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Chapter 6

The Arab Uprising: State of Emergency and Constitutional Reform

Andrej Zwitter

The state has a right to exist – the International Court of Justice saw this as a core principle of international law in its Nuclear Weapons advisory opinion, a norm that constitutes the basis of the international legal right to self-defence. This is not to say that a government has a right to exist. Rather the right of a government to exist derives from the principle of the self-determination of peoples (Zwitter 2012a). Accordingly, peoples have the choice to choose their government and its form. That the international community saw it similarly can be seen in the preambular paragraph of the res. 1973 (2011) concerning Libya (which was used by NATO to justify what eventually became a regime change): ‘*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya’. It is these principles of international law (sovereignty, independence, territorial integrity) that form the international legal basis of the state of emergency.

On a national level, most of the time constitutional regulations ensure the survival of the state. However, these tools have been used by dictatorships, since the forging of modern constitutions that know the concept of states of emergency. This is not to say that the legal mechanism of the state of emergency only exists in dictatorial regimes. Particularly during heat waves, US states frequently declare state of emergencies due to wildfires. Recently, Oslo was about to declare a state of emergency regarding the visit of teen super-star Justin Bieber (Hughes 2012). This is indicative of the fact that state of emergency declarations are subject to a consideration by the executive branch whether any kind of event can be dealt with within the boundaries of law or not. Claims that states of emergency measures are predominantly in use in autocratic regimes also lack solid evidence. In fact, states of emergencies are frequently declared by democracies to overcome challenges of natural, economic and manmade nature.

It is, nonetheless, undisputed that the strategic role of states of emergencies imposed by repressive regimes are often different. Whereas in any case emergency laws are mostly designed to give an extraordinary measure of flexibility and an extended reach to the executive, their use and their duration suggest different end goals. Taking a look at the countries that recently experienced what was called in the media the ‘Arab Spring’, it becomes evident that states of emergency were often put in place to stabilize a political leadership that had lost (or never had) its legitimacy with the people, to crack down on unwanted opposition and human

rights defenders, and to circumvent human rights obligations that would otherwise limit administrative detention and the power of security and military forces.

This is one of the reasons why the Arab Uprisings, starting in Tunisia in January 2011, have led to a wave of constitutional reforms, most of which are also concerned with emergency laws (such as in Tunisia, Libya, Syria, Egypt). If constitutional reforms are indeed to lead to more democratic and liberal states, the crucial test remains how states perform in the state of emergency. This short paper presents the current development around what has been called by many the ‘Arab Spring’ and analyses the prospects of democratic control and the rule of law from the view of constitutional arrangements concerning states of emergency. As such each section briefly outlines the political and legal background of the country and afterwards takes a look at the legal norms concerning the state of emergency in the respective country. Before a closer look at the countries will be given, the essay will outline key elements of principles stemming from the rule of law, democracy and minimum requirements of checks and balances that will be used as benchmarks in the discussion section.

Conditions of Rule of Law and Democracy

Emergencies require states to sometimes act faster (urgency) and/or more effectively (i.e. better) than is possible within the limitations imposed by the law. Typically, we can observe with dictatorial regimes that (Zwitter 2012b, p. 107):

1. they can enact ad hoc legislation for concrete problems for the execution (as executive and legislation are, maybe not *de lege* but often *de facto*, the same),
2. processes of legislative decision making and execution are faster as no majority consensus has to be found (or at least only within a smaller group belonging to the political elite), and the executive often wields unlimited power to deal with the situation,
3. the administration is under little control by the representation of the people due to a lack of checks and balances.

If this is a recipe for effectiveness and efficiency, this means that a liberal democracy has mainly four tools to its disposition to deal with emergencies (Zwitter 2012b, p. 108):

- a. moving legislative power to the executive;
- b. granting extended administrative power to the executive (*vis-à-vis* the rights of the citizen);
- c. reducing the democratic control (checks and balances) over the executive;
- d. installing accelerated judicial procedures (e.g. the martial law norm that civilians can be tried before military courts).

This means that democracies that try to survive in times of crisis become less democratic—a paradox that has been captured by Kelsen’s realization that a democracy must do anything to survive, but that the *identity thesis* prohibits the state to act outside the law, which results in the necessity for emergency norms (Kelsen 1960).

