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Constitutional or Unconstitutional: Is That the Question?

→ Eya Jrad



A handout photo made available by the Tunisian Presidency shows Tunisian President Kais Saied gesturing among supports as he walks protected by security guards in Habib Bourguiba Avenue, Tunis, Tunisia, 01 August 2021. Two Members of the Parliament were reportedly arrested on 01 August bringing to three the number of MPs detained since Saied sacked prime minister Mechichi and suspended the parliament on 25 July. Saied said he acted within the constitution as US Secretary of State Antony Blinken called for the return 'to the democratic path' in the country. © EPA



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A decade ago, Tunisians united to topple a 23-year-old dictatorship and ignite hope for change around the region. Despite a successful transition to electoral politics and the adoption of various political reforms, including a new constitution, the hopes and aspirations of Tunisians for more opportunities and justice were not met. Today, they are faced with multiple, and seemingly insurmountable, challenges.

A health crisis that is getting worse due to its mismanagement,¹ an enduring economic crisis (with unemployment at 17.8% in the first quarter of 2021, compared to 15.3% in the second quarter of 2019), police brutality and continued impunity, a rise in violence and criminality² (violent crimes rate³ reached 88% of the overall violence percentage in December 2020), a political⁴ and constitutional⁵ impasse, regional inequality, corruption, and poor governance. All these crises have overshadowed hopes for a better future with a painful reality.

In February 2021, the credit rating agency, Moody's, downgraded Tunisia's ratings to B3 with negative outlook, reflecting "weakening governance in the face of rising social constraints that increasingly inhibit the government's flexibility to implement fiscal adjustment and public sector reforms that would stabilize and eventually reverse a marked increase in its debt burden". It also downgraded the Central Bank of Tunisia rating from Baa 3 to Ba1. This has a direct impact on Tunisia's creditworthiness for investors and funds.

Amid poor public policymaking, calls spread on social media for mass protests on 25 July, in commemoration of Republic Day, to hold politicians accountable for the multifaceted crisis in which Tunisia is floundering. Nationwide protests erupted (in Bardo, Sfax, Kairouan, Tozeur, Mahdia, and so on), demanding the dissolution of the Parliament and dismissal of the government.

Later that day, the President of the Republic Kais Saied announced he was activating Article 80 of the Constitution which deals with the state of exception, to freeze the parliament's activities⁶, waive the immunity of all its members, head the Public Prosecution Office and dismiss Head of Government Hichem Mechichi. Shortly after, he decreed a nationwide, month-long curfew from 7pm to 6am⁷, (curfew hours changed again starting from 1 August: from 10pm to 5am), a ban on public and private gatherings of more than three people; the dismissals of the



Defence Minister Brahim Bartagi and acting Justice Minister Hasna Ben Slimane; and the closure of central administrations, local collectivities and public institutions with an administrative nature for two days.

Since then, much confusion and controversy has taken place over the interpretation of Article 80 of the Constitution, with detractors of the President's decision arguing that he acted unconstitutionally while Saied – a constitutional law professor himself – argues that he acted within the parameters of the constitution. Meanwhile, the body that is supposed to settle such questions – the Constitutional Court – has yet to be formed in Tunisia.

As the President issues successive presidential decrees regulating the 'exceptional circumstances,' the debate continues and intensifies.

This piece aims to contribute to the ongoing debate on the constitutionality of the measures taken by the President of the Republic Kais Saied, by examining both the text of the Constitution and the context. This piece argues for a contextual interpretation approach in order to adjust to the dynamic nature of societies.

Conditions of Application of Article 80 of the Constitution

Substantial conditions

Article 80 is conditioned on the existence of an "imminent danger threatening the nation's institutions or the security or independence of the country and hampering the normal functioning of the state."

It is worth noting that, during the Constitutive Assembly's (NCA) voting on the above-mentioned article, concerns over the broad wording of the article were voiced, due to the absence of definition of what constitutes an 'imminent danger' and 'exceptional circumstances', those concerns were dismissed by the Rapporteur-General to the NCA, who maintained that the formulation of the article was "clear".⁸



Due to the political polarization and tension, nearly 6 years passed after the deadline⁹ to establish a constitutional court¹⁰ - the authority in charge of giving the authentic or official interpretation of the constitution. Indeed, the intent and real desire did not seem to be there from the beginning to endow the country with a constitutional court formed of competences and working to guarantee the supremacy of the Constitution. Its formation was hindered by the failure of the Assembly to elect its 4 appointees,¹¹ motivated by disagreements between parliamentary blocs. In April 2021, to unblock the situation, an amendment was proposed to the Article 10 of the Constitutional Court's Law to cancel the order of the parties that have the authority to appoint members of the Court¹². The bill was rejected by the President Kais Saed and sent back to the parliament for a second reading.¹³ His decision was motivated by the fact that the passing of the law exceeded the constitutional deadlines provided for in Paragraph 05 of Article 148 of the 2014 constitution.¹⁴

In the absence of a constitutional court, it is up to the President of the Republic, “Head of State and the symbol of its unity, in charge of ensuring respect of the Constitution,”¹⁵ to interpret the constitutional text.

