fulfilment of the Objectives of the Revolution on 11 April 2011 and forwarded to the Government on 13 April, was as follows:

“The Central Authority is composed of sixteen (16) members appointed by decree and chosen as follows:
- Three (3) magistrates selected by the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition from among six (6) candidates nominated by the Association of Tunisian Judges on an equal basis from among the advisors of the Administrative Tribunal, the Advisors of the Court of Auditors, and Judicial Courts...”

However, to the surprise of all the members and the President of the High Authority, the text published in the Official Gazette was different from the one proposed, as two conditions were added thereto, as follows:

“- Three (3) magistrates selected by the High Authority for the Fulfilment of the Objectives of the Revolutions, Political Reform and Democratic Transition from among six (6) candidates, half of them proposed by the Association of Tunisian Judges and the other half by the Tunisian Magistrates Union (Syndicat des Magistrats Tunisiens), respectively, on an equal basis from among the Advisors of the Administrative Tribunal, the Advisors of the Court of Auditors, and third-grade magistrates of Judicial Courts...”

This incident had a very negative impact on the relationship between the Government and the High Authority and caused the Association of Tunisian Judges to withdraw from the High Authority, even though the Union of Tunisian Judges, to pacify the climate, announced its decision to relinquish its candidacy in the elections for the Independent High Authority for Elections. To address the final withdrawal of the Association of Tunisian Judges and to complete the composition of the electoral body, the High Authority for the Fulfilment of the Objectives of the Revolution resorted to the last paragraph of Article 8 on the election of representatives of magistrates on the basis of open candidacy.57

57 “In the event candidacies are not submitted on before the date mentioned above, the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition shall select members directly from among those who meet the conditions set forth above.”
Article 15 of Decree No. 2011-35

Hardly had the issue of Article 8 of Decree No. 2011-27 on the Establishment of Independent High Authority for Elections come to an end when the “bomb” of Article 15 of Decree No. 2011-35 of 10 May 2011 on the Election of the National Constituent Assembly exploded. The members of the High Authority proposed this Article on the basis of the following considerations: the old ruling party, the Democratic Constitutional Rally, which was dissolved by judicial decree on 3 March, 2011, caused grave political and social damage to the country. It bears huge responsibility in weakening the State and marginalising the citizens’ contribution in the country’s growth, by increasing the spread of corruption, rigging elections and falsifying statistics, interfering with the functioning of the judiciary, monopolising powers, and making lies and cajolery as fundamental principles in the running of the State. Accordingly, the overwhelming majority in the High Authority, with the exception of some parties such as the Progressive Democratic Party, agreed to exclude the old ruling party from the constituent process and exclude those who held a position therein from running for the constituent elections. The same decision was deemed applicable to all those who called on the despot to run for a new presidential term in 2014. However, the members of the High Authority disagreed on the duration of the exclusion. After a heated debate, voting took place on Monday, 11 April 2011 to set a period of 23 years for exclusion, starting from the beginning of the rule of Ben Ali in 1987 to the end of his reign. That vote was one of the four votes, dealing with the most important issues of the electoral decree, i.e. the voting method, Article 15, the adoption of the principle of parity between men and women in the preparation of candidacy lists, and finally, the vote on the electoral decree as a whole.

In the same week, on 13 April 2011, the Prime Minister, Interior Ministers, Defence Minister, Finance Minister, and Justice Minister met with the President of the High Authority. The Prime Minister asked the President of the High Authority about the “storm” caused by Article 15. The latter defended the philosophy of its draft, recalling the historical responsibility of the said party in weakening the country. He also pointed to the famous slogan of the Revolution “RCD Get Lost” (RCD Dégage). He stressed that the provision applied only to the constituent elections. The Prime Minister was convinced and expressed support on this respect, but he expressed strong reservations regarding the period approved by the Authority. He proposed that the members of the Office of the President be added to the exclusion list. Moreover, the Prime Minister requested some time for further reflection and consultation on the matter, and to avoid collective prosecution and any “witch hunt.” He also rejected the approach of «bringing the Government to its knees.» This feeling was aggravated by the intense attacks mistakenly uttered by some members of the Authority against the Prime Minister accusing him of yielding to a «shadow Government» composed of members of the old regime.

On 26 April, at a press conference, the Prime Minister announced his proposals in respect of Article 15, for the replacement of the term “members of the Government” with the term “members of the Office of the President, the advisers of the President, and the Office of the President’s attachés”, and replacement of the term “23 years of exclusion” by “10 years of exclusion.” He also proposed that responsibilities should be determined by decree. Faced with this position, there were calls at the meeting held by the Authority on Thursday, April 28th, to

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58 Mounqi Ellouze, La Presse de Tunisie, Friday 15 April 2011, p. 5.
59 Chokri Belaid, "Kol Al-Nas", Saturday 16 to Friday 21 April, 2011, p. 6.
condemn what was considered a retreat from the goals of the Revolution. In the face of this grave crisis – as the deadline for the election of July 24th was fast approaching. The President of the High Authority presented a proposal, apparently adopting a consensual solution, but which was in fact a return to the Authority’s position. It was to delete any explicit reference to the exclusion period, replacing it with the phrase “era of the former president.” The Prime Minister – with the derision of those who know but are not unwary – accepted this solution to save the situation and strengthen the elections. However, a full month of hesitations and delays was wasted. In the end, the President of the Republic signed Decree No. 2011-35 of May 10th 2011, which was published in the Official Gazette, Issue No. 33 on May 10th 2011, in the following wording:

Article 15
Any person who fulfils the following criteria shall have the right to be member of the National Constituent Assembly:
- To be a voter;
- To be 23 years of age or more on the day he/she presents his/her candidacy.