A basis for the democracy to survive its state of emergency regime can be seen in the following limitations (Zwitter 2012b, p. 110):

- a temporal limitation of emergency powers
- a spatial and territorial limitation of emergency powers
- a limitation of objectives of emergency powers

As well as these conditions that govern the principle of proportionality between the emergency and the imposition of emergency regulations:

- the condition of necessity
- the condition of concreteness
- the condition of urgency

These principles are frequently violated, most often when it comes to the regimes affected by the Arab Uprisings. The question is whether the constitutional reforms triggered by these events starting in February 2011 in Tunisia and Egypt will lead to improved emergency laws that will be less prone to misuse. Let me, however, foreshadow that not all states that will be illustrated briefly in the following have a history of misuse of emergency powers.

In the following each country’s state of emergency regulation and its development (within the period before the Arab Spring, during interim legal regimes and after a new permanent legal regime has been established) will be evaluated on a scale from 0–3 (0 – not present, 1 – weak, 2 – medium, 3 – strong) based on the following criteria:

- Parliamentary and/or judicial control
- Necessity
- Proportionality
- Time limit
- Constitutional guaranties and limits to changing formal laws
- Limited material legal powers
- Preservation of civil liberties

For countries, which are keeping its original system until a new legal regime is adopted, I have used the same value for ‘interim legal regime’ as for the ‘old legal regime’. In the cases where no new draft constitution has been published I have adopted the value of ‘interim legal regime’ also for ‘old legal regime’ if there was no indication that the legal situation would deteriorate and under the assumption that it would at least stay the same. Concerning preservation of civil liberties, I looked at whether the constitution enshrines such liberties and to what extent they can be revoked in times of crises.

Egypt

Egypt, next to Syria, is one of the most prominent cases of the misuse of emergency laws. Effectively, Egypt was under declaration of the state of emergency since the Arab-Israeli War 1967. The state of emergency was lifted for an 18-month period in 1980 and imposed again (and since then continuously prolonged) after Sadat's assassination in 1981. The state of emergency in Egypt was based on the Egyptian Constitution (Constitution.net 2012) and since 30 March 2011, was based on the Constitutional Declaration (Supreme Council of the Armed Forces 2011), both very general in nature stating that the emergency is declared in the manner prescribed by the law (see: Art. 148 Egyptian Constitution; Article 59 Constitutional Declaration). Notwithstanding the calls of the European Union to end the state of emergency in full before the recent elections on 23 May (Al-Youm 2012), legal analyst Nathan Brown already predicted that Supreme Council of the Armed Forces (SCAF) would let the state of emergency partially in force for some areas and to prevent thuggery until it expired with 1st June 2012 (Lynch 2012). Does that mean all is good? Hardly so – the automatic end of the state of emergency did not abolish the material law that guide the execution of the state of emergency. Furthermore, on 13 June 2012, Decree 4991/2012 was released in order to allow military forces to detain people who violate certain provisions of the penal code (otherwise only permitted to the police) in order to fill a legal void until the new constitution was ready (Ghoussoub 2012). This raised fears among human rights activists that the feared state of emergency norms would creep back into the new state (Arabic Network for Human Rights Information (Cairo) 2012). The legitimacy of the constituent assembly was disputed by oppositional groups as 12 liberals withdrew from it on 18 November after 5 Copts had already withdrawn before since they were not allowed to discuss all the articles of the new constitution (Elyan 2012). Furthermore, on 22 November President Mursi issued a decree giving himself sweeping powers in Article VI: 'The President may take the necessary actions and measures to protect the country and the goals of the revolution' (Ahram Online 2012). Mursi's decisions were to be final until the new parliament is elected and could not be appealed again according to Article II (Aljazeera 2012). In addition, Mursi stated that the constituent assembly could not be dissolved by the judiciary. On 3 July 2013, the army detained the Muslim Brotherhood's President, Mohammed Mursi and the Supreme Constitutional Court suspended the constitution after being in force for only 6 months. This military supported popular coup d'état *was mostly directed against the Leadership of President Mursi and its Muslim Brotherhood support base*. The 2014-Constitution was fundamentally revised by a committee of experts (committee of 10) and a political committee, the committee of 50 (Mansour 2013), and was put to public referendum on the 14th and 15th of January 2014. The revision process was much less disputed than the previous one and albeit a low level of public trust after political turmoil; it received

an approval of 98.1 per cent with a participation rate of 38.6 per cent (BBC News 2014a).

