



## ORIGINAL PAPER

# The Concept of Emergency Powers in The Roman Dictatorship

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**Abstract:**

The Roman dictatorship is undoubtedly the most outstanding example of normative order to contain the concept of emergency powers. It illustrates, in a remarkable manner, how conventional restraints were markedly effective in achieving a transient and temporary deviation from the established legal order, formally and consciously made, solely to meet a genuine crisis, reverting to normality as soon as the necessity for its existence subsided, and avoiding its institutionalization.

**Keywords:** *Emergency Powers; Roman Dictatorship; State of Emergency.*

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### **Introduction**

The Roman dictatorship institution represents the prototype for all modern institutions governing exceptional states. The Romans implemented a structure in which an emergency institution was a regular and recognized instrument of the state built into a constitutional framework. This institution was hailed by Machiavelli as one that deserves to be numbered and considered among those that were the source of the greatness of the empire (Machiavelli, 1996: 74). Correspondingly, Clinton Rossiter also suggested that the splendid political brilliance of the Roman people grasped and solved the difficult dilemma of emergency powers in a manner quite unparalleled in all history, indeed so boldly and uniquely that a study of modern government crisis could find no more propitious starting point than a succinct survey of the celebrated Roman dictatorship (Rossiter, 1948: 15).

Thus, the Roman solution to the emergency powers problem was touted as maybe the most strikingly successful systems of emergency government (Watkins, 1940: 324-332). The distinctive features of the famous Roman dictatorship - recognition of the special nature, its provisional aspect, the appointment of a dictator according to a very specific constitutional form that separated those who declared an emergency and those who exercised dictatorial powers on such occasions, the appointment was done only for a special purposes, maintaining the constitutional order instead of replacing or changing it - are commonly regarded as setting the basic guidelines for all the modern-day constitutional emergency regimes.

The constitutional nature was the main thrust of this emergency institution. Operating within the constitutional framework, the dictator was invested with extraordinary, yet constitutional powers. The emergency was met with special powers by an authoritarian character, but the employment of such kind of powers and the authority to use them were regulated by law.

In the year 501 B.C., during a war, the consuls, who represented the elected chief magistrates, elected a *magister populi* with royal title and powers, who later came to be known as dictator. Traditionally, the dictator was presumed to carry out military functions that would be fundamental to defend the republic against foreign threats, and then would be considered a *dictator rei gerundae causa* (for getting things done) (Rossiter, 1948: 21). The military origin of this institution is apparent from the dictators original title of *magister populi* (master of the citizen army) and the fact that to assist him in his very important task the dictator had the ability to appoint a delegate, known as *magister equitum* (master of the horse, who was supposed to be the commander of the cavalry), and gave him the full power of *imperium* (Mommsen, 1864: 325-26).

He was expected to remain in power only as long as the danger existed; as the danger was originally only military, a single campaign of 6 months was held to represent the maximum duration of the office. During this period of time, the dictator exercised the full regal *imperium* and the accompanying military jurisdiction, all without appeal. The dictator office never lost its original military character fully, but it represented part of the republican constitution rather than a suspension of it.

Although the assignment of a dictator was a very radical constitutional move undertaken only in exceptional times of crisis, an appearance of normality was maintained as much as possible. During the dictatorship, the state regular institutions - the Senate, the consulship, the tribunes, and all the other office holders - continued to fulfill all their normal functions and maintained their full authority. The end result was

that the consuls, the Senate and the tribunes, remaining in their authority, came to become like a guard on the dictator to force him not to depart from the right way.

As we shall see, in addition, the dictator was called to maintain and protect the existing constitutional order. Consequently, the dictator did not have the power to do anything that would affect the state, such as taking the power from the Senate, abolishing old laws and making new ones (Machiavelli, 1996: 74). The dictator also could not use his power in order to alter the basic character of the state or its framework. Consequently, his authority did not extend to the promulgation of new legislation, a power that was reserved only to the Senate. In *The Social Contract*, Rousseau emphasizes this significant distinction between the the supreme ruler and the legislator. “The dictatorial powers and the legislative authority are not to be merged or confused. The supreme ruler, tailored around the outline of the Roman dictatorship, may enjoy absolute powers as necessary for the preservation of society and its members, and may silence all the laws and suspend for a moment the sovereign authority, but he does not possess the power to alter arbitrarily the basic legal framework of that society as put in place by the legislator” (Rousseau, 1993: 294). The constitutional order and the ordinary laws, in all or in part, can be suspended under the reign of the supreme ruler but they can't be amended, modified, or repealed during that time. To sum things up, he can do anything, except to make new laws (Machiavelli, 1996: 76).