Formal conditions

To trigger Article 80, the Constitution sets out a number of conditions.

1. Consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People

Article 80 states that the President may take any measures “after consultation with the Head of Government and the Speaker of the Assembly of the Representatives of the People and informing the President of the Constitutional Court.”

The text of the Constitution does not however specify the form of the consultation and whether their opinions are binding. It does not indicate (as it does in other parts of the constitution) that it shall be a “binding opinion,”¹⁶ which means that the President is not bound by the Head of Government or the Speaker's opinions.

While the statement of the Presidency mentioned “consulting the Head of



Government and the Speaker of the Assembly of the Representatives of the People...," the Speaker of the Assembly (ARP) Rached Ghannouchi position's was unclear, as he first declared that he was "consulted by the Presidency", before retracting and denying having been consulted by the Head of State to activate Article 80 of the Constitution.

As for the Head of Government, he did not specify in his statement of abandonment whether he was consulted or not.

2. Informing the President of the Constitutional Court

Article 80 states that the President of the Republic (PR) may take any measures necessitated by the exceptional circumstances after "informing the President of the Constitutional Court".

In the absence of a Constitutional Court, there are two possible readings:

The first, is that this is a condition for activating Article 80 of the Constitution and therefore, failure to do so would constitute a violation of the article.

The second possible interpretation – favored by Pr. Amin Mahfoudh, a constitutional law professor, - is that at the stage of activating Article 80, the role of the Constitutional Court is not determinative since the PR shall only inform the President of the Constitutional Court. Thus, the inability to inform him/her does not prevent the President from activating Article 80. The absence of the court will however constitute a real issue after 30 days, when the court has to "verify whether or not the circumstances remain exceptional".

In the midst of the current crisis, the long-delayed Constitutional Court is the missing key that could have averted the political crisis culminating in the turmoil Tunisia is currently going through.

3. Announcement to the people of the measures

Article 80 of the Constitution states that "The President shall announce the measures in



a statement to the people”. On the night of 25 July 2021, Kais Saied declared the above-mentioned measures on Tunisia’s National Public TV.

Assessment of the Measures Taken on 25 July 2021

On the freezing of the Assembly of the Representatives of the People

Paragraph 2 of the Article 80 of the Constitution provides that “The Assembly of the Representatives of the People shall be deemed to be in a state of continuous session throughout such a period. In this situation, the President of the Republic cannot dissolve the Assembly of the Representatives of the People.”

Legal experts, notably the Tunisian Association of Constitutional Law,^[17] disagreed with this decision to freeze the Assembly of the Representatives of the People, explaining that the article meant that the Assembly takes part of the actual management of the state of exceptionality, and is not excluded from it.

However, other legal experts and jurists¹⁷ have agreed with Saied’s interpretation, considering that he acted within his prerogatives under a state of exception since he simply “froze” the Parliament’s activity, rather than dissolving it.

This interpretation is based on the fact that while the philosophy and the plain meaning of Article 80, aim to ensure that the three branches of the government are collectively facing the ‘imminent threat’, the President based his decision on a broader interpretation based on context, that admits that the legislative and government are part of the said threat.

This situation is mainly due to the fact that the whole constitutional drafting process was tainted by what doctrine¹⁸ has termed ‘dilatatory compromises,’ i.e., drafting acceptable wording, at the time, by the actors, but which concealed contradictory ulterior motives which they tacitly agreed to postpone for the future.



In their view, the Assembly has been discredited, and a study has shown that only 19% of respondents¹⁹ have confidence in the legislature. Popular demands for its dissolution have been mounting over the last few months as violence broke out more regularly in the parliament, “despite the fact that the country’s parliament was freely elected, the institution inspires very little trust among the public. The failure of parliament to address the country’s economic challenges, combined with relatively weak attachment to political parties are major factors driving this low level of confidence.”²⁰ The release by the Court of Accounts of its general report presenting the results of its monitoring of the early presidential election campaign, the 2019 legislative elections, and general monitoring of party finances flagged violations that marred the financial accounting and legality of resources and expenditures for candidates in the presidential and legislative elections of 2019. In this context, Saied and his supporters argue that the Assembly has become part of the problem.