The following persons shall not have the right to stand for the elections:
- Whoever held a position of responsibility in Government in the era of the former president, except those who were not members of the Democratic Constitutional Rally;
- Whoever held a position of responsibility in the Democratic Constitutional Rally in the era of the former president. The relevant responsibilities shall be determined by Order upon the proposal of the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition.
- Whoever called on the former president to run for a new presidential term in 2014. The High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition shall set a list with the names of those persons.

After being drafted by the High Authority, the relevant implementing regulation, above mentioned, was issued on August 3rd, 2011.60

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60 Decree No. 2011-1089 of 3 August 2011 determining responsibilities within the organs of the former Democratic Constitutional Rally in accordance with Article 15 of Decree No. 2011-35 of 10 May 2011 on the Election of the National Constituent Assembly.

The Interim of the President of the Republic,
On the proposal of the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition; and
The Opinion of the Administrative Tribunal

Decrees the following:
Article 1: Whoever held a position of responsibility in the Democratic Constitutional Rally shall be banned from running in the elections for membership in the National Constituent Assembly, in accordance with the provisions of Article 15 of Decree No. 2011-35 of 10 May 2011 on the Election of the National Constituent Assembly.

Article 2: The positions of responsibility in the Democratic Constitutional Rally include:
The Presidency of or membership in the Political Bureau;
Postponement of Elections

The postponement of elections was one of the most serious crises that we experienced in 2011. When the Independent High Authority for Elections met in late May to proceed with the organization and planning of the electoral process, I felt that this process, from the technical and organizational perspectives, would require much time beyond the date set for the elections (July 24th, 2011). In this regard, it should be recalled that this date was set for February 2011, when we were heading for the presidential elections, pursuant to Article 57 of the Constitution.

That date was not changed even after changing the electoral process and opting for constituent assembly elections. Although the Head of the Independent High Authority for Elections President, Kamel Jendoubi, stated in many of his declarations, starting from the communiqué of May 22nd, 2011, that there were necessary material reasons for postponement, the idea of postponing the elections was denied vehemently with reactions ranging from a sense of disappointment and mistrust to violent accusations of political manipulation and corrupt intentions. This concern was strongly reflected in the audio-visual media and newspapers, as well as inside the High Authority for the Fulfilment of the Objectives of the Revolution, which consequently saw the first withdrawal of the Ennahdha Movement at the beginning of June 2011. Faced with this serious situation of confusion and suspicion, Prime Minister Beji Caid Essebsi launched broad consultations with the parties represented at the High Authority for the Fulfilment of the Objectives of the Revolution and other political parties, associations and personalities. After these consultations, which significantly contributed to calming the political atmosphere, he organized a public meeting at the Conference Palace on June 8th, 2011 with the participation of political parties, national figures, trade unions, UTICA, national associations, the press, the media, the Bureau of the High Authority for the Fulfilment of the Objectives of the Revolution, and members of the Central Electoral Commission. At this “conference”, he delivered an important speech in which he reviewed the enormous difficulties that faced the work of the Independent High Authority for Elections. He clearly and convincingly explained that these reasons had nothing to do with any hidden intentions or political agendas. He then suggested the holding of the elections on Sunday, October 23rd 2011 instead of October 16th, which was the date proposed by the Independent High Authority for Elections. This speech had a remarkable effect on restoring political concord and social calm, enabling the Independent High Authority for Elections to begin its work in normal conditions and to firmly and seriously prepare for organising the constituent elections.

Withdrawal of some member organizations from the High Authority

Membership in the Central Committee, and
Political positions in the Central Administration as follows:
Permanent secretaries, assistant secretaries, Chief of Staff, Secretary-General of the Tunisian Union of Youth Organizations, Director of the Centre of Studies and Training, presidents of districts, affiliation in the National Bureau of Students of the Democratic Constitutional rally, membership in coordination committees, membership in universities/territorial and professional federations, presidency of territorial and professional committees.

Article 3: The Prime Minister, the ministers, the secretaries of state and the Independent High Authority for Elections shall be responsible, each within their own field of competence, for implementing this Decree, which shall be published in the Official Gazette of the Tunisian Republic.

