



Tunisia Constitutional e-Forum

Acts organising the Provisional Public Authorities, Legal Analysis and Political Extension

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This article was prepared for Right to Nonviolence's Tunisia Constitutional e-Forum
www.righttononviolence.org/mecf/tunisia/#e-forum

Suggested citation: Bassem Karray, *Acts organising the Provisional Public Authorities, Legal Analysis and Political Extension*, RIGHT TO NONVIOLENCE TUNISIA CONSTITUTIONAL E-FORUM, 2 October 2012, <http://www.righttononviolence.org/mecf/mr-bassem-karray/>

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Acts organising the provisional public authorities, legal analysis and political extension¹

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1- The transitory period is a huge political process linking two political phases by setting up an array of deep reforms in a short period to break with a dictatorship or a colonial phase and to establish a democratic regime. When this period exceeds a reasonable limit of time, social peace is consequently threatened and exposed to disastrous scenarios. The legal system which harmony depends on its constitution is during this process destabilized. Looked at as symbol of tyranny, the supreme norm is always suspended. As a result, the harmony and coherence of the legal system are basically affected. By suspending the constitution of 1959 after La Kasba II sit-in, the Tunisian political system is governed by a provisional Act, known in political jargon as the mini-constitution. During 2011, the Tunisian public authorities have already been governed by two different Acts.

2- In fact, after its independence Tunisia passed through two transitory periods. The first goes back to 1955 after the conclusion of La Marsa treaty on June 3, 1955 which granted Tunisia the internal independence from French protectorate. Waiting for the adoption of a constitution, the Tunisian Bey enacted on September 21, 1955 the Act related to provisional organisation of public authorities. Pursuant to its rules, a provisional government headed by Habib Bourguiba is formed to watch over, under the authority of the Bey, the political and social transition process. But, the government did not have sufficient prerogatives to renovate the political and social system inasmuch as the legislative Act was beyond its power. Thus the head of government strongly claimed this power to achieve a social modernist program. He progressively managed to marginalize the Bey, symbol of conservatism. Therefore, the latter decided on August 3, 1956 to abdicate his prerogative of enacting decrees by reforming article 3 of the Act organising the provisional public authorities. This transfer allowed Habib Bourguiba to modernise the Tunisian society; he promulgated the personal status code on August 13, 1956 (just ten days after obtaining the prerogative of drafting decrees). The code abolished polygamy and granted women several rights. September 21, 1955 Act played a key role in the process of women emancipation, but it didn't lead to the democratization of the political system insofar as the main powers were concentrated in the head of government. By comparing rules of 1955's act to those of 2011's acts, we can say that history is being remade.

3- Before the deadline fixed by article 57 of constitution dated on June 1st, 1956 which dealt with the event of presidency vacancy, the interim president (Fouad Mbazaa, who was the head of chamber of representative) officially announced, in a historical speech delivered on March 3, 2011, the suspension of the 1959 constitution. The transitory period started on March 15, 2011, in accordance with the Decree-Law n° 14 of March 23, 2011. The first act was enforced until the entering into effect of the second Act adopted by NCA on December 6, 2011. These two Acts, which are adopted through different procedures, provided for different contents.

The first Act

¹ Special thanks to Hatem Rebai

4- The Decree-Law n° 14 of March 23, 2011 relative to provisional organisation of the public authorities (official gazette of the Republic of Tunisia, n° 20, March 25, 2011) was inspired by the September 21, 1955 Act and the constitution of June 1st, 1959. As its title suggested, this Act organized the public authorities during the first transitory period which should lead to the election of a National Constituent Assembly. Aware of their lack of legitimacy, the interim president relied on revolutionary legitimacy and political consensus to remain on duty until a new president appointed by the NCA takes over.

5- The Decree-Law's institutional rules substituted those of the 1959 constitution which were not valid any longer. The preamble of the Decree-Law stated that the existing public authorities cannot duly perform their tasks ordinarily due to the political crisis caused by the downfall of Ben Ali. It also pointed out that only rules related to the organisation of public authorities were abrogated. Except for the Administrative Tribunal and the Account Court; the two councils of the legislative body, the Economic and Social Council and the Constitutional Council, were, in accordance with Art 2, dissolved. With regard to the fundamental rights rules, which occupied the first part in the 1959 constitution, the Decree-Law was silent on their validity. Through the absence of explicit abrogation, these rules were assumed to be still in force.

6- The preamble reaffirmed the principle of popular sovereignty. The people's representatives, reiterated the preamble, should be directly, freely and fairly elected. By electing their Constituent Assembly representatives, Tunisian people will exercise their sovereignty formally and legally. As for the 14th January uprising, it was considered by the drafter as a form of popular expression. It bears witness to the will of the Tunisian citizens to break once and for all with the ancient regime by adopting a new constitution.

7- As it was a provisional Act, the Decree-Law expired, in the terms of its Art 18, as soon as the future national Constituent Assembly comes into function and adopts another organisation of public authorities. But, since this Assembly is a sovereign and a supreme authority endowed with unlimited prerogatives, it can maintain this Decree-Law until the enforcement of the next constitution. The first Constituent Assembly elected in 1956 had kept the Decree of September 21, 1955, relating to provisional organisation of the public authorities, into force up to the first legislative and presidential elections held in November 1959.

8- The Act of 23 March, 2011 is known as a mini-constitution insofar as it provided for an arsenal of rules related to the executive, legislative and judicial powers. During the transitory period, executive and legislative powers were solely vested in the provisional President. The major challenge of the first provisional Government was to restore the State's authority in the soonest time. But, the doubt over its legitimacy was a source of hindrance to the implementation of its tasks.