### **Appointment of Dictators**

With the fall of the monarchy in the year 509 B.C., the Roman republic moved to establish an executive that was headed by two chief magistrates, the consuls. The exact timing of the move is a matter of some controversy (Cary and Scullard, 1975: 56). The two consuls had immense power at their disposal. Consequently, each of them had the power to command the army and to exercise jurisdiction in all matters (Jolowicz and Nicholas, 1972: 45.). Nonetheless, in order to prevent the reversion to a monarchical structure of government, the newly established executive offices of the republic were based on two principles (Cary and Scullard, 1975: 62-63.): the principle of collegiality and equal powers, and the principle of limited and non-renewable terms of office. The two consuls enjoyed equal authority and disposed of the same range of powers, functions and responsibilities. Each of them also enjoyed an unlimited veto power over the actions and decisions of his colleague. Also, each consul was elected for a period of one year without the possibility of reelection.

However, at the same time, the romans were aware of the fact that an equal partnership at the helm might not be adequate in times of emergency. In such precarious times there might exist a need for decisive and swift actions. The possibility of a deadlocked leadership that is unable to agree on what actions ought to be taken posed a real challenge. Hence, another institution - the dictatorship - emerged as a temporary revival of the monarchy, only used in times of emergency, when it was necessary to concentrate the whole power of the state in a single person (Mommsen, 1864: 326).

These verity of the situation was captured by the fact that when a dictator was appointed -the origin of the term, “*dictus*” (named, appointed), points to the fact that the dictator was the only non-elected magistrate of the republic - an axe, symbolizing the power to administer capital punishment, appeared in his fasces (a bundle of wooden rods that represented authority) even within Rome's city boundaries, whereas the fasces of the consuls included an axe only when presented outside the city.

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In such grave times any one of the consuls - in case the two could not agree or otherwise act together, the decision regarding which one of them was to act on the matter was decided by lot - could appoint a dictator who, upon entering office, became the highest magistrate of the republic, superior also to the consuls who appointed him. Machiavelli suggests that, since the appointment of a dictator relegated the status and authority of the consuls, it was wise to leave such an appointment in the consuls hands, because “wounds and other ills which are inflicted of one’s own accord and choice, grieve you much less than those that are inflicted on you by others” (Machiavelli, 1996: 196). However, while the dictator combined the powers of the two consuls, he neither replaced them nor took away their powers (Lintott, 1999: 111). The decision of the dictator, in contrast to those of all other magistrates (including the consuls), could not form the subject of an appeal at the centuriate assembly. The dictator was immune to any intervention by the tribunes or from the Senat. Also, the size of army he could raise was not limited, and he had full control in establishing the tactical and strategic goals of the troupes under his command (Rossiter, 1948: 25). In addition, he was the only magistrate who did not have to fear a possible punishment and accountability after the termination of his office (Rossiter, 1948: 19).

Although the appointment of the dictator was a matter for the full discretion of the consuls, the practice that developed was that it could not be made without the Senate’s recommendation, and the *imperium* of the dictator had to be confirmed by a law passed by the curiate assembly (Jolowicz and Nicholas, Roman Law: 35). This reflected the increase in the political clout of the Senate, but not less importantly it was also the result of a basic fear of tyranny. Once a dictator had been appointed it was extremely difficult (although not impossible) to turn back the wheel. Therefore, it was decisive that the appointment would not be taken rashly and without a proper inspection of the circumstances. Involvement of the Senate in the nomination of a dictator became very important, once the position was no longer the sole estate of the Patrician nobility and was also opened to the plebs. Constitutional consciousness prohibiting excessive concentration of power in the hands of any one leader, coupled with internal socio-political considerations, led to a partial “legislative” control of the emergency mechanisms and to the exclusion of any assumption that the emergency measures were an exclusive domain of the government (executive branch). In time, with the increase power of the Senate within the structure of government, the Senate did not only suggested the appointment of a dictator, but also went further even to identify the particular person. Such suggestions of the Senate were always followed. (Gross and Ní Aoláin, 2006: 24)

Therefore, as we have seen, the institution of the dictatorship was alien to the basic governmental structure of the republic. The system of officers coequal in their powers and able fully to veto each other’s decisions and actions could not comfortably coexist with the vesting of absolute power in a single person. The notion of sharing the burdens of governance was clearly at odds with the dictatorship (Cary and Scullard, 1975: 97). Hence, although giving the dictator all the powers needed to defend the republic against its enemies, well-defined constitutional restrictions were laid out in order to prevent unwarranted aggrandizement and abuse of the powers of the dictator and a return to the monarchical system (Cary and Scullard, 1975: 63).

Therefore, this set of provisions related to the procedure for appointing the dictator represented the success of the institution. Thus, the appointment of a dictator by the consuls, coupled with the provision that no consul might appoint himself as dictator,

ensured that the dictatorship would be invoked by officers other than the dictator himself. The republican structures ensured a separation between those who decided that an emergency existed and those who exercised the most awesome emergency measures. Thus, the dictator's powers were conferred upon him "according to public orders, and not by his own authority." (Cary and Scullard, 1975: 74).

### **Limitations of Time**

Perhaps the most significant limitations are the exceptional nature of the circumstances that would justify the appointment of a dictator and the temporal duration of this extraordinary appointment. No other political or legal system in the world has ever applied the time limit for emergency measures as successfully as the Roman system.