Tunis, 3 August 2011
The Interim President or the Republic
Fouad Mebazaa
Withdrawals started with the Association of Tunisian Judges in protest against the Government's actions in respect of Article 8 of Decree No. 2011-27 on the Establishment of the Independent High Authority for Elections. This was followed by the first withdrawal of the representatives of the Ennahda Movement because of the crisis of the postponement of elections and then, after its return to the scene following the 8th of June speech, their second withdrawal as an expression of their rejection to the subject of deliberations determined by the majority of the High Authority, i.e. the political parties law. The Congress for the Republic followed suit and the Reform and Development Party supported the move. To avoid discord, a group of members of the Authority entrusted one of them, Mr. Mokhtar Yahyaoui, who was close to the Ennahda Movement, to settle the situation and he set off for this purpose. After two meetings at the headquarters of the Bar Association on Tuesday 5th and Tuesday 12th of June, 2011, the Authority’s spokesman, Mr. Samir Rabhi, and Vice President Mrs. Latifa Lakhdar informed Mr. Yahyaoui of the result of the final meeting: reconsideration of the Authority’s structure and strengthening of its Bureau, approval of the agenda of the Authority until the October 23 elections, and commitment to the principle of consensus without resorting to voting in the future. The President of the Authority considered that these conditions deserved to be a basis for negotiation and should be presented to the Authority’s Board for approval. However, he rejected the two conditions deemed in violation to the Authority’s law and also refused to yield to what he viewed as a «diktat» by the Ennahda Movement, that «The text of the agreement be announced verbatim by Mr. Yadh Ben Achour, President of the Authority, on Tuesday evening 12 July 2012 in the media ...» Accordingly, the position of the President of the Authority was an obstacle to the return of the Ennahda Movement despite the efforts he made later to persuade its leadership. As for Mr. Yahyaoui, or «the Honourable Judge» according to the words of the Ennahda Movement, went on the offensive, on the following day, and drew his sword from the sheath to attack the President of the Authority, taking up thus the role of a litigant, not the judge.

Referendum and «Declaration of the Transitional Process»: 15 September 2011

Two sets of questions of utmost importance were often asked:
- What were the limits of the jurisdiction of the Constituent Assembly? Was it limited to drafting of the Constitution, or did it have law making powers? And how long would its work last?
- What were the legal indicators that could be used?

Determination of the Jurisdiction of the Assembly

It seems clear that several legal indicators suggest that the main function of the Constituent Assembly does not go beyond the constituent stage. Regardless of Decree No. 2011-14, mentioned earlier, Decree No. 2011-35 on the Election of the National Constituent Assembly defines in its preamble the function of the National Constituent Assembly, namely to be entrusted with the drafting of a new Constitution, no more. In this regard, the Decree states, «based on the will of the Tunisian people to elect a National Constituent Assembly entrusted

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61 The President of the Authority was absent from the meeting for compelling reasons.
62 "Statement on the High Authority" issued by the President of the Ennahda Movement, Rached Ghannouchi on 13 July 2011.
with the drafting of a new Constitution...» This trend was also confirmed by Decree No. 2011-1086 of 3 August 2011 convening the voters.

However, this mere indication is not sufficient, as we need to ask about the legal meaning. That is, it is hard to claim that the electoral decree determines the jurisdiction of the constituent assembly elected by the people.

Setting the National Constituent Assembly’s Term

No provision in the electoral law, Decree No. 2011-35, determines the term of the National Constituent Assembly’s mandate. However, the two regulatory orders issued to call voters for the elections on their first scheduled date, before the postponement, then on the final date set for 23 October 2011, determined this term as one year. Article 6 of Decree No. 2011-1086 of 3 August 2011 convening the voters, states, «The National Constituent Assembly shall convene after the Central Commission of the Independent High Authority for Elections announces the final results of the election, and shall draft the Constitution of the country within a maximum period of one year from the date of its election.»

Accordingly, some held the view that the determination of the term was legally binding on the National Constituent Assembly. To answer this argument, we first underline that the matter in itself, an administrative decision, cannot restrain the National Constituent Assembly, and the latter can either leave it aside or forthright abolish it. Then, we stress that those debaters missed out that the implementing regulatory orders, such as Decree No. 2011-1086 of 3 August 2011, may not add a new rule to the law they were issued to implement, except when necessary and in a way that does not exceed direct implementation that does not violate the superseding text. Otherwise, if such a decree provides for new rules not necessarily implied by the original text, it becomes null and void. Given that Decree No. 2011-1086, like its predecessor, provides for a new rule not necessarily provided for in the text that supersedes it, it becomes null and void for that reason.

