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# The Phenomenon of Abusive Constitutionalism How Does the Abusive Constitutional Interpretation Destroy the Democratic Character of the Constitution? « Tunisia as a Case Study »

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**Abstract**

This paper reflects a number of concerns. The first one is to identify an increasingly important issue that I call: The Abusive Constitutional Interpretation as a tactic of the phenomenon of "Abusive Constitutionalism" to consolidate power. In fact, a rash of incidents in a diverse group of Arab countries, such as Tunisia, has shown that the tools of constitutional interpretation by the fundamental actors in the process of interpretation can be used to undermine democracy with relative ease. This question arises more precisely after the last events in the Arab world when Tunisian President Kais Saied, has decided to freeze parliament for at least a month, remove the immunity of parliamentarians, sack the prime minister, and take control of the security forces. The president Saied considers these actions legitimate according to his interpretation of Article 80 of the 2014 Constitution. So, then he took both the

executive and legislative powers, both for himself, which means that power is now very centralized. After this crisis which has been developing since the summer of 2020, the events of July 25 were the last resort for Saied to reach his objective to assume complete control of the country. The paper asks how the use of a constitution itself and its interpretation can erode the democratic order. This reading involves the use of the constitutional text and its interpretation by diverting the proper meaning of the constitution. The idea here is to use the legal form and constitutional tools as a tactic by replying on the constitution itself to impose an abusive political intervention.

**Keywords**: Constitutionalism, Abusive Interpretation, the democratic order, Constitution-Making.

## * Introduction

In the modern world many states claim to be democracies. Even at the time, the Soviet Union and its allies refer to themselves as socialist or "people's democracies". Western states, whether presidential or parliamentary in character, refer to themselves as liberal democracies, and in the third world, including the Arab world, there are numerous regimes-whether party, multi-party, or no-party in character-which call themselves democratic.

The purpose of this essay is not to sift through these competing claims, let alone to take the defense of any one model against all comers. As "Philip Resnick" in "PARLAIMENT VS PEOPLE" pointed out that ; "none of these states lives up to a working model of democracy, defined as power in the hands of the people, while most actively militate against this (Sinclair & Resnick, 1986) ".

The paper examines one of more important conceptual and practical issues associated with modern constitution-making: The conceptual and practical role played by the «actors of constitutional interpretation "in constitution-making which is a pervasive theme.

Certainly, the interpretation of the constitution is everyone's business in a democratic society. Nonetheless, only the interpretation emanating from

public authorities is capable of producing legal effects. So, it is the one which exclusively catches our attention.

Tackling the mechanism of the abusive constitutional interpretation it still seems democratic from distance and comprises several elements that are no different from those found in other constitutional mechanisms of interpretation. However, from close up, it has been substantially reworked to undermine the democratic order.

In the case studied, 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.

Amid poor public policymaking, calls spread on social media for mass protests on July 25th, in commemoration of Republic Day, to hold politicians accountable for the multifaceted crisis in which Tunisia is floundering. 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 activities, waive the immunity of all its members, head the Public Prosecution Office and dismiss Head of Government Hichem Mechichi, creating a constitutional crisis in a country already embattled by dire COVID-19 conditions.

As the president Saied said "The constitution does not allow for the dissolution of parliament, but it does allow for its work to be suspended". The expression of "but it does allow for its work to be suspended" shows that the president has interpreted the constitution based on the Article 72 which considers him to be "the Head of State and the symbol of its unity ... and allows him to guarantee his independence and continuity and thus ensures compliance with the constitution.

The question then arises: how can we qualify this interpretation? Is

this a coup? 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 expression stated that he based his decisions on the Constitution (Article 80), and thus, for him, his measures are still within the constitutional legitimacy. Although the president insisted that his move was constitutional, Parliament Speaker, the Tunisian Association of constitutional law and other political actors accused the president of launching a “coup” against the revolution and constitution.

I draw off of this recent example from Tunisia, after the last events of 25 July 2021, just to illustrate the idea of "abusive constitutional interpretation". But it is important to note that this example only scratches the surface of what is an increasingly routine occurrence in the Arab world (Landau, 2012).

*** The specificity of the study**

It was indisputable that the Arab world sees itself crossed by a democratic movement which touches the very foundations of the political regimes in place since the so-called Arab Spring. The common idea to all the post-revolutionary Arab Constitutions (just after the waves of 2011) was summed up in the will of the constituent to seek a certain balance of powers. The balance of powers then allows reciprocal control of one power over another and makes it possible to constitute a guarantee for the concentration of power within the executive or legislative power; As Montesquieu pointed out, “So that we cannot abuse power, power must, by the arrangement of things, stop power”.

