

Declaration of July 25th, 2021: Has the Constitution of January 27th, 2014 been buried?

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During the evening of July 25th, 2021, national anniversary of the proclamation of the Tunisian Republic and the abolition of monarchy in 1957, the President of the Tunisian Republic declared his decision to activate Article 80 of the 2014 Tunisian Constitution relating to the state of exception. Following this announcement, Tunisia has entered a phase of serious constitutional and legal ambiguity threatening the democratic process, as well as rights and liberties. The first decisions of the President of the Republic, issued in the form of decrees from July 26th, 2021, raise many questions and concerns that usually correlate with exceptional situations.

1. Has the President translated the spirit of Article 80 of the Constitution to the letter?

To answer this question, we will examine all the requirements of Article 80 of the Constitution and highlight the extent to which the President of the Republic has adhered to it in his Declaration and in the Presidential decrees issued starting July 26th, 2021.

-In case of imminent danger threatening the national integrity, security or independence of the country and hindering the regular functioning of public authorities: this is the primary condition of the state of exception, which is subject

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to the discretionary power of the President of the Republic, and this is exactly how it happened.

- On the obligation to consult the Head of Government and the President of the Assembly of People's Representatives: in the Declaration of July 25th, the President of the Republic claimed to have consulted the President of the Assembly of People's Representatives and the Head of Government, without specifying the substance and form of the consultation. The President of the Assembly of People's Representatives has totally denied this, while the Head of Government, who disappeared since July 25th, 2021, neither denied nor confirmed having been consulted by the President of the Republic. He only published a letter on his Facebook page.

- On informing the President of the Constitutional Court: In the absence of a Constitutional Court, there is no need to talk about this condition. Indeed, we are confronted with a material impossibility. Therefore, it was impossible to inform its president.

- During this period, the Assembly of People's Representatives is considered in permanent session: The President of the Republic adopted his decree on July 25th, 2021, which was not published in the Official Gazette until July 29th, 2021 [Presidential Decree No. 80 of July 29th, 2021] suspending all the work of the Assembly for a period of one month. This is in flagrant violation of the provisions of Article 80, which require the Assembly to be in a state of permanent session. The President of the Republic also decided to prevent the deputies from meeting by ordering the army and police forces to block all access to the Assembly's headquarters.

- On the prohibition of a motion of censure against the Government: Article 80 prohibits the obstruction of the Government's action. In view of the fact that the members of the Government have been subject to approval by the Assembly, the President of the Republic is prohibited from terminating their functions during the period of the state of emergency. *Ipsa facto*, the President of the Republic has no authority over the Government under the Constitution and should not do so under any circumstances [Article 89]. However, the President of the Republic issued his first decree during the state of exception [Presidential Decree No. 69 of July 26, 2021, on the termination of the functions of the Head of Government and members of the Government]. So what is its constitutional basis?

This was also done under very suspicious circumstances surrounding the disappearance of the Head of Government and his total absence from July 25th, 2021, until this date.

Consequently, referring to the 10 conditions set by Article 80, the President of the Republic has applied only two formal conditions: to announce the measures in a message to the people and to limit the deadline to 30 days with the possibility of extension by presidential decree! So how can we qualify the situation?

2- Is Article 80 still applied? And in general, has the Constitution been respected?

In the absence of the conditions of Article 80, the presidential decrees reflect an "unconstitutionality". So why apply Article 80? What we see is the presidential pursuit of a minimal constitutional legality, if only formally! This is not, however, entirely acceptable for the following reasons:

- First, the failure to comply with the requirements of Article 80, as mentioned above;

- Second, the President has granted himself powers that are in flagrant contradiction with Article 80, on the one hand, and with the other provisions and spirit of the Constitution, on the other.

First of all, the President has granted himself the power to pass decree-laws during this period, which is in direct contradiction with Article 80, which requires that the Assembly of People's Representatives be in permanent session to legislate and even double its legislative work.

Secondly, the President has seized all executive power and appointed a head of government under his control, in clear violation of the provisions of Article 80, which requires the government to continue its activities. This article also prohibits members of the government from being removed from office or from presenting a motion of censure against them during the state of emergency.

Thirdly, the President has proclaimed himself head of the Public Prosecutor's Office, as stated in the declaration of July 25th, but so far, no decree has been issued to that effect. This is a very dangerous precedent that no former President of the Republic or Government has ever committed, even in the darkest period of authoritarianism and dictatorship! How shall we describe this situation in which the President has control over all powers?

We believe that we are facing a flagrant violation of the spirit and provisions of the Constitution. It is a usurpation of power. This was confirmed following the adoption of the presidential decree stating that: "The parliamentary immunity of all members of the Assembly of People's Representatives is lifted for the duration of the suspension of its work. (Article 2 of the Presidential Decree No. 2021-80 of July 29th, 2021, on the suspension of the powers of the Assembly of People's Representatives).

Is there any legal or constitutional basis for these provisions? It appears that there is none for such a measure!

These measures announced on July 25th, 2021, are not in accordance with the provisions of the 2014 Constitution. On a practical level, we are witnessing a provisional organization of public authorities that began on July 25th and that continues until the regular functioning of public authorities resumes!

3- To what extent can we speak of a return to the regular functioning of public authorities?

The President of the Republic himself declared to the public that "we are in a situation of provisional organization of public authorities" during his visit to Habib Bourguiba Avenue during the night of July 25th, 2021.