9- The mini-constitution determined the regime of the legislative Acts adopted during the transitory period. Pursuant to its Art 4, the Decree-Laws were considered as legislative Acts. They were promulgated by the provisional President after having been deliberated by the Council of Ministers. Its Art 5 enumerated the different topics of the Decree-Laws (such as electoral and ownership regimes, educational and cultural rules, legislative amnesty...). This list was not limitative insofar as the last paragraph of Art 5 provided that all topics falling under the scope of the legislature were enacted by a Decree-Law. Thus, the range of topics of the Decree-Laws was likely to extend. The drafters seemed to reproduce the content of the Art 34 of the previous constitution. The Decree-laws were identified with two cumulative criteria: formal (deliberation into the Council of Ministers and promulgation by the interim President) and material (their domains were related to legislative ones).

10- The executive power was bicephalous. It was shared between the provisional President and the Government headed by a Prime Minister. The provisional President monopolized the majority of powers to the detriment of the Prime Minister who was empowered to temporarily replace the President and to fill the vacancy in event of death, incapacity and resignation of the president. This issue is reminiscent of the ex-Art 57 before its revision after the ascension of Ben Ali to the presidency. Besides, Art 13 of the Decree-Law n° 14 placed public forces under the authority of the Prime Minister who regained a prerogative enjoyed before the revision of the ex-Art 60 of constitution in 1988. Consequently, public forces were under the command of the interim President and the Prime Minister as well.

11- Pursuant to Art 7, the provisional President was entrusted with the implementation of Decree-Laws. He asserted that the general regulatory power (*pouvoir réglementaire général* in French) can be totally or partly delegated to the Prime Minister. The possibility to delegate the totality of this power amounts to power withdrawal which is not allowed in the delegation theory. It seems that the drafter of the Decree-Law had rewritten the ex-article 53 of the 1959 constitution before its revision in 1997.

12- The Decree-Law was hastily drafted and therefore some of its rules were not meticulously written. As expected, the Constituent Assembly has adopted a clearer and more intelligible Act to govern the constituent phase. As regard to the political events, the second transitory period might last more than one year given the variety and the enormity of the Constituent Assembly's mission. In its implement, many serious loopholes were detected.

The second act

13- The Act of December 6, 2011 was adopted after long discussions in the NCA. The legitimacy of people's representatives and the achievement of the purpose of the "Tunisian revolution" were given due emphasis in its preamble.

14- After the elections of 23 October 2011, the NCA decided to break with the first period by passing a new Act setting up an Assembly Regime. As it is the unique and the sovereign authority, the NCA monopolizes all political powers. The executive and judicial powers are under its authority. Pursuant to its article 5, the NCA has formally elected the President of the Republic. In fact, the three first winning parties in the elections (later called Troika) decided beforehand to share the presidency of the assembly, the government and the republic. As result, in this case and in some other events the NCA endorses the parties' decisions without a real deliberation. It also has endorsed the dismissal of the central bank governor which was inopportune proposed by the provisional President of the Republic who enacted the nomination of the new governor before the NCA has given its approval of the dismissal Act. This affair displayed paradoxically the weakness of the Assembly and the discrepancy between rules and reality.

15- The balance between powers is shaken given the decline of the Assembly authority and the insignificant powers attributed to the provisional President of Republic. The provisional government and particularly its head have been allocated a great deal of functions, both in executive and legislative domains. The head of government is, pursuant to article 17 and 18, the supreme administrative authority and he is responsible for the management of public policies to the detriment of the President of the Republic whose functions are, in the terms of article 5, insignificant. Thus, Tunisian political system has moved from the concentration of powers in the President, under 1959's constitution rules, to that in the head of government.

16- After a short period of symbiosis, the relationship between the two heads of executive power is marked more and more by the disharmony which has an adverse effect on the credibility political institution. The extradition of the Libyan Prime Minister Bagdadi mahmoudi, is very revealing of the absence of coordination. A great political clash between Carthage Palace and la Kasbah occurred and could have broken the coalition. In such a dispute, article 19 provides that the NCA sits as a dispute settlement body and fulfil the role of an arbiter, however, members of the Troika found an incongruous compromise to avoid a political crisis. The motion of censure which was initiated by the opposition against government could not be voted on in plenary session because there was not a quorum.

17- Concerning the enacting regime of the legislative, it is largely similar to the one instituted by the constitution of 1959. The NCA received almost the same list of legislative domains which was attributed to the ex-chamber of representatives. Outside the list provided by article 6, the head of government can freely legislate by acts called autonomous regulatory decrees (*décrets réglementaires autonomes* in French). This category of acts is not easily classified into the normative hierarchy due to its strange merging of legislative acts and executive measures. In addition to this favour, the head of government is granted power to legislate by a specific decree in fiscal issues, known as *legislative decree*, which is the domain of the NCA. Pursuant to article 6, the NCA can delegate its power especially in fiscal domain to the head of government by the annual financial acts or any other act related to financial matters.

18- Strangely enough, The Assembly shows a deficiency in the implementation of articles 21 to 25. In accordance with their content, the powers vested in the NCA are the revision of the regional and local council regulation, the reorganisation of the judicial structure, the establishment of transitional justice mechanism, the setting up of a future independent electoral body. These strange deficiencies indicate the lack of a political commitment to reform the ancient regime heritage and to accelerate the second transitory period.