However, while traditional methods of democratic overthrow such as the military coup have been on the decline for decades, the use of constitutional tools to create authoritarian and semi-authoritarian regimes is increasingly prevalent. Powerful incumbent presidents and parties can engineer constitutional

change so as to make themselves very difficult to dislodge as well as defuse institutions such as courts that are intended to check their exercises as power.

The resulting constitutions still look democratic from a distance and contain many elements that are no different from those found in liberal democratic constitutions. But from close up they have been substantially reworked to undermine the democratic order. Even worse, the problem of abusive constitutionalism remains largely unresolved, since democratic defense mechanisms in both comparative constitutional law and international law are largely ineffective against it.

This study aims to deal with the most important issue which can be summed up in the following questions:-

1- In the Arab world, how can the constitution-making contribute to a true democratic transition, while speaking of the practical case of Tunisia? How did the constitutional approach deepen the crisis more deeply instead of seeking an adequate solution?

2- In other words: how can constitutions be used to be much better protected against threats to the democratic order in the Arab world?

3- The rest of this Article proceeds as follows:

**Part I**: **«We the People» Reflects the Philosophy of the Democratic Character of the Constitution**:

In this part I will present a global overview of the birth of the philosophical idea of the constitution. It is a question of reviewing and rethinking the first expression of "We the people of the United States" and analyzing its impact on the transformation of constitutional thought; that is, how this expression has represented a mutation in the constitutional spirit, and so a revelation in constitutional thinking.

**Part II: The Abusive Constitutional Interpretation as a Tactic of the Phenomenon of "Abusive Constitutionalism":**

First, I define abusive constitutionalism, give recent

examples of it in Colombia, Venezuela, and Hungary, and explain why constitutional tools are so effective at entrenching modern authoritarian regimes. Second, I focus on another model of the practice of the phenomenon of "abusive constitutionalism: The Abusive Constitutional Interpretation.

**Part III: How the President's Ruling Destroys the True Meaning of the Constitution:**

This part explains how the president's ruling destroys the true meaning of the constitution by an abusive and illegitimate interpretation in the names of Articles 77, 80 of the Constitution.

**Conclusion:**

Finally, I conclude by asking whether constitutional theory is capable of devising better solutions to the problem I have already identified.

**Part I: «We the People» Reflects the Philosophy of the Democratic Character of the Constitution**

In the first aspects of constitutional history, the idea of the constitution seems to be simple: It means "how something is organized", and in this case the U.S Constitution organized the 13 states into a simple single national government.

In this sense, Alexander Hamilton announced, at the time, that "the people of the thirteen colonies were the first to be given the opportunity to define their constitution “from reflection and choice” rather than “accident and force”(Hamilton et al., s. d.)**.**

So, having declared their independence from Great Britain, and having subsequently purchased it on the battlefield, the 13 colonies thirsting for political liberty then set about the task of framing what became the U. S. Constitution as the first written constitution.

The delegates agreed that the authority for the government should not come from a king, but should come from the people themselves. That idea is expressed in the first line of the constitution in the preamble.

What happened in Philadelphia was really a “revelation in constitutional thinking”. Thus, at the time, the delegates made a bunch of intellectual and philosophical leaps that transformed the nation of the union. The first leap was to come to

understand that "we the people of the United States" rather than «we the people of each of the several states" was sovereign.

From that Time, the democratic character of the constitution is revealed in the first three words of the U.S Constitution: "We the people". The idea that the people through their chosen representatives should form a government that challenged the way virtually every other country in the world was governed at the time (Laxar, 2010).

Writing in support of this document, and against the Anti-Federalists, the Federalists defended the essential principle of the constitution: a strong central government with a due regard for the rights and liberties of both individuals and the states (Himmelfarb, 2005). Federalists and Anti-Federalists wrestled with one another over these issues, both fearing that the inherent weakness of human nature could soon endanger the new republic (Himmelfarb, 2005).

This is one of the reasons that the Federalists were "so insistent upon the separation of powers and checks and balances (Himmelfarb, 2005). And as noted by Madison, "No theoretical checks, no form of government, can render us secure (Himmelfarb, 2005); the 13 states fully realized that, human nature being what it is the separation of governing powers was an absolutely critical element in curtailing the abuses of government (Laxar, 2010).

Historically, Liberal theory, as philosophical base of the constitutionalism, was chiefly concerned with limiting the absolute powers of Kings, a goal which could best be secured through the separation of powers, endowing the legislature and the judiciary with rights which were safe from executive encroachment.

Thus, Parliament began by being convened at least once a year. It would vote all legislative enactments and would further have the right to impeach ministerial officials. Its proceedings would be free and unhindered, and Parliament would control the power of the purse. With time this was extended to the larger sphere of executive action, with the doctrine of ministerial responsibility to Parliament.