On the dismissal of the Head of the Government

A week before the events, in the midst of the country’s worsening health crisis, photos were leaked of the cabinet in a luxury hotel in Hammamet, which further angered local opinion and incited calls for the dismissal of the Head of the Government and his cabinet.

Article 80 Paragraph 2 only addresses the case of removal of the Head of Government by the Assembly: “A motion of censure against the government cannot be presented”. There are no similar prerogatives granted to the President of the Republic during this state nor during normal times. Hence, to justify such a dismissal, it would have to be considered “measures necessitated by the exceptional circumstances.”

Rather than opting for a broad interpretation of Article 80 of the Constitution, the President could have decreed a Provisional Organization of the Public Powers in order to suspend chapters of the Constitution (namely Titles 3 and 4 on the



legislative and the executive), in order to avoid the discord of the current situation (issuing presidential decrees amending the constitution).

On the seizure of powers

Following the decision of the President to take over supervision of public prosecution, he has been criticized for concentrating all powers in his hand and stepping over the independence of the judiciary, a principle that is enshrined in the Constitution²¹ and the law of the country.²²

However, by virtue of the law, the public prosecution (Articles 22 and 23 of the Tunisian Code of Criminal Procedure²³) is under the authority of the Ministry of Justice, and hence of the Executive.²⁴

Furthermore, Article 115 of the Constitution states that “the public prosecution service is part of the judicial justice system [...] judges of the public prosecution service exercise their functions as determined by the law and within the framework of the penal policy of the State.” Article 80 of the Constitution allows the President to “take any measures necessitated by the exceptional circumstances”, including penal policies. But this does raise a real concern of counterbalancing the powers of the President.

The Supreme Judicial Council affirmed in a statement that “the Public Prosecution is part of the judicial system, and its judges enjoy the same rights and guarantees of sitting judges.” However, the statement was clearly lacunar, as it neither referred to Article 102 of the Constitution, which states that the “Judiciary ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms,” nor rejected the decision of the President to take over supervision of public prosecution. These measures shall be temporary, to ensure “a return to the normal functioning of state institutions and services.” This issue is crucial as to whom and how this return to normalcy shall be evaluated.

Is This a Coup?



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We must bear in mind that a coup is an illegitimate power grab, suspending the application of the Constitution, deploying the military, and silencing dissident voices. However, the President expressly stated that he is basing his decisions on the Constitution (Article 80), and thus, for him, his measures are still within the constitutional legitimacy.

With the absence of a definition in Tunisia's national law of what a coup is, we return to the African Charter on Democracy, Elections and Governance which, in its Article 23, defines a coup as:

- “Any putsch or coup d’Etat against a democratically elected government.
- Any intervention by mercenaries to replace a democratically elected government
- Any replacement of a democratically elected government by armed dissidents or rebels.
- Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
- Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government.”

According to this definition, what happened does not correspond to any of the coup scenarios.

Qualification of the decisions varied, from calling it a ‘coup’ to a “legitimate revenge of the state and society,”²⁵ with some analysts even terming it a “coup of brilliance and mastery.”^[27]

What happened would better fit what doctrine has termed to be a ‘constitutional dictatorship,’ legitimized by exceptional circumstances and limited in time.

A ‘Constitutional Dictatorship’ is when “individuals or institutions have the right to make binding rules, directives, and decisions and apply them to concrete circumstances, unhindered by timely legal checks to their authority. Clothed with all of the authority of the state [...] subject to various procedural and substantive limitations.”²⁶



The event spurred national and international reactions. While some commentators and foreign partners stressed the need for the “preservation of the democratic roots of the country, respect for the rule of law, the Constitution and the legislative framework; while remaining attentive to the wishes and aspirations of the Tunisian people” ([European Union](#)), others took more extreme positions (such as congresswoman Ilhan Omar, who went as far as encouraging the suspension of all security aid, to those she had termed “[human rights abusers](#)”). National organisations however, emphasized the importance of “ensur[ing] the independence of the national decision and without the interference of any foreign party” ([National Bar Association](#)).