Battle of the Referendum

To answer these questions, the issue of the referendum was raised at the beginning of April 2011. It worsened from the beginning of August to mid-September 2011 and concurrently with the internal crisis of the High Authority, the serious rebellious events experienced by the National Guard barracks at Owainia, and the resulting tensions in the security unions. At the time, a comprehensive media campaign was launched to discredit both the elections and the National Constituent Assembly on the grounds of the dangers that would result from them. According to what was published in the newspapers, this initiative was undertaken by the Coalition of the Republican Concord, which comprised 47 (then 59, and some said 70 and even 80) small-scale parties, mostly stemming from the “Democratic Constitutional Rally.” In early September, the Coalition submitted a petition to the Prime Minister, who responded to it on 6 September 2011 in his speech bearing various meanings:

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63 Le Maghreb, Advocates and Opponents of Referendum, Tuesday, 13 September 2011, p. 6.
64 Al Chourouk, “Who wants a referendum...,” Thursday, 8 September 2011, pp. 6 and 7.
66 Al Chourouk, “More than 80 Parties Say Yes” 12 September 2011, p. 3.
“The referendum recently advocated by several parties is not the prerogative of the sole transitional Government, on the contrary, it must be the subject of a consultation between all parties on the national political scene: the Interim President, national parties, and the High Authority for Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition.” In anticipation of what could happen or the dominance of those advocating the referendum, and due to the small number of registered voters (27%) until early August 2011, the Prime Minister started to study the subject. He envisaged a referendum in parallel to the elections, asking three questions:

1. Do you agree that the Assembly elected shall only act as a constituent assembly?
2. Do you agree that the term of the National Constituent Assembly’s mandate shall be six months starting from this day?
3. If the answer is “Yes” to the above two questions, do you agree on continuing work according to the provisional organisation of pubic authorities until the Constitution enters into force?

The closer the date of the elections, the fiercer the campaign, to the extent that it included some political parties independent from the “Coalition”, such as the Progressive Democratic Party, some national figures or political analysts, e.g. Sadok Belaid and Dr. Mohsen Marzouk, the Director of Al-Kawakibi Democracy Transition Centre. The campaign caused a sense of anxiety and fear that it would spread among the public, making wide segments of the political community and civil society side with it. They backed away from the idea of holding the constituent elections, or made them contingent on the holding of a previous or concurrent referendum to determine the objectives, jurisdiction, and term of the Constituent Assembly so that it does not monopolize power and bring us back to dictatorship from which we were saved by the Revolution. It is just right to admit today that these proponents of the referendum were not too pessimistic, as the experience of the Assembly led to wasting precious time, worsening the situation and stirring agitation and confusion. However, they forgot that if we had taken this course, we would have been in a much worse situation.

Thus, we fell in a serious political crisis that almost blew away the entire transition process. Those who depicted the situation as a “referendum bomb” were absolutely right. Some viewed the referendum as a “booby trap,” interference with the election, or conspiracy, while others viewed it as recourse to the people against a possible drifting towards the unknown or towards a new collective dictatorship. Others viewed it as somewhat a “truth hiding a fallacy” and even something technically and legally impossible. It is worth noting that

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67 Le Maghreb, Wednesday, 7 September, and Tuesday, 23 September 2011, ibid.
70 According to an opinion poll, 57% “yes”, 25% uncommitted, and 18% “No”, Al-Mouharrer, Sunday, 11 September 2011, p. 5.
72 Mohammed Saleh Al-Rabaawi, Assabah weekly newspaper, Monday, 12 September 2011, p. 4.
74 Samir Taieb, Assabah weekly newspaper, Monday, 12 September 2011, p. 7.
76 Samir Ben Umar, Al-Mouharrer, "Some Parties Say Yes, Others Say No", Saturday, 17 September 2011, p. 5.
the withdrawal of some political parties from the High Authority for the Fulfilment of the Objectives of the Revolution, such as the Ennahdha Movement and the Congress for the Republic, as well as the troubled relationship between the Authority and the Progressive Democratic Party when they discussed the issue of the funding of political parties by companies, did not help solve the crisis facing the Authority.

Declaration on the Transitional Process

At a meeting organized by the Swiss NGO “Centre for Humanitarian Dialogue” (HD Centre)\(^78\) on the 27\(^{th}\) of July 2011 to which the President of the High Authority for the Fulfilment of the Objectives of the Revolution and some political parties affiliated thereto were invited, a discussion on the political situation in Tunisia took place. Then, the Tunisian side agreed to continue these meetings in an “open dialogue” between political parties. Due to the impossibility of inviting more than 100 existing parties or adopting objective criteria for inviting some and not inviting others, a decision was taken to invite only the parties represented in the High Authority. However, this solution would inevitably require organizing the dialogue outside the framework of the High Authority, given that some of the parties concerned withdrew from it. To justify the supervision of the President of the High Authority, a decision was taken to make the initiative personal, with any relationship to the operation of the High Authority. In spite of aiming to save the elections, this solution caused tensions within the High Authority and accusations against its president that he marginalised it.\(^79\)

After six meetings, from August 5\(^{th}\) to September 12\(^{th}\), and given the risks threatening the transitional process as a result of the campaign on the referendum and altercation among parties, the representatives of parties\(^80\) focused the dialogue on finding a solution to the crisis. In the end, we managed to prepare a document called “Declaration on the Transitional Process”. In an event attended by the press and media at the Conference Palace on Thursday, the 15\(^{th}\) of September, eleven parties that included members of the High Authority signed the Declaration. The Congress for the Republic (CPR) did not sign the Declaration, as it did not agree on setting a term for the National Constituent Assembly’s mandate. Owing to its importance, the full text of the Declaration is provided below:

At the initiative of Mr. Yadh Ben Achour, the representatives of the twelve parties continued their open dialogue on ways to ensure the success of the electoral process and the following transitional stage. In this context, they agreed to:

1. Emphasize absolute commitment with regard to the date of the election scheduled to take place on the 23\(^{rd}\) of October 2011;
2. Emphasize the political parties’ and candidates’ commitment to a code of conduct, issued by the Central Commission of the Independent High Authority for Elections throughout the entire transition period to ensure mutual respect between political rivals and the media sector to avoid defamation and agitation, and to ensure strict neutrality

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\(^77\) Chafik Sarsar, “The referendum is technically impossible,” Al-Mouharrer, 8 September 2011, p. 6.
\(^78\) Centre pour le dialogue humanitaire.
\(^79\) See the statement by Mr. Abdul-Majeed, who announced his withdrawal from the High Authority at the session held at the High Authority on Wednesday, 14 September 2011, “Deliberations of the High Authority for the Fulfilment of the Objectives of the Revolution,” Part II, p. 940.
from any political propaganda or partisan activity in places of worship, educational institutions and workplaces;

3. Limit the term of the National Constituent Assembly’s mandate to a maximum period of one year so that the State and its institution may attend to addressing a number of key issues, at both the social and economic levels;

4. Continue consultation and the quest for consensus among various parties for the proper management of this new transitional stage;

5. Develop a general flexible vision of how to transfer power immediately after the election of the National Constituent Assembly. This vision should feature the following:
   - The current transitional Government and the Interim President shall continue to assume their functions until the National Constituent Assembly elects a new President for the Republic who shall then form a new Government;
   - Immediately after the announcement of the final results of elections, the current Interim President shall convene the first meeting of the National Constituent Assembly, which shall immediately elect its president to run and conduct its proceedings and organize its meetings, as well as form a committee to draft its rules of procedure;
   - The National Constituent Assembly shall determine the new organization of public authorities and elect the new Head of State on its basis;
   - After consultation with the groups that make up the National Constituent Assembly, the new Head of State shall designate a personality to form the Government;
   - The designated Prime Minister shall present his team and the programme of his Government to the National Constituent Assembly for approval;
   - The National Constituent Assembly, the new President of the Republic, and the Government shall engage in their duties until they are replaced definitively with the permanent authorities on the basis of the new Constitution approved by the National Constituent Assembly.

Signatures:
   Ettakatol Party: Mustapha Ben Jaafar (Secretary-General)
   Renewal Movement: Ahmed Ibrahim (Secretary-General)
   Movement of Social Democrats: Ahmed Khaskhousi (Secretary-General)
   Democratic and Nationalist Movement: Chokri Belaid (General Coordinator)
   Reform and Development Movement: Mohamed Guoumani (Secretary-General)
   Green Tunisia Party: Abdelkader Zitouni (Secretary-General)
   Progressive Democratic Party: Maya Jribi (Secretary-General)
   Ennahdha Movement: Rached Ghannouchi (Founder)
   Democratic Labour Party: Mohamed Jomour (Secretary-General)
   Arab Democratic Vanguard Party: Khayr Eddine Swebni (Secretary-General)
   Leftist Socialist Party: Mohamed Kilani (Secretary-General)

Effects and Assessment of the Declaration

Some journalists said that it seemed that the “Declaration on the Transitional Process” killed the idea of a referendum, since it dispelled many of the concerns raised by those who feared that the country might move towards the unknown. It emphasized absolute commitment

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with regard to the date of the election, set a maximum duration of the mandate of the National Constituent Assembly at one year, and drew up a roadmap for the transition of power following the elections and the adoption of the Constitution and appointment of permanent legal authorities accordingly. Therefore, the Declaration had a positive impact, save a few exceptions.\textsuperscript{82} Not surprisingly, after the Declaration, the campaign for the referendum subsided and calm returned to the political arena, providing an appropriate environment for the success of the electoral process in due time.

Some people questioned the binding character of the Declaration: Did it have a legal binding character? This question will be answered in the second study in which we will deal with the controversy about the legitimacy of the National Constituent Assembly after the 23\textsuperscript{rd} of October 2012.

It should be noted that the Declaration on the Transitional Process, besides calming the atmosphere, had an impact on the remaining transitional period. Importantly, it was the first time that a “roadmap” approach was set up. Later this approach was used in the framework of the national dialogue. Furthermore, it drew up the plan for the provisional organisation of public authorities adopted by the National Constituent Assembly by Constitutive Law No. 2011-6 on the 16\textsuperscript{th} of December 2011.