In fact, if "the people" existed for such theorists as Locke or

Montesquieu, Bolingbroke or Madison, they would represent more of a potential threat to a liberal order than a bulwark to it. Locke did not hesitate to place property first and foremost among the values of civil society and to oppose any threats which might arise to it. Montesquieu was candid about his opposition to democracy, speaking about the ineptitude of the lower classes for the art of government. As for Madison, several of his contributions to The Federalist Papers emphasized the dangers to liberty which, in a republican scheme of government, were likely to come from the people (Sinclair & Resnick, 1986).

In 18th-century, England was more successful than America or France in fending off the doctrine of popular sovereignty. While the revolutions in the latter two countries did not go much beyond liberal forms, a democratic quality was inherent to both. In the American Revolution, the more conservative of the two, this took the broad participation in the framing of the constitution and for something close to universal white male suffrage in the elections of President and Congress.

In France, Rousseau had articulated a theory of popular sovereignty in his discussion of the general will in The Social Contract. While Rousseau reserved democracy for the legislative rather than the executive realm, he underlined the inalienability of popular sovereignty. He berated the English for their faith in septennials elected Parliaments, emphasizing the importance of direct citizen participation in political affairs.

It was the people, assembled annually, who should decide whether the existing constitution was to be kept or altered. Rousseau was, of course, only one intellectual influence on the French Revolution. Still, from the initial events of 1789 through the stormy days of the Convention and the Jacobin dictatorship, one can trace an emerging doctrine of popular sovereignty. This concept was not without difficulties.

But let us be clear about what was displaced by popular sovereignty. It swept away the skein of feudal privilege, undid the not-so-sacred powers of the king, and allowed to the third estate and, marginally, to "*le petit people*", a first taste of political participation. In other words, with one

stroke it abolished aristocratic pretensions and legitimist claims to absolute power **(**Sinclair & Resnick, 1986). In fact, the term "democracy" basically means that the People “we the people” exercises sovereignty.

Indeed, the appetite for constitutionalism, as a concept, arises not from political theory but from the tangible needs of millions of people. Above all, the idea of constitution is advanced by the success of political movements whose goal is to properly establish and protect the rules of democracy and thus improve the lives of the majority of the population in a number of ways. The constitution establishes the rights of people and the rules under which they behave towards one another in society.

Since then, the common idea to all the post-revolutionary constitutions, after, was summed up in the will of the constituent to seek a certain balance of powers. The balance of powers then allows reciprocal control of one power over another and makes it possible to constitute a guarantee for the concentration of power within the executive or legislative power; As Montesquieu pointed out, “So that we cannot abuse power, power must, by the arrangement of things, stop power (*The Spirit of Laws*, s. d.).

Nowadays, the precise issues that constitution-makers confront vary widely and depend on the specific historical circumstances under which they operate. Generalizations are difficult, perhaps impossible, to come by. Yet, we can identify some issues about constitutional design that arise repeatedly. One of the central questions in constitutional theory is**:** How can constitutions be used to better protect against threats to the democratic order (Laxar, 2010) **?**

This question has taken on new urgency since the Arab Spring, with a fresh wave of new, embattled democracies throughout the Middle East and North Africa, which is the subject of our study.

**Part II: The Abusive Constitutional Interpretation as a tactic of the Phenomenon of “Abusive Constitutionalism”**

David Landau defines the phenomenon of abusive constitutionalism as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before. As

he said “In contrast to past practice, where authoritarian regimes were generally formed through military coup or other unconstitutional practices, would-be autocrats now have significant incentives to appear to be playing by the constitutional rules. Thus they are increasingly turning towards constitutional amendment and replacement as tools to help them construct a more authoritarian order (Landau, s. d.-a).

To analyze this phenomenon, he mentioned three mechanisms of constitutional change - constitutional amendment and constitutional replacement - to explain how undermining the democracy. For that, David Landau gives three examples drown from recent experiences in Colombia, Venezuela, and Hungary, showing how powerful individuals and political parties can use the tools of constitutionalism to undermine democracy (Landau, s. d.-b).

On his part, Mark Technet announced in his work “Advanced Introduction to Comparative Constitutional law” that the Constitution-making can occur in nations with established constitutions as well, so, here we need, as he said, to distinguish between amendments, which are routine, and the replacement of a constitution in force (Tushnet, 2014).

In this context, Mark Technet treats the idea of abusive Constitutionalism as another form of constitution-making which can be called “abusive”(Tushnet, 2014).

According to his conception, the idea of abusive constitutionalism seems simple: Sometimes, political leaders use the legal form of constitution-making to enact constitutional amendments or a new constitution with provisions that are inconsistent with constitutionalism understood in roughly liberal terms. In plain language, attempting to give more precise analytic content to this idea, Mark Technet reveals some of the idea's complexities:

First, it is probably useful to distinguish between abusive constitutionalism and the replacement of constitutionalism by authoritarianism, even if the latter occurs through means authorized by the constitution in place? The reason is that the matter of concern here is not the abuse of the existing constitution, but the authoritarian outcome. Using

constitutionally authorized means to revise a constitution dramatically or to replace it entirely is not in itself a matter of concern for constitutional theory as long as the new constitution is itself normatively acceptable (Tushnet, 2014).