The dictator's term of office was limited to six months or to the end of the term of the consuls who appointed him, whichever came first, and could not be renewed. Illustrating that the dictator's short term was one of the features that caused the astonishing success of the institution. Machiavelli compares the roman dictatorship with the rule of the Decemviri, and argues that an important flaw in the latter was the fact that these ten men were invested with absolute power for a long period of time (in this context Machiavelli considered a year to be a long time) (Machiavelli, 1996: 76-77). Correspondingly, Jean-Jacques Rousseau implies that the appointment of a dictator, also known as the supreme ruler, be done only for a brief duration, defined in advance and not subject to expansion (especially not by the dictator himself) (Gross and Ní Aoláin, 2006: 21).

Nonetheless, it is critical that its span should be established only for a brief period, incapable of being prolonged without reason. During the emergency which determined its approval, the state is either soon saved, or soon lost; and, when current need passed, the dictator becomes either tyrannical or idle. In the Roman Empire, where the dictator held office for a limited period of only six months, the majority of them step down before their time expired. If their term of office had been longer, they might have tried to extend it even further, the way the decemvirs did when they were chosen for a year. The dictators only had time to resolve the needs that caused them to be chosen; they had no time to seek other interests (Rousseau, 1993: 296).

Thus, the Roman dictators ended their mandates and relinquished their astonishing and unlimited powers with extraordinary precision, after a fixed period of time, without the need to use brute force, often used by many current regimes. The basic condition of successful government in emergencies - the temporary nature - on which all current scholars of constitutionalism insist that it be respected, has been met almost to perfection in ancient Rome. In the annals of Rome, no one came closer to the ideal functioning of the dictatorship than Lucius Quinctius Cincinnatus. According to tradition, Cincinnatus was appointed dictator in 458 BC. to save a Roman army, led by one of the consuls, which was besieged by enemy forces. The old Roman farmer was called from the plow by his compatriots and was given despotic authority to deal with the crisis. The most significant and famous fact is that, immediately after his victory over the enemy, just fifteen days after his appointment, Cincinnatus resigned, relinquished all his special powers, and returned to work his land (Rossiter, 1948: 16).

Cincinnatus's unwavering commitment to serve the republic and his willingness to give up the awesome powers that had been entrusted to him came to represent the prime example of the dictatorship and the qualities that were expected of a dictator and a

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leader. The fact that dictators were appointed only for a limited term, and their power to act was limited only to the special occasion for which they were called, is the cause of its success and the reason for the absence of abuse. As Machiavelli puts it: "When a dictator came, he gained more fame the earlier he resigned." (Machiavelli, 1996: 186).

### **Non-derogable Areas**

Modern emergency law recognizes certain non-derogable and inalienable rights as a limitation upon wide-ranging emergency powers. This, however, is not a latter-day invention. The Roman dictator, in spite of his awesome powers, was similarly circumscribed, *inter alia*, by two non-derogable and inviolable conventions. He could not alter the basic form of government and he could not make laws. The former limitation was premised upon the view that the "sacred trust" of the dictator was to maintain the constitutional order, and although to this end he was competent to resort to any measure, the republic which he was chosen to defend could not be altered or subverted. Machiavelli put it succinctly when he said that the dictator could do nothing to change the form of government, such as diminishing the powers of the Senate or the people or to abolish existing institutions and create new ones (Machiavelli, 1996: 195).

The other limitation - the ban on making laws - is mentioned by Rousseau when he says that the suspension of legislative power does not imply its abolition; Therefore, the dictator can do anything but make laws (Rousseau, *Social Contract*, p. 294.). It is certain that this limitation, expressed by Rousseau in such sweeping terms, did not preclude the dictator from ruling as the executive head, through decrees and appropriate orders, and with the power to disregard existing laws. What he was deprived of was formal legislative power, exercised as such by the legislature. This denial was no more than what it is commonplace in modern constitutions.

Another important restriction on the dictator's powers stemmed from the fact that he was expected to restore order and security to the republic in the face of a certain threat, often military (Rossiter, 1948: 24). However, with all his immense powers, the dictator could not start, on his own initiative, a war against an external enemy. This right was reserved only for the Senate. The role of the dictator was only defensive. He was also required to perform his duties only for the public good and not for private purposes or irrelevant reasons. Machiavelli similarly said the dictator could do no harm to the Republic. The Roman dictator was further limited by his dependence on his creator in financial matters. This is due to the constitutional prohibition of withdrawals from the public treasury without the consent of the Senate.

Thus, as said in the introduction, the Roman dictatorship is undoubtedly the most outstanding example of normative order to contain the concept of emergency powers. It illustrates in a remarkable manner how conventional restraints were markedly effective in achieving a transient and temporary deviation from the established legal order, formally and consciously made, solely to meet a genuine crisis, reverting to normality as soon as the necessity for its existence subsided, and avoiding its institutionalization.

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