Conclusion

The debate in this matter goes beyond the legality of the measures to their legitimacy. Scenes of Tunisians chanting in the streets in many parts of the country during the night of the 25th, defying the risks of COVID-19 and the curfew in order to back Saied are evidence to that. Opinions polls conducted by Emrhod Consulting show that so far there is real popular support for Saied’s measures.[\[29\]](#)

Some of those who defend Saied’s actions have cited De Gaulle’s famous citation that “there is first France, then the State, and finally, as far as the major interests of both are safeguarded, the Law,”²⁷ to argue that in terms of its importance, the Constitution is superseded by national interests.

Concerns over potential drifts are legitimate, especially given that there are no guarantees of the respect of the limitation to the state of exception, nor control of the legality of measures taken. Pr. Amin Mahfoudh qualified the decisions made by the President of the Republic during a state of exception as ‘act of government’. The Administrative Court defined Acts of Government as “important general policy acts (measures), such as acts related to the state of war, international relations, and relationship between government and the legislature” where there is no recourse against them for excess of power.²⁸ And with the limited prerogatives conferred to the Provisional body for the constitutional review of bills, legislative measures cannot be overturned either.

This means that Tunisia has entered a period with almost no checks and balances,



under ‘a constitutional dictatorship.’ In this context, a lot will depend on the person of Kais Saed and his commitment to “ethical standards or principles that are part of a political credo,” that are considered supra-constitutional principles, notably respect for the fundamental rights of human beings, the dignity of the person. Yet, fears of an ‘Egypt scenario’ are misplaced or seem exaggerated. Political opponents are freely expressing themselves; the military has not taken over the running of the state. Close oversight of the situation by free media and strong watchdog organisations are the only guarantees against potential abuses.

Lastly, a few questions are in order:

First, the lack of a clear roadmap and identification of the team tasked with managing and communicating during this turbulent context is causing impatience and frustration at both the national and international levels.

Second, would a 30-day deadline be enough to address the ‘imminent threat’? And allow the the “return to the normal functioning of state institutions and services”?

Since the start of these developments, presidential decisions have been moving fast. As a matter of fact, the Public Prosecution Office has started bringing cases against parliamentarians accused of committing election crimes or other types of crimes and offenses. The scenario of a changed political landscape is possible, based on the Court of Accounts report there is a possibility of dropping lists of political parties accused of such crimes (namely Ennahda, Qalb Tounes and Aich Tounsi), redistributing their seats (next in line), and returning to Parliament after the expiry of the exceptional deadlines.

However, referrals of civilians (MPs) before the Military Court of First Instance in Tunis are causing great concern, especially with the dismissal of State Attorney General, Director of Military Justice and the Minister of National Defense without appointing replacements. These decisions are inconsistent with constitutional principles and international conventions.²⁹

Also, the presidential order ‘suspending the work of the Assembly and lifting of parliamentary immunity for deputies for the duration of the suspension’ was issued on the night of 30 July 2021, in the Official Gazette, stipulated for “the possibility of extending the mentioned period (ie the month) by virtue of a



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presidential decree,” without specifying the number of extensions, opening the door to unlimited extensions. National Organisations³⁰ have warned against “any illegal and unjustified extension of the disruption of state institutions, stressing the need to adhere to the declared month period stipulated in the constitution.”

A real impasse is looming on the horizon, however, if, thirty days after the entry into force of these measures, the “Speaker of the Assembly of the Representatives of the People or thirty of the members thereof (want) to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain exceptional.” Presidential Decree N°80 has stipulated that the extension is made possible by virtue of a presidential order, in clear contradiction of Article 80 of the Constitution, conferring the right to decide on the extension to the Constitutional Court.