Second, Recent scholars has introduced an idea related to that of abusive constitutionalism, with the label "backsliding". Here the idea is that every constitution achieves some level of satisfaction of its motivating values, and that constitutional change can reduce that level. A clear example would be the adoption in a reasonably stable democracy of measures whose effect is to reduce the scope of the franchise, especially if the reduction has the additional effect of making it more difficult to effectively challenge the political majority that adopted the measures. The idea of backsliding can be applied outside the context of liberal democracy, at least where the constitution in place can be fairly described as aspirational. One might reasonably use the term "backsliding" to describe the movement from a commitment to Stalinist- type communism to the contemporary organization of the economy of the People's Republic of China (Tushnet, 2014).

Finally, some of these difficulties can be brought home by describing one constitutional transformation often described as abusive and one that is not, but perhaps should be. To explain this difficulty, Mark Technet gives two examples: that of “Hungary” as well as that of the “United States (Tushnet, 2014)”.

Similarly, Lawrence Repeta announced in his work "Get Ready for New Battles over Japan's Constitution" that the same phenomenon is showing up even in some countries generally considered stable liberal democracies. In this context, what happened in Japan for example is applicable when the Japanese Prime Minister Shinzo Abe, the leader of the traditionally dominant Liberal Democratic Party (LDP), announced that he would pursue constitutional changes that would reduce the required majorities for constitutional change from two thirds of the Diet to only a simple majority (Landau, s. d.-b).

For more explanation of this phenomenon, I am going to provide two cases standing for the abusive constitutionalism in comparative law,

with are the case of Colombia and Hungary. By the way, David Landau has studied such abusive constitutional phenomenon thoroughly.

*** Abusive Constitutionalism by Amendment: Colombia**

Colombia has historically maintained a semblance of democracy, largely by relying on regular elections and rotation in the presidency, with only a small number of historical exceptions. The country, for example, has had far fewer and shorter interludes of military authoritarianism than its neighbors(Landau, 2012). Also, historically, presidents have generally been limited to a single term in office, and this has helped to maintain the democratic order by preventing the emergence of strongmen with a continuous hold on the office(Landau, s. d.-a).

However, President Alvaro Uribe Velez tested this paradigm after winning election in 2002. Like Hugo Chavez in Venezuela, he won as an outsider, running against the traditional two-party system (Mainwaring et al., 2006). He gained substantial popularity as a result of the perception that he was responsible for a marked drop in violence in the country (Mason, 2003), and he leveraged his popularity in order to push through an amendment to the Constitution allowing him a second term in office (Uprimny, s. d.).

The Colombian Constitution is fairly easy to amend, requiring only an absolute majority of Congress in two consecutive sessions, and Uribe was easily able to surpass this threshold; Art. 375 requiring a simple majority of Congress in the first round and an absolute majority in the second round (Coward et al., 2021).

A group of citizens challenged the law in front of the Colombian Constitutional Court, alleging that there were procedural irregularities and that the amendment constituted a "substitution of the Constitution" that could not be carried out by amendment, but instead only by a Constituent Assembly (Bernal, 2013).

On the second point, they emphasized that the design of the Constitution was set up for one- term presidents and that by holding more than one term Uribe would be allowed to appoint many of the officers who were responsible for checking him (Arts. 249, 281. Justices of the Council of State, Supreme Court, and

Constitutional Court have eight-year terms (Coward et al., 2021))

They also noted that Uribe would face substantial electoral advantages because of his office, and thus would be difficult to dislodge. The Court responded that two-term presidencies were fairly normal internationally, that the extra four years would not allow him to capture all or mast control institutions, and that special legal safeguards taken during the re-election campaign would help to ameliorate Uribe's advantages. And according to the decision of the Constitutional Court “C-104005” the amendment included a requirement that Congress pass a statutory law regulating the rights of the opposition, and in order to help ensure a level playing field.

However, it also warned that the allowance of additional terms-unconstitutional, because the electoral advantages enjoyed by the incumbent would grow, and horizontal checks on his power would erode. The Court was forced to face this situation four years later, after Uribe had won a second term, Supporters of the still-popular President worked to pass an amendment allowing a third term through Congress, and the Congress approved a referendum on whether three consecutive terms in office should be allowed (Landau, s. d.-b). If given to the public, the referendum almost certainly would have passed, since Uribe continued to enjoy approval ratings well above sixty percent (Beltrán, 2002).