\textbf{Elections: From Hurdles to Marvels}

The electoral process necessitated many preparations in terms of legal expertise, technology, and electoral, administrative, communication and financial mechanisms, which are too many to be highlighted in this research.\textsuperscript{83} Tunisia was not familiar with such matters. Thus, it was not easy for it to practice them. Rather, it had to start from scratch. The process required innovation, extrapolation, and creative imagination. There were also hesitations, stumbling, and receding. In this regard, the two bodies did their part to ensure the success of the experience, despite the campaigns aiming to set up hurdles staged by those who had nothing to offer but gossip and defamation.\textsuperscript{84}

\textbf{Election of the Independent High Authority for Elections}

\textit{Pursuant to the Decree No. 2011-27, the High Authority for the Fulfilment of the Objectives of the Revolution undertook the organisation of the election of the Independent High Authority for Elections on Monday, May 9\textsuperscript{th} 2011. The High Authority had to elect three members from the Tunisian Bar Association and one member from each of the following: the National Association of Solicitors' Chambers, the National Association of Bailiffs, the National Association of Chartered Accountants, the National Union of Tunisian Journalists, Tunisians Abroad, Tunisian Federation of Human Rights, IT and computer science experts, and two academics. The ballot resulted in the election of eleven members to represent the institutions

\textsuperscript{82} Zuhair Al-Moghazawi, Le Maghreb, 18 September 2011, p. 5.
\textsuperscript{83} For more in-depth information, see the The Independent High Authority for Elections' report on "The Progress of the NCA Elections," February 2012 (referred to herein as “The Independent High Authority for Elections’ Report”).
\textsuperscript{84} Such as Mr. Abdul Wahab Al-Hani, Al Majd Party, who kept criticizing in newspapers the High Authority and its experts simply because they sought the assistance of a US NGO “IFES” to take advantage of its well-established expertise and experience in the electoral field. He ridiculously claimed that those experts would reveal "State secrets" and threaten its security.
mentioned above. However, the representatives of the judiciary, for the reasons mentioned above, boycotted the election, so the High Authority had to postpone it and resort to the last paragraph of Article 8 of Decree No. 2011-27. Accordingly, the High Authority completed the formation of the Independent High Authority for Elections (16 members) on Tuesday, May 17th, 2011.

The Work of the Independent High Authority for Elections

Regardless of the many physical, logistical, and administrative difficulties it faced, the Independent High Authority for Elections was from the start the subject of criticism and caution for some political parties, particularly the Ennahdha Movement, which did not succeed in winning the majority of votes for its candidates in the High Authority. Ennahdha showed aversion against the Independent High Authority for Elections and its president, Kamel Jendoubi. Additionally, the Independent High Authority for Elections faced other problems, for example, in the legal field there was a need to update Decree No. 2011-27 and the preparation of implementing and regulatory orders and decrees. In the political field there were issues with the proliferation of parties (in excess of 100) on the Tunisian scene, the organization of the election campaign, and the issue of political publicity. In the technical field difficulties were faced on the training of trainers and provision of cadres for the regional bodies, voter registration staff, and polling station staff. On all fronts, the Independent High Authority for Elections faced many obstacles, such as the issue of political publicity and the lack of discipline by some political parties, e.g. the Progressive Democratic Party, some media, and communication agencies.

We cannot in this article, analyse, even briefly, the valuable work carried out by the Independent High Authority for Elections, which was recognized by all, including those who expressed reservations before the election. Among the most difficult issues faced by the

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85 Here are the results of the vote:
1. Boubaker Belthabet (103 votes), Mohamed Fadhel Mahfoudh (96 votes) and Ridha Torkhani (87 votes) of the Tunisian Bar Association
2. Sami Ben Slama of the National Association of Solicitors' Chambers (103 votes)
3. Nabil Bafoun of the National Association of Bailiffs (80 votes)
4. Anouar Ben Hassan of the National Association of Chartered Accountants (65 votes)
5. Larbi Chouikha of the National Union of Tunisian Journalists (72 votes)
6. Kamel Jendoubi, representative of Tunisian expatriates (112 votes)
7. Abdel-Rahman Hedhili of the Tunisian Federation of Human Rights (90 votes)
8. Zaki Rahmouni, computer science expert (67 votes)
9. Souad Kaley Triki, representative of women university professors (70 votes) and Mohamed Seghaier Achouri, representative of men university professors (46 votes)
10. Here are the results of the vote:
86 Decree No. 72 of 2011, dated 3 August 2011, Official Gazette of the Republic of Tunisia No. 58, p. 1370.
87 The Independent High Authority for Elections made a decision to freeze the election propaganda from September 12, 2011, “ISIE’s Report,” p. 45.
88 For simple representation, the number of training beneficiaries at the level of polling stations was 45,160 people, “The Independent High Authority for Elections’ Report,” p. 69; 8,536 polling stations in the State distributed across 4,836 centres; and 371 polling stations abroad distributed across 66 centres, “The Independent High Authority for Elections’ Report,” p. 178.
Independent High Authority for Elections, we first mention its own interpretation of the regional bodies of the Central Commission; second, the problems related to the registration of voters and preparation of voting registers; third, the issue of the representation of Tunisians abroad.  