Let us take an exemplary comparative look at one of the most critical provisions that haunted the Egyptian people – the state of emergency regulation:

2007-Constitution (Art. 148)	2012-Constitution (Art. 148)	2014-Constitution (Art. 154)
<p>The President of the Republic declares a state of emergency in the manner regulated by law.</p> <p>The proclamation must be submitted within the following fifteen days to the People's Assembly for a decision.</p>	<p>The President of the Republic shall declare, after consultation with the Cabinet, a state of emergency in the manner regulated by law.</p> <p>Such proclamation must be submitted to House of Representatives within the following seven days.</p>	<p>The President of the Republic declares, after consultation with the Cabinet, a state of emergency in the manner regulated by law.</p> <p>Such proclamation must be submitted to the House of Representatives within the following seven days to consider it.</p>
<p>In case the People's Assembly is dissolved, the matter shall be submitted to the new Assembly at its first meeting.</p>	<p>If the declaration takes place when the House of Representatives is not in session, a session is called for immediately.</p> <p>In case the House of Representatives is dissolved, the matter shall be submitted to the Shura Council, all within the period specified in the preceding paragraph.</p> <p>The declaration of a state of emergency must be approved by a majority of members of each Council.</p>	<p>If the declaration takes place when the House of Representatives is not in regular session, a session is called immediately in order to consider the declaration.</p> <p>In all cases, the declaration of a state of emergency must be approved by a majority of members of the House of Representatives.</p>
<p>In all cases, the proclamation of the state of emergency shall be issued for a limited period which may only be extended with the approval of the Assembly.</p>	<p>The declaration shall be for a specified period not exceeding six months, which can only be extended by another similar period upon the people's approval in a public referendum.</p>	<p>The declaration is for a specified period not exceeding three months, which can only be extended by another similar period upon the approval of two-thirds of House members.</p> <p>In the event the House of Representatives is dissolved, the matter is submitted to the new House in its first session.</p>
		<p>The House of Representatives cannot be dissolved while a state of emergency is in force.</p>

Figure 6.1 Egyptian Constitution

The material emergency law triggered by a declaration of emergency is *Emergency Law No. 162 of 1958* (Wolfe 2011), which provides among others provisions the right to curb any civilian assembly, impose censorship, close stores, seize companies, and the detention of persons forced to hard labour without trial for six months plus a fine of 40.000 Egyptian Pounds (Carnegie Endowment for International Peace n.d.). As material emergency law (*No. 162 of 1958*) still exists, even though it is not in force right now.

The developments around the government's effort to create a new emergency law are currently disputed. According to NGOs and news reports the government intends for many of the old regulations simply to be transferred into ordinary criminal law and other regulations remaining the same while giving the law a new name. 'Only in Egypt: you object to the Emergency Law, they change its name to the 'protecting society from criminals' law; you object to that and its name becomes the 'safeguarding the gains of the revolution' law' (Afify 2012).

Figure 6.2 Egypt – Constitutional Change

Libya

On 29 January 2011, Al Jazeera reported that the Gadhafi regime in Libya had cancelled all football games and had declared a state of emergency and security alert at the beginning of the revolutions in Tunisia and Egypt out of fear the unrest could infect Libya as well (Dorsey 2011). Around February 20 protests escalated

in Libya as well leading to a *de facto* state of emergency due to an internal armed conflict. End of February Italy suspended a treaty of friendship forbidding warfare and military confrontation (Zevi and Meichtry 2011). On 17 March, the Security Council unanimously adopted Chapter VII resolution 1973 imposing a no-fly zone over Libya assets freeze and an arms embargo and:

Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory. (UN Security Council Resolution S/Res/1973 of 2011, para. 4)

On 27 October 2011, the UN Security Council decided unanimously to end the NATO Civilian Protection Mandate over Libya (UN Security Council Resolution, S/Res/2016 of 2011).

The legal document in force after the Libyan Government of King Idris was overthrown in 1969 was issued by the Revolutionary Command Council, Constitutional Proclamation 1969.¹ It was to be replaced by a real constitution, which never happened. The Declaration on the Establishment of the Authority of the People² established the General People's Congress and existed parallel to the Constitutional Proclamation. The Constitutional Proclamation regulated concerning martial law (Art 24) and identically for emergencies (Art 25):

The Revolutionary Command Council shall make decisions concerning martial law or the state of emergency whenever there is a threat to the internal or external security of the State and whenever the Revolutionary Command Council deems it necessary for the protection and defense of the Revolution.