For that, according to the decision “C-141/10”, the Constitutional Court was again faced with the problem of whether the amendment was constitutional; both procedurally and substantively this time it struck it down on both grounds. Procedurally, the Court found problems with the financing of the initiative and with its passage through Congress. Substantively, it noted in detail the ways in which Uribe's re-election would allow him to influence the selection of virtually all officials which were supposed to be checking him, and thus would have "deep repercussions on the institutional design adopted by the Constituent Assembly.

Moreover, it noted that the advantages of incumbency would potentially grow over time, making Uribe increasingly difficult to dislodge

from the presidency; In short, the Court held that the second re-election constituted a "substitution of the Constitution" because it would create such a strong presidency as to weaken democratic institutions (Landau, s. d.-a).

The decision was complied with, and Uribe did not run for a third term (Posada-Carbó, 2011). It is probably too much to say that the Court succeeded in preventing Colombia from becoming a competitive authoritarian regime; unlike Hugo Chavez in Venezuela or Rafael Correa in Ecuador, Uribe did not launch all-out attacks against most of the horizontal checks on his power, or threaten to remake the entire institutional order. Further, the Colombian regime contains a high number of relatively autonomous checking institutions, and it would not have been easy for Uribe to pack all of these institutions (*Political Institutions and Judicial Role in Comparative Constitutional Law*, s. d.). But the Court probably did prevent a significant erosion of democracy by preventing a strong president from holding onto power indefinitely.

*** A Combination of Reform and Replacement: Hungary**

In Hungary, the Fidesz Party won the Parliamentary elections of 2010 with fifty-three percent of the vote. They ousted the previously governing Socialists, who had presided over a deteriorating economy. However, because of the way that the Hungarian voting rules worked, the fifty-three percent of the vote translated into sixty-eight percent of the seats, a sufficient Constitution (Bánkuti et al., 2012). The Fidesz Party has had a checkered and opportunistic ideological past: it began as a Libertarian party after the transition from Communism, but became a Conservative party after suffering early electoral defeats (Kiss, 2002).

Although the Fidesz Party had not campaigned on a platform of constitutional change, it began moving towards radical constitutional reform after winning the 2010 election. It first enacted a series of constitutional amendments - ten in the closing months of 2010 that weakened institutions serving to check parliamentary majorities, particularly the Constitutional Court.

For instance, Judy Dempsey in her opinion article "Hungary Waves off Criticism over Media Laws" cited in the New York Times (Dec. 25, 2010) adds that "the Parliament also passed a number of laws that had important effects on the democratic order. For example, a set of media laws concerned critics, as they potentially reduced the independence of media outlets"(Landau, s. d.-b).

The Parliament reformed the Constitution to give Fidesz members more unilateral power over the nomination process, and after the Court struck down a retroactive tax on bonuses received by departing civil servants, the Parliament responded by passing a constitutional amendment stripping most of the Court's jurisdiction over fiscal and budgetary matters (Halmai, 2012).

The Court was asked to strike down this amendment on the ground that it was substantively unconstitutional because it was severely at variance with the existing constitutional order, but a majority of the Court declined to adopt that doctrine and held that it could only review constitutional amendments for procedural problems (Landau, s. d.-a).

The Fidesz majority then went forward with a plan for constitutional replacement Parliament; it began writing an entirely new text (Arato, 2010). The process was widely criticized for not being inclusive; the party used a parliamentary device to evade most deliberation on the bill, and almost no input was received from opposition political forces (Grabenwarter et al., 2011).

As in the Venezuelan case, the new Constitution both undermines horizontal checks on the majority and may help it to perpetuate itself in power indefinitely. The new Constitution expands the size of the Constitutional Court, thus giving the ruling party additional seats to fill. It also creates a new National Judicial Office, controlled by the party, and one with broad powers over both judicial selection and the assignment of cases within the ordinary judiciary. Note that "the National Judicial Office was created and defined by a cardinal law, rather than by the Constitution. The Constitution required the creation of cardinal laws to govern various areas, and the Constitution requires a two-thirds majority to either write or amend

these cardinal laws"(Grabenwarter et al., 2011a).

The judicial retirement age was reduced from seventy to sixty-two, giving the National Judicial Office a large number of vacancies to fill in a short period of time (Grabenwarter et al., 2011b). Other key institutions, like the Electoral Commission, Budget Commission, and Media Board, have been re- staffed with Fidesz loyalists and often given very long terms of twelve years (Landau, s. d.-b).

Finally, new rules adjust the electoral districts in ways that would have substantially increased their share of the vote in each of the past three elections, thus potentially making the Fidesz harder to dislodge in the future (Szigetvári et al., s. d.).

This effort has provoked some responses both domestically and internationally. Domestically, the Constitutional Court for the time-being retains sufficient independence to issue some important rulings against the regime. For example, the Court struck down the effort to lower the retirement age to sixty-two, although it issued a weak remedy that appeared to have no effect on the judges already removed from the bench (Scheppele, s. d.-a). It also struck down a new voter-registration law that seemed designed to further tilt the electoral balance in the Fidesz's favor (Scheppele, s. d.-b).