Endnotes

1. As of 27 July 2021, Tunisia had lost 19 132 lives to COVID-19. The health sector has been struggling to face increases of infection, adding to that the hasty decision to hold walk-in vaccination sites on Aid Adhha, which turned out to be a “populist and criminal decision,” as qualified by former PM. Hichem Mechichi.
2. GBV and normalization with the culture of violence (via traditional and social media), etc.
3. All types of violence: including criminal, economic, institutional, sexual, etc.
4. President Kais Saied refused to allow some of the new ministers to take their oath of office amid an ongoing power struggle between him and Mechichi, who is backed by Ghannouchi.
5. The Constitutional Court, which was supposed to be established within a year of the new Constitution in 2014, has been delayed for years due to the failure to elect a third of its members by Parliament, as only one candidate out of the four obtained a two-thirds majority. The most recent episode of the constitutional crisis was when the President refused to sign off the amendment of the law, in violation of the Constitution according to him.
6. The wording was later changed by virtue of the presidential decree N°80, of 29 July 2021 to “all competencies of the Assembly of the Representatives of the People are suspended.”
7. Bearing in mind that since 8 July, curfew had been from 8 PM until 5 AM.
8. On the 12 January voting session.
9. Set by Article 148-5 at ‘a maximum of one year from the elections’
10. “The independent judicial body guarantor of the supremacy of the Constitution and the protector of the democratic republican system and of rights and freedoms within the scope of its competencies and powers established by the Constitution.” Article 1 of the Organic Law No.50-2015 on the Constitutional Court.
11. The President of the Republic, the Assembly of the Representatives of the People, and the Supreme Judicial Council shall each appoint four members.
12. The Article lists “successively the Assembly of the Representatives of the People, the Supreme Council of the Judiciary, and the President of the Republic.”
13. Parliament has preserved the same amendments that were proposed, allowing the Supreme Judicial Council and the Presidency of the Republic to choose 8 members of the Constitutional Court without waiting for Parliament to complete the election of 3 out of 4 members of its appointees.
14. The Assembly re-examined the bill, maintaining the same amendments. In theory, the vote at second reading should give rise to the promulgation of the law by the President of the Republic. The President can 1) promulgate it, 2) refer the matter to the Provisional body for the constitutional review of bills for the unconstitutionality of the amended bill - which presumes that the ARP is prepared to amend the text of the law -, or 3) refuse to promulgate it; the Constitution is silent on this third hypothesis.
15. Article 72 of the Constitution
16. Article 106 of the Constitution “XXXXXXXXXX”
17. Including Pr. Amine Mahfoudh, Me. Hedi Kerrou.
18. Carl Schmitt



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- the broader population. The surveys were weighted to account for any random variations that may exist by gender, age, level of education, or geographic area. The margin of error for each country is less than ± 3 percent.”
19. On methodology: “these findings are based on nationally representative public opinion surveys that included
 20. ~~KAS Regional Political Attitudes and Discontent Survey~~ ~~Researcher~~ ~~Trusty~~ ~~Political Attitudes and Discontent~~ ~~to~~ ~~PolDiMed Survey~~”. February 2021
 21. Article 102 of the Constitution.
 22. For instance: provisions of the organic law No. 34 of 2016 of April 28 2016 on the Supreme Council of the Judiciary.
 23. It is worth noting that the post of Attorney General of the Republic was abolished by law n° 87-80 of December 29, 1987
 24. Also, The General Inspectorate, the body responsible for inspecting all jurisdictions and all services and establishments under the Ministry with the exception of the Court of Cassation, is under the direct authority of the Minister, according to Article 24 of the Decree No. 2010-3152 of December 1, 2010, on the organization of the Ministry of Justice.
 25. Political Scientist. Mohamed Kerrou. “Kais Saied ou la revanche légitime de l’État et de la société”. Leaders July 2021.
 26. Sanford Levinson and Jack M. Balkin. “Constitutional Dictatorship: Its Dangers and Its Design”. Available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1220&context=fss_papers
 27. Cited in Mohamed Kerrou. « Kais Saied ou la revanche légitime de l’État et de la société ». Leaders. 28/07/2021.
 28. Administrative Court. Case n°325 – 14 avril 1981 – Pierre Falcon / Ministry of Agriculture
 29. Article 110 of the Constitution states that military courts are courts specialized in military crimes, but Article 149 of the Constitution calls military courts to continue exercising their powers entrusted to them by the laws in force until they are revised in line with the provisions of Article 110 referred to above. Attempts to revise the legal texts regulating the jurisdiction of military courts have been blocked by the parliament for the last two years.
 30. The National Syndicate of Tunisian Journalists, Tunisian League for the Defense of Human Rights, The Tunisian General Labor Union, The National Bar Association of Tunisia, Tunisian Association of Democratic Women, Tunisian Judges Association, Tunisian Forum for Economic and Social Rights.



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About the author

Eya Jrad

Dr Eya Jrad is a Researcher and Assistant Professor of Security Studies and Criminal Justice in Tunisian universities. She holds a PhD in International Relations Law (Minor in Security Studies) from the Faculty of Legal, Political and Social Sciences of the University of Carthage. Her areas of interest are Governance and the Rule of Law, Security and Justice Sectors Reform, Borders, Violence and Social Resilience, in North Africa, with a focus on Tunisia.

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arab-reform.net

contact@arab-reform.net



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