Concerning the first issue, the Central Commission set up, in the internal constituencies (27) and external constituencies (6) regional bodies almost similar to the Central Commission. Neither Electoral Decree No. 2011-35 nor Decree No. 2011-27 required that interpretation, on the contrary, they were supposed to be simple executive bodies. At first, this procedure was perceived with reservation and concern because of the complexity it might add to the electoral process. Indeed, experience showed that the Independent High Authority for Elections made the right choice and that the regional bodies were on the whole a guaranty of transparency. Regarding the second issue of voter registration, the Independent High Authority for Elections encountered some difficulties, including delays in the registration of voters holding ID cards, then allowing voters to vote directly without prior registration, and finally allowing them to vote without ID cards on the basis of other official documents such as passports. Concerning the selection of electoral constituencies outside Tunisia, the Independent High Authority for Elections found, with the help of the High Authority for the Fulfilment of the Objectives of the Revolution and the Ministry of Foreign Affairs – with some reluctance – effective solutions to supervise this sensitive process, which enabled the Tunisians abroad to participate, for the first time and on the widest scale, in parliamentary elections.

The Memorable Day: Sunday, 23 October 2011

This day will remain in Tunisian collective memory as a perpetual symbol and memorial. Everyone will remember the feeling of pride and honour associated with this historic date, when swarms of voters went to the polling stations in the early morning to exercise freely their electoral right and duty in an unprecedented pluralistic framework under the supervision of “Jendoubi’s Independent High Authority for Elections. International and Tunisian observers watched scenes of inexpressible emotional and symbolic power, reflecting a great sense of patriotism and pride in that small country whose revolution reached remote areas and echoed everywhere.

Despite significant delays in the announcement of the election results, because of the multitude of issues related to vote counting, registration, and collection processes, the Independent High Authority for Elections announced the final results by virtue of a decree dated November 13th 2011, which was published in the Official Gazette of the Republic of Tunisia. The results were as follows:

<table>
<thead>
<tr>
<th>List of Parties</th>
<th>Number of Seats at the</th>
<th>Total Votes</th>
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91 On all these levels, and despite the doubts and fear of failure, The Independent High Authority for Elections did great work in regards to its interpretation of Decree No. 27, and Tunized solutions to the maximum possible extent. Besides the Independent High Authority for Elections’ President Kamel Jendoubi, Central Commission’s team and regional bodies, Adel Gaaloul, Secretary of State to the Minister of Industry and Technology, and Ridha Belhadj, Minister Delegate to the Prime Minister in charge of the election file, played a crucial role in the coordination and encouragement efforts, in addition to spreading a spirit of optimism without negligence of reality. We were in dire need of that since we were sitting on burning coal.


These results sparked amazement, analysis and questioning around three issues: the defeat of the so-called “left”, particularly the Progressive Democratic Party, which, according to some statistical institutions, won a number of votes close to the number of votes won by the Ennahdha Movement and the Democratic Modernist Pole; the emergence of the “Popular Petition”, which did not stand out earlier, and claimed the third rank in terms of seats; and the scattering of votes, the small number of seats won by independents, and a large number of blank votes for ghost candidates.
The Second Provisional Organisation of Public Authorities

On November 12\textsuperscript{th} 2011 at the Palace of Carthage, the Interim President of the Republic invited the political parties and the President of the High Authority for the Fulfilment of the Objectives of the Revolution, Political Reform and Democratic Transition who agreed after a fruitful and quiet discussion on the Draft Decree (No. 2011-3576 of November 14\textsuperscript{th} 2011) prepared by the Panel of Experts to convene the members of the National Constituent Assembly to its opening session.\textsuperscript{94}

On another memorable day, November 22\textsuperscript{nd} 2011, and in an atmosphere of exceptional pride, celebrating the return of awareness and freedom thanks to the Revolution, the winners

\textsuperscript{94} The Interim President of the Republic,

Considering Decree No. 14 of 2011, dated March 23, 2011 on the Provisional Regulation of Public Authorities;
Decree No. 27 of 2011, dated 18 April 2011 on the Establishment of The Independent High Authority for Elections;
Decree No. 35 dated 10 May 2011 on the Election of the NCA, revised and supplemented by Decree No. 72 of 2011, dated August 3, 2011;
Decree No. 1086 of 2011, dated August 3, 2011 calling for the elections of the NCA;
The Independent High Authority for Elections Central Commission’s decision dated November 13, 2011, concerning the announcement of the final results of the NCA’s elections; and
Opinion of the Administrative Tribunal,

Decrees the following:

Article (1): The members of the National Constituent Assembly shall be invited to attend its opening plenary session on Tuesday, November 22, 2011 at the former headquarters of the Assembly of the Representatives of the People in Bardo at 10 a.m.

Article (2): Until the NCA President is elected, the opening plenary session shall be chaired by the eldest member with the help of the youngest male and female members.

Article (3)

1. The chairman of the opening session shall recite the final list of the NCA’s elected members.
2. The NCA’s members shall take the following oath: “I swear by Allah the Almighty to independently undertake my responsibilities at the National Constituent Assembly of the Republic of Tunisia and to serve the nation solely.”

Article (4): The NCA shall elect its president and two deputies, while observing the principle of gender equality. Nominations shall be submitted at the opening session. The chairman of the opening session shall receive, record and declare nominations at the plenary session.