Internationally, various institutions of the European Union and the Council of Europe have searched for an appropriate response. The Venice Commission, created to give constitutional assistance to the transitional democracies in Eastern Europe, has criticized certain parts of the new text and related laws (Grabenwarter et al., 2011b), while enforcement proceedings were brought against certain elements of the program, especially those that reduced the independence of the Central Bank and lowered the retirement age for judges to sixty-two (European Central Bank., 2020). In response, the Fidesz has modified some of its policies.

We do not know whether the result of the Hungarian case will be the creation of a competitive authoritarian regime, but the intent was clearly to move in that direction. It may be difficult for a member of the European Union to move too far in the direction of authoritarianism, although it is startling how successful the Fidesz has

been in carrying out this goal within a short period of time.

**Part III: How the President's Ruling destroys the true Meaning of the Constitution**

I focus here on another model of the practice of the phenomenon of abusive constitutionalism: The Abusive Constitutional Interpretation. Certainly, the interpretation of the constitution is everyone's business in a democratic society. However, only the interpretation emanating from public authorities is capable of producing legal effects. So, it is the one witch exclusively catches our attention.

In addition, the work of interpretation is not entirely free. It is carried out according to the modalities that the constitution or the law determine, subject also to the controls which may be organized within the same power or by one power over another (Van de Kerchove, 1978).

Indeed, using constitutionally authorized means to read and interpret a constitution is not in itself a matter of concern for constitutional theory as long as the modern theory of interpretation is itself normatively acceptable. But the question is how a constitutional interpretation can be used quite frequently to weaken democracy and make a regime "significantly less democratic.

Tackling the mechanism of the abusive constitutional interpretation still seems democratic from distance and comprises several elements that are no different from those found in other constitutional mechanisms of interpretation. However, from close up, it has been substantially reworked to undermine the democratic order.

In the case studied, the president Saied considers these actions legitimate according to his own interpretation of Article 80 of the 2014 Constitution. So, then he took both the executive and legislative powers, both for himself, which means that power is now very centralized. After this crisis which has been developing since the summer of 2020, the events of July 25 were the last resort for Saied to reach his objective to assume complete control of the country.

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) (Jrad, s. d.).

This part aims to contribute to define and situate abusive constitutional interpretation. Secondly, goals to the ongoing debate on the constitutionality of the measures taken by Kais Saied, by examining both the text of the constitution and the context to argue that the abusive constitutional interpretation was just a "tactic to consolidate power"; since then, going far to impose a regime more presidential than parliamentary.

*** Defining and Situating Abusive Constitutional Interpretation**

Such a nation might "need" a constitution for several reasons. The primary one is that in the modern world a constitution is probably a convenient way of laying out the formal contours of the mechanisms for exercising public power. Second, domestic actors may treat the existence of a constitution as establishing or symbolizing the nation's existence as a state. Finally, in nations with heterogeneous populations a constitution can serve as an expression, perhaps the only one available of national unity.

For all that, constitutions as maps of power may be somewhat inaccurate. The realities of power may not be fully reflected in a constitution. Or, in other situations, a constitution and its aims can be both exceeded through a false interpretation also called an "abusive constitutional interpretation".

In fact, a constitution as a document is, firstly, a "text", a "set of words" whose meaning does not exist

independently of the reading which is made of it by the ones who interpret it (Debbasch, 2001). But sometimes a constitution can be badly drafted with great ambiguity which poses problems of interpretation.

In this sense, the modern theory of interpretation affirms that any text has virtually a plurality of meanings and that it is the authorities, responsible for applying it, who determine which of these meanings will be positive law: legal interpretation is also, and firstly, an act of will, by which the authorized interpreter chooses a meaning among those that the text contains.

An interpretation specifies the meaning of the words. It reveals the spirit of the rule. It seeks the intention of the authors of the constitution. It appeals to all the potentialities of reasoning, analysis or synthesis. It thus brings out the correct meaning that can be given to a provision.

The purpose of the constitution justifies the authority attached to its provisions. The constitution assigns them a place like no other in the field of the rule of law. The interpretation of the Constitution, too, will occupy a place of its own. The powers organized in the State are bound to respect the constitution. They can only act in the manner established by the constitution. But in the pursuit of their action, the various public authorities faced an imprecise, insufficient, ambiguous constitutional provision, which causes recourse to constitutional interpretation as a tool to resolve the political situation.

An abusive constitutional interpretation 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.

Consequently, the above reading of an abusive constitutional interpretation is going to push us to take the case of the Tunisian President K. Saied into consideration for more grasping.

