Conflating the Powers of the Commissarial and the Sovereign Dictator in Tunisia

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On July 25, 2021, with high and increasing rates of coronavirus infections, Tunisian President Kais Saied declared a state of emergency, transferred responsibility for the health crisis to the military and dissolved Parliament. In the following months, Saied rejected calls for new elections and declared that a public process would be undertaken to discuss and draft changes to the Constitution. After a drafting process that the Venice Commission labelled as neither legitimate nor credible, the proposed draft constitution was criticised for creating an 'omnipotent President, a powerless parliament and a toothless judiciary.' In response, the majority of political parties in Tunisia called on the public to boycott the ensuing referendum. Nonetheless, on July 25, 2022, a year after Saied declared a state of emergency and with only 28 percent of eligible voters participating, Tunisia ratified its new Constitution. There are many factors that may explain the political environment that allowed for the introduction of a new constitution: high unemployment, spiralling inflation, and the public's frustration with parliamentary 'dysfunction.' However, as fears of a return to authoritarianism in Tunisia continue to grow, it is important to note that the conditions that allowed for the creation of the 2022 Constitution cannot simply be attributed to Tunisia's deteriorating economic conditions and political intransigence. Although President Saied was able to channel public dissatisfaction, it was the allocation of presidential power under Tunisia's 2014 Constitution that allowed him to sideline opposition groups and push through a constitution that has diminished the role of the parliament and dramatically expanded his own executive power.

Saied's ability to introduce a new constitution was achieved through the conflation of two distinct forms of power: the constituted power provided to a 'commissarial' dictator and the constituent power provided to a 'sovereign' dictator. German political theorist, Carl Schmitt, argued in his 1921 book Die Diktatur ('Dictatorship') that the commissarial and the sovereign dictator pursue different objectives and that their powers should be exercise by separate entities. A commissarial dictator is used to combat a threat to the state and defend its existing political and constitutional structure. Importantly, the commissarial dictator's emergency powers are provided by and contained within the existing constitution. In contrast, the constituent power of the sovereign dictator originates from the pre-constitutional sovereign will of the people. It is used to repudiate and transform a state's existing constitutional order. It is the exercise of constituent power when drafting a constitution, or at least the strength of a claim to be exercising constituent power, that provides the new constitutional order with its legitimacy. Schmitt's distinction between the commissarial and the sovereign dictator helps to frame and explain how the structure of Tunisia's 2014 Constitution provided President Saied with both emergency powers and a direct popular mandate to change the constitution.

I. The Commissarial Dictator

Schmitt's commissarial dictator is modelled on the dictatorships that occurred in the early and middle Roman Republics, where dictatorship was used as a reactive or defensive mechanism. In a modern context, the power of the commissarial dictator is often reflected through emergency powers in the constitution that can be exercised when a threat necessitates urgent, exceptional and temporary action. Emergency powers are justified because they ensure that states

with deliberative, democratic systems do not compromise their ability to defend themselves through indecision or delay. Appointed in times of grave emergency, the commissarial dictator during the Roman period was provided with expedient, centralised and discretionary power, exercised free from existing legal restrictions. Nonetheless, the power of the commissarial dictator under the Roman model was limited in three ways. First, emergency decrees issued by the Roman dictator expired with the resolution of the crisis. Therefore, a Roman dictator had no authority to create permanent laws. Second, the 'heteroinvestiture' principle ensured the entity declaring the existence of a state of emergency, the Roman Senate, was separated from the individual exercising emergency powers, the extraordinary magistrate. This prevented the extraordinary magistrate from inventing or exaggerating potential threats to expand his/her power under the guise of an apparent emergency situation. Third, a dictatorship existed for a maximum duration of six months. In a contemporary context, it may be impossible to foresee the exact duration of many emergency situations. To ensure that a state of emergency does not continue into perpetuity and remain unchallengeable in the legal sphere, many constitutions explicitly require periodic judicial review to determine whether the conditions that justified a state of emergency have ended. These three structural limitations aim to ensure that the commissarial dictator's emergency powers remain delegated and temporary.