Article (5): The NCA President and two deputies shall be elected by secret ballot and an absolute majority of its members. If on the first ballot no candidate has obtained an absolute majority of votes, a second vote shall take place for only the two candidates who have received the largest number of votes during the first ballot. The candidate who obtains the largest number of votes shall be declared a winner.

Article (6): Following the election of the NCA President and his two deputies, the opening session shall be adjourned. Upon resumption of the meetings, the elected president and his two deputies shall undertake their duties, and the President shall propose to the NCA to form the Ad Hoc Committee for Establishing the NCA’s Rules of Procedure and the Ad Hoc Committee for the Provisional Regulation of Public Authorities.

Article (7): This Decree shall be published in the Official Gazette of the Tunisian Republic.

Tunis, 14 November 2011
Interim President of the Republic
Fouad Mebazaa
gathered at the Bardo Palace to draft the Constitution of a civilian, democratic and revolutionary Republic for free citizens. At the opening session, Article 2, which reads, “Until the election of the President of the National Constituent Assembly, the opening plenary session shall be chaired by the eldest member who will be assisted by the youngest male member and the youngest female member” was implemented. As a matter of fact, the eldest member was Mr. Tahar Hmila of the Congress Party for the Republic.

Afterwards, the events unfolded in accordance with the Declaration of September 15th 2011, so that State business continues without interruption or political vacuum. The President of the National Constituent Assembly was elected at the opening session; the Government resigned and was entrusted to act as a caretaker Government until the appointment of the new Government. On December 12th 2011, the new Interim President, Moncef Marzouki, was elected. On December 16th 2011, Constitutive Law No. 2011-6 on the Provisional Organisation of Public Authorities, later known as the “Little Constitution” was put to the vote. In accordance with the Constitutive Law, Mr. Hamadi Jebali was charged with forming the new Government, pursuant to Presidential Decree No. 2011-1 of December 14th 2011. Then, he was appointed as Prime Minister pursuant to Presidential Decree No. 2011-2 of December 24th 2011. The members of the Government were appointed pursuant to Decree No. 2011-4796 of December 29th 2011. Following the transfer of power from the Interim President Fouad Mebazaa to the elected Interim President at Carthage on December 13th, and from Prime Minister Beji Caid Essebsi to Prime Minister Hamadi Jebali at the Kasbah on December 26th 2011, the first transitional period successfully ended, as history will remember, despite myriad hindrances and obstacles.

Conclusion

The above is just an overview of the constitutional setting of the first transitional phase. The author studied it from a personal perspective, while being aware that this is only part of the truth, which requires supplementation. Researchers should continue their effort for a further in-depth, extensive, and accurate picture. In this phase, every one of the key actors did their best to ensure the success of the transitional period. We do not belittle the role of Prime Minister Mohamed Ghannouchi in establishing the High Authority for the Fulfilment of the Objectives of the Revolution under difficult circumstances. We also acknowledge the efforts of Prime Minister Beji Caid Essebsi and his aides, as well as the ministers, the public administration, the security institution, and the national army, in saving the situation from serious deterioration. We should not also forget the revolutionary gains and achievements made by both the High Authority for the Fulfilment of the Objectives of the Revolution and Independent High Authority for Elections. We mentioned above that the relationship between constitutional law and the Revolution was a troubled dialectical relationship, fluctuating between separation and connectedness, legitimacy and revolution, according to the circumstances. In the context of the relationship between the Revolution and the legal system, it is paradoxical that the Revolution, by definition and nature, is a phenomenon that contradicts the legal system, especially the Constitution, because it disavows and rebels against the legal system and breaks its pillars. The Revolution generates a new legitimacy aiming to bring down the existing constitutional legitimacy. The paradox we mentioned is that the Tunisian revolutionary experience shows the opposite. This means that legal considerations and the prevention of a constitutional vacuum were the biggest concerns of the Revolution. With the exception of Decree No. 2011-14, characterized by a break with the previous Constitution, in the transitional phase there was no break in the continuous sequence between the positive legal text and the text that followed it in terms of amendment, revision or
replacement.\footnote{For example: From the Constitution of 1959 to the thirteen decrees issued in accordance with Article 28; and from Decree No. 14 and Decree No. 35 of 2011 to the Constitutive Act No. 6 of 2011 and from the latter to the Constitution of 27 January 2014.} Besides, there was no interruption between the previous constitutional institution and the one that replaced it. There was at all times a legal basis.\footnote{For example: From the interim legislator, i.e. the President of the Republic under Decree No. 14, to the National Constituent Assembly through the elections of October 23, 2011, to the Assembly of the Representatives of the People through the elections of October 26 2014; or from the Interim President and Government under Decree No. 14 to the Interim President and Government under the Constitutive Act No. 6 of 2011, to the elected President and Government under the 2014 Constitution and through the legislative elections of October 26, 2014 and presidential elections in December 2014.} This is the lesson to be learned from the Tunisian Revolution in its constitutional manifestations. There is no doubt that the Revolution jolted the traditional legal standards, but the law, despite its exceptionality, was its ally at every moment until the return to the Constitution that materialized from it.