*** A Cross-reading of the Article 80 of the Tunisian Constitution**

Tunisia 2014's Constitution includes a specific provision on the state of emergency. Attempting to give more precise analytic content to the idea of "abusive constitutional interpretation" marked by the Tunisian president requires a new reading of this Article (80) compared to the other chapters of the constitution dealing with the possibility of the dissolution of the parliament or the possibility to any measures necessitated by the exceptional circumstances; namely: the Articles 72-77-93-95. That is to say, the constitution must be interpreted in its entirety respecting the principle of "the unity of the constitutional text".

*** According to Article 80 of the constitution, the president**

« In the event of imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state, the President of the Republic may take any measures necessitated by the exceptional circumstances, 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 President shall announce the measures in a statement to the people.

The measures shall guarantee, as soon as possible, a return to the normal functioning of state institutions and services. 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 and a motion of censure against the government cannot be presented. Thirty days after the entry into force of these measures, and at any time thereafter, the Speaker of the Assembly of the Representatives of the People or thirty of the members thereof shall be entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain

exceptional. The Court shall rule upon and publicly issue its decision within a period not exceeding fifteen days.

These measures cease to be in force as soon as the circumstances justifying their implementation no longer apply. The President of the Republic shall address a message to the people to this effect.

*** Conditions of Application of Article 80 of the Constitution**

The first cross-reading of this chapter shows that the intervention of the President of the Republic to take the measures required by these exceptional circumstances remains very limited. This requires respecting several operational conditions before announcing the political decision.

*** 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". Dose the president Saied have the constitutional right to interpret the constitutional text ?

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" on the 12 January voting session. Due to the political polarization and tension, nearly 6 years passed after the deadline, (Set by Article 148-5 at 'a maximum of one year from the elections) to establish a constitutional court.

In the absence of a constitutional court, according to Article 72, 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" to interpret the constitutional text (*Comparative Analysis between the Constitutional Processes in Egypt and Tunisia - Lessons Learnt -Overview of the Constitutional Situation in Libya*, s. d.).

*** Formal Conditions**

The adopted measures should be suspended once the reasons for their implementation have ceased. Considering their exceptional character, certain conditions must be in place.

**Prior** to the announcement of the state of emergency, the Constitution stipulates the 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 question which arises, For this point, is that the text of the Constitution does not specify the form of the consultation and whether "their opinions are binding" or not. It does not indicate that it shall be a "binding opinion", which means, for some, that the president is not bound by the opinions of the head of government or the speaker of the Assembly of representatives of the people.

**The next condition** is to inform the President of the Constitutional Court. Article 80 states that the President of the Republic may take any measures necessitated by the exceptional circumstances after "informing the President of the Constitutional Court". But, in the absence of a constitutional court, another question arises : What is the possible reading for this case ? There are two possible readings:-

**The first one**, is that this is a condition for activating Article 80 of the constitution and there-fore, failure to do so would constitute a violation of the Article.

**The second** possible interpretation 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. However, 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".

On her part, Eya Jrad announced in her work "Constitutional or Unconstitutional: Is That the Question" that 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 (Jrad, s. d.).

**Additionally**, through an official statement to the people, the president must announce that he intends to implement such measures: Article 80 of the Constitution states that "The President shall announce the measures in a statement to the people".

*** An Abusive and Illegitimate Interpretation in the Names of the Constitution**

As the president Kais Saied said: "The Constitution does not allow for the dissolution of parliament, but it does allow for its work to be suspended". The expression of "but it does allow for its work to be suspended" shows that the president has interpreted the Constitution based on the Article 72 which considers him to be "the Head of State and the symbol of his unity ... and allows him to guarantee his independence and continuity and thus ensures compliance with the constitution.

The President expression stated that he based his decisions on the constitution (Article 80), and thus, for him, his measures are still within the constitutional legitimacy. Although the president insisted that his move was constitutional, Parliament Speaker; the Tunisian Association of constitutional law and other political actors accused the president of launching a "coup" against the revolution and constitution.

The question that arises: how can we qualify this interpretation? Is this a coup? 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.

According to the African Charter on Democracy, Elections and Governance which, in its article 23, defines a "coup" as:-

1- Any putsch or coup d'Etat against a democratically elected government.

2- Any intervention by mercenaries to replace a democratically elected government

3- Any replacement of a democratically elected government by armed dissidents or rebels.
4- 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, and according to the first reading, what happened probably does not correspond to any of the coup scenarios. Qualification of this decision varied, from calling it a "coup" to a "legitimate revenge of the state and society (Jrad, s. d.)," with some analysts even terming it a "coup of brilliance and mastery (Abdeljelil, s. d.).

What happened would better fit what doctrine has termed to be a "constitutional dictatorship"(Balkin & Levinson, s. d.); or what I would call an "abusive constitutional interpretation" legitimized by exceptional circumstances and limited in time.