The expression has important connotations. Does it mean that the exceptional period necessarily imposes an exceptional organization of powers, or that the President of the Republic has his own conception of this organization, while waiting for the return to normalcy? If so, how will this return take place?

- On the non-compliance of the provisional organization of powers with the 2014 Constitution: through the concentration of powers in the hands of the President of the Republic on July 25th, 2021, we note that the provisional organization of powers does not comply with the 2014 Constitution:

The Constitution established an adjusted parliamentary system (a semi-parliamentary system) in which the government is subject to the control of parliament, which grants it confidence and can withdraw it.

However, what is happening since the beginning of the "state of exception" is the effective establishment of an "ultra" presidential regime (*presidentialist*) which goes beyond the presidential regime that prevailed in Tunisia until the outbreak of the Revolution of December 17th, 2010-January 14th, 2011 and led to its overthrow in 2011. This confirms what the President of the Republic has recently declared wishing that the Constitution of June 1st, 1959, be reinstated!

All these events and decrees make us wonder about the return to normalcy! How will this return take place?

Following the non-application of the Constitution as of July 25th, the suspension of the work of the Assembly, as well as the lifting of the immunity of deputies, the dismissal of the government and the announcement of the presidency of the prosecutor's office, can the provisions of the 2014 Constitution still be applied?

Returning to the current Constitution seems difficult. The fact that some deputies are being prosecuted (either arrested or indicted) makes it even more complicated. Subsequently, military justice continues to be activated, especially after the dismissal of the Minister of National Defense (Presidential Decree No. 69, dated July 26th, 2021) and the dismissal of the Attorney General Director of Military Justice (Presidential Decree No. 68, dated July 23rd, 2021).

Therefore, the Assembly will not be the same after July 25th, 2021. Pending the issuance of decree-laws by the President, we expect a text that will temporarily organize public authorities until the 2014 Constitution is repealed in order to proceed to the change of the political and electoral regime in accordance with the referenda.

We believe that the 2014 Constitution is no longer applied. What are, therefore, the risks involved?

4-On the risks of the non-application (suspension) of the Constitution!

All indicators confirm that the Constitution of 2014 is no longer applied. The President uses it only as a provisional text until it is replaced by another! So what are the risks involved?

-The risk for the democratic transition in Tunisia: the mechanisms of democracy that gave birth to the Constitution of 2014, some provisions of which have not been implemented (the establishment of constitutional bodies, the Constitutional Court, equality between citizens, the protection of public and individual rights and freedoms, and the completion of the process of transitional justice) are threatened. The mechanisms of representative and participatory democracy guaranteed by the Constitution were the fruit of the revolution and of the blood of martyrs and political leaders assassinated, such as Chokri Belaid and Mohamed Brahmi.

It is evident that the freezing of all institutions and the concentration of all powers in the hands of one person, the President of the Republic, threaten the democratic process. All previous experiences, tens of them, have shown that no democratic, social political regime has been the result of such concentration of powers. The importance of the establishment of institutions is the guarantee of the democratic transition (even if it is unsteady). The concentration of powers in the hands of a single person opens the way to tyranny and dictatorship and presents a danger to freedoms.

- On freedoms under threat, the concentration of power in the hands of a single person has never been a guarantee for freedoms, despite the President of the Republic affirmations of his support for individual and public freedoms on several occasions in the presence of representatives of civil society organizations, national organizations, and media. However, we must remain careful and vigilant.

First, the lifting of parliamentary immunity based on a presidential decree and without any constitutional basis exposes the deputies to risks regarding their rights and freedoms. This is clear in the arrest of MPs Yassine Ayari and Maher Zaid and following the issuance of warrants against the MP Mohamed Affes and other MPs of the coalition al-Karama.

Second, the implementation of military justice in a civil state and the involvement of the military in political life is contrary to the civil state and presents a danger to rights and freedoms because the intervention of the military leads *a fortiori* to the application of the code of military justice (promulgated by Decree No. 57-9 of January 10th, 1957). This code is one of the most hostile to rights and freedoms, because one of the principles of this code is military discipline and hierarchical power, which has nothing to do with civil life based mainly on freedom, the right to be different, and equality.

Third, the violation of fundamental freedoms: despite the ratification by the Tunisian Republic of the International Covenant on Civil and Political Rights, including Article 4, concerning the state of emergency, the measures announced from July 25th, 2021, are totally contrary to the provisions of the Covenant.

The latter states in its Article 4 that the state of emergency does not allow any derogation from the freedom of expression, organization, peaceful demonstration,

freedom of worship and the prohibition of torture. However, Decree No. 70 of July 26th, 2021, which was consolidated by Decree No. 83 of July 30th, 2021, prohibits "all demonstrations and all private and public family gatherings in open and closed spaces". This provision is in flagrant violation of the freedom of demonstration.

Therefore, no matter how one may describe what has happened in Tunisia since July 25th, 2021: a coup d'état, a coup de force, a usurpation of power, a serious violation of the Constitution, etc. this situation is serious because unprecedented in Tunisia. What happened is far beyond the Constitution and the institutions it has established: the Parliament, the Government, and the judiciary. This situation violates the rights and fundamental freedoms and imposes a political involvement of the army that threatens the civil state!

In view of this serious situation, it will not be possible to return to the Constitution of 2014, because it seems that the President of the Republic has buried it. Indeed, he has repeatedly declared the rejection of this Constitution, which sets out the rights and freedoms and which allowed him to be elected as President of the Republic.