The emergency provision in Article 80 of the 2014 Tunisian Constitution explicitly adopts the exception and normalcy distinction described by Schmitt: emergency powers shall be used in 'exceptional circumstances' to 'guarantee, as soon as possible, a return to the normal functioning of state institutions.' Two of the three structural limitations described by Schmitt were included in the 2014 Constitution. First, emergency decrees were considered temporary: they 'cease to be in force as soon as the circumstances justifying their implementation no longer apply.' Second, members of the legislature were able to make a formal request to the Constitutional Court to review whether the existing circumstances justify the continuation of a state of emergency. However, the failure to establish the Constitutional Court under Article 12 meant that these two structural limitations were not applied in practice. After political disagreement about potential appointees, Parliament initially failed to pass a bill to create the Constitutional Court. It eventually passed a bill in 2021, but President Saied blocked the bill, claiming that the Parliament was trying to use the instigation of the Constitutional Court to 'settle scores' and that 'after more than five years… they have missed the deadline.' This meant there was no judicial body to review the President's decision to declare a state of emergency or to assess if the situation still required emergency measures. Finally, the 2014 Tunisian Constitution failed to adopt the heteroinvestiture principle. Article 80 allowed the President to both decide if there is an emergency and what must be done to eliminate it. This is a significant theoretical departure from the assignment of emergency powers to a particular entity to address a specified threat.

II. The Sovereign Dictator

The sovereign dictator described by Schmitt is not itself sovereign and does not acquire permanent sovereign power. Instead, the sovereign dictator is commissioned with a form of constituent power; an element of sovereignty that allows a particular individual or entity to create constitutional change on behalf of the sovereign of people. If the sovereign dictator exercises executive, legislative or judicial powers, then he/she is acting 'ultra vires' their original commission of action. Saied's claim to be exercising the constituent power of the sovereign people was strengthened by his electoral success in the 2019 presidential election. Article 75 required the president of Tunisia to be elected by an 'absolute majority of votes cast' in either the first or the second round of presidential elections. Saied, a former constitutional law professor, campaigned for constitutional change that would devolve greater power to the regions, reduce the power of parliament and provide the president with wide executive authority. He received 18.4 percent of the votes in the first round, the most of any candidate, and won 72.7 percent of the votes in the second round. Surveys

during this period indicated that over 80 percent of Tunisians wanted some form of constitutional change. Although it is unclear exactly how the public wanted to change the constitution, Said's electoral success and the public's disillusionment with the existing political system indicate that the Tunisian people were not seeking a return to normalcy or a restoration of the existing constitutional order. Exactly how constituent power should be exercised, or the legitimacy of Saied's claim to be commissioned with a constitution-making power, are important questions that go beyond the scope of this piece. Instead, it focuses on the dangers of combining a direct popular mandate, and the claims to popular legitimacy that this creates, with the ability to declare a state of emergency and issue emergency decrees.

III. The Language of Both the Commissarial and the Sovereign Dictator

Saied employed the language of both the commissarial and the sovereign dictator to justify the declaration of a state of emergency and his decision to replace Tunisia's existing constitution. When campaigning for the presidency in 2019, Saied made no secret of his desire to 'radically reform' the political system. However, in August 2021, he argued that his declaration of a state of emergency was to preserve 'public security' and 'to protect the normal operations of state institutions.' Saied stated that he would issue a decree to regulate 'these exceptional measures' and that it 'will be lifted' when the circumstances justifying the state of emergency have ended. He argued that people who suggested that he was trying to violate the constitution were 'looking for a mirage' and that he would 'keep respecting' constitutional legitimacy. Despite these statements, Saied also argued that the Constitution is 'not eternal,' as 'sovereignty belongs to the Tunisian people.' If it is not possible for the people to exercise their 'sovereignty through the framework of the constitution,' then 'there needs to be a new text.' In a statement to a U.S. Senate delegation, Saied argued that he was not instigating a coup because 'a coup suggests a lack of legitimacy' and his actions reflect the 'broad popular will' of the people. It is difficult to imagine that Saied, a former constitutional law professor, did not recognise the contradictory nature of his claim to be exercising emergency powers to defend the existing constitutional order, while simultaneously implying that he had been provided with a form of constituent power that could be used to replace it.

Conclusion

Saied's use of wide emergency powers to help sideline parliamentary opposition and support the constitution-making process, contradicts the underlying rational that emergency powers are needed in democratic states to defend the existing constitutional order against urgent and exceptional threats to the state. To preclude the potential misuse of emergency powers a state's constitution should be designed to prevent the entity exercising emergency powers from simultaneously claiming that they represent the 'broad popular will' of the people. The ability to exercise broad emergency powers and Saied's direct popular mandate, after campaigning to change the constitution, made it difficult to define the President's exact commission of action and determine when he went beyond it. To further limit the potential misuse of wide emergency powers the principle of heteroinvestiture should also be adopted, separating the power to declare a state of emergency from the ability to issue emergency decrees. These structural measures, supported by Schmitt but absent in Tunisia, help to ensure that emergency powers are used only to defend and restore the existing constitutional order, not to transform it.

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