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 the abusive constitutional interpretation" marked by the Tunisian president

*** The Article 80 states that «Assembly of the People's Representatives remains in permanent session»**

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.

Returning to the Tunisian Constitution, Article 77 stipulates that: "the president is also empowered to

dissolve the Assembly of People's Representatives in the cases provided for by the Constitution".

This arrangement (Paragraph 2 of the Article 80) means the exclusion of the parliamentary recess and the continuation of the Council's activities normally, especially managing the state of emergency under the same law. Noting that freezing the parliament's activity means dissolving it, which is strictly prohibited by Chapter 80.

The president's decisions did not meet the objective and formal conditions stipulated in Article 80 of the Constitution on which they were based, as it clearly states that "the Assembly of the People's Representatives remains in permanent session". Legal experts, notably the Tunisian Association of Constitutional Law, 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.

Indeed, the conditions expressed in Article 80 do not specify whether the president must consult with the parliament and government on the critical situation the country is facing, or on the measures to be taken. In fact, the president has a certain degree of discretion to decide whether to delay the state of emergency. However, Article 80 does not confer unrestricted powers to the president. It clearly states that during a state of emergency, parliament shall be deemed to be in a state of continuous session throughout such a period. Therefore, the president cannot dissolve parliament.

Consequently, the abusive interpretation of the president appears clearly by this decision since, in reality, the president with this decision, not only exceeded his powers through these decisions, but also arbitrarily violated the most important provisions in this chapter.

*** On the dismissal of the Head of the Government**

It is clear that the 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 neither 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.”

On her part, Eya Jrad announced in her work “Constitutional or Unconstitutional: Is That the Question? “ that “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)”(Jrad, s. d.).

However; the Tunisian Constitution stipulates that:” … A vote of no-confidence in the government requires the vote of an absolute majority of the members of the Assembly of the Representatives of the People, and the presentation of an alternative candidate to head the government whose candidacy must be approved in the same vote. The President of the Republic shall entrust this candidate with the task of forming the government, according to the provisions of Article 89 … In the event of failure to attain the necessary absolute majority, a motion of censure may not be reintroduced for a minimum period of six months …”.

Moreover, a motion of censure against the government cannot be presented. This implies that the state of emergency neither settled a constitutional dictatorship, which would have concentrated all three branches of government in the hands of the president, nor allows the suspension of the separation of powers.

*** The Constitutional Court – has yet to be formed in Tunisia**

Much confusion and controversy have 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.

Accordingly, if the president must consult with the prime minister and the speaker of parliament and inform the head of the constitutional court. However, the latter is impossible to fulfill given that Tunisia has yet to institute a constitutional court that oversees a legitimate implementation of the constitution.

Consequently, given the nature of the measures announced by President Saied, he exercised his powers beyond the scope and conditions stipulated in the constitution. Yet, the crisis in the country has been ongoing for months and is undeniably of an exceptional character, which legitimately allows the recourse to Article 80. On the contrary, their scope should be limited and restricted, mainly in the absence of a judicial review by the constitutional court.

*** Conclusion**

If constitutionalism, in its principle, aims primarily at the consolidation of democratic regimes, academics today doubt the value of constitutional rules for the competitive authoritarian project. Political scientists argue that formal rules are relatively unimportant to competitive authoritarian regimes because these regimes tend to rely on informal sets of norms to perpetuate themselves in power.

The main purpose of this paper is to get a handle on the issue of abusive constitutional interpretation. In fact, the purpose has been conceptual and descriptive. I have argued that the undermining of democracy through the use of the tools of constitutional change, and especially by abusive constitutional interpretation, is likely to be increasingly common in the future, and that we have few adequate responses in comparative and international law.

Therefore, K. S's decision to suspend the Tunisian Constitution is seemingly an attempt to use the legal

form of constitution-making with the objective of meeting a specific end he has already worked on while interpreting the Constitution according to his own reading. In plain language, the purpose behind making such a step is considered to be abusive in the largest sense of the term.

And as David Landau said "several examples have shown, abusive constitutional practices can proceed through a variety of different routes to achieve the same goals constitutional replacement can amendment attempts are stymied, and would-be authoritarians can resort to undermining a number of different institutions, in a number of different ways, to achieve their goals". In addition to the abusive constitutional interpretation as a tactic in order to further concentrate powers and thus even undermine the democratic order, the following question is going to be obvious:

*** Can we develop, in the Arab world, more effective responses at either the domestic or international level?**

An honest answer must express some recognition of the difficulty of the task. What is more, we must rethink the constitutional theory and the way it has been applied in the hope of achieving democracy, as there is an evident difference between what is theoretical and what is political.

Accordingly, by casting an eye over how President Kais Saied set up a system under which he would govern the country by decree, bypassing Constitution, I can say that the Constitution, which is merely a set of legal documents, inevitably failed to present itself as a mechanism for a democratic transition.

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