In addition to these two documents the Green Book, which laid out Muammar Gadhafi's political philosophy, also became a quasi-legal/quasi-religious fundament of the Libyan state – an obligatory source of study for all Libyans. According to the first volume a system of popular congresses and people's committees, replacing the parliamentary system, would lead to the ideal form of direct democracy in accordance with what Gadhafi called 'Third Universal Theory' (al-Qadhafi n.d.).

While not indicated otherwise, the end of the NATO mandate in October 2011 seemed to have marked the end of the state of emergency, which was *de facto*

1 Constitutional Proclamation on 11 December 1969 (ICL Document Status: 1992).

2 Declaration on the Establishment of the Authority of the People (Adopted on: 2 March 1977).

externally imposed by the conflict. *De iure* one might assume that the state of emergency either formally ended with the dissolution of the General People's Congress (GPC), the passing of the new 'Constitutional Declaration' on 3 August 2011, or did not end at all (Simpkins 2012). Clarity to this constitutional confusion was brought by a report of Malta Today in April 2012 that Libyan considered reinstating the state of emergency due to the real risk of a renewed outbreak of violence (Vella 2012). Such a declaration would have to happen on the basis of the transitional document, which Libya's National Transitional Council passed on 3 August 2011, as 'Constitutional Declaration'.³ It indicates that currently a state of emergency is not declared. Formally this would be a bit problematic: since the Constitutional Declaration does not provide for emergency measures the only basis of such a declaration would be Article 17, which in sentence 3 provides a *carte blanche* in the form of a general clause

The Transitional National Council shall be entrusted to guarantee the national unity, the safety of the national territory, to embody and circulate values and morals, to ensure the safety of citizens and expatriates, to ratify the international agreements and to establish the bases of the civil constitutional democratic state.

A draft on a new emergency law has already been published by the interim government, which according to the Libya Herald states that authorities are allowed to enact the measures such as to: collect or confiscate weapons, ammunition and explosives, declare a curfew, arrest and detain anyone believed to be a threat to public security or who is a repeat offender, intercept communications and impose controls on the media, declare any area to a military zone under the control of a military commander (Libya Herald 2012).

On 14 November 2012, the first elected government of Libya was sworn in replacing the interim government (Gumuchian & Shuaib 2012). A month later, on 17 December, Russia Today reported that the new government had declared a state of emergency for the southern regions of *Ghadames, Ghat, Obari, Al-Shati, Sebha, Murzuq, and Kufra in order to bring them back under government control. On 16 July 2013 the successor of the National Transitional council, the General National Council (GNC) passed the electoral law to install the 60-member commission to draft the future constitution (Smith 2013).*

Options for a constitution drafting are to use the 1951 Constitution (in its form of 1963) as a draft, which according to Mohammed Ben Ghalbon, chairman of the Libyan Constitutional Union, has the advantage to already include a federal system and to provide the legal basis to reclaim Libya's seat in the United Nations (Ghalbon 2011). Of course, many articles would have to be amended.

3 Libyan Constitutional Declaration, passed by the National Transitional Council on 3 August 2011; publicly announced on 10 August 2011 by Abdul Hafiz Ghoga, Vice President; an English translation can be found here: <http://portal.clinecenter.illinois.edu/REPOSITORYCACHE/114/>.

Of particular concern regarding the use of state of emergency regulations of the 1951 Constitution, in my opinion, would be particularly two provisions: Article 70, which gave the King the right to proclaim a state of emergency with only the parliament to check upon the continuation of the declaration, does not contain further limitations or other checks and balances, such as time limitations or proportionality limitations. Furthermore, Article 195 would allow the suspension of constitutional provisions in times of emergency. Read in conjunction with Article 70 and with a view to the experience with the Weimar Constitution, the latter provision could be used to dissolve the parliament altogether and install a permanent state-of-emergency-regime. This might require specific constitutional guaranties or preferably even the abolishment of Article 195. The federal-system option as provided by the 1951 Constitution (removed by the 1963 amendments, which lead to sever social instabilities), however, might provide a way out of the political deadlock, caused by tribal politics and regional militias claiming their own role in the political process, only if it would account for the political and economic changes over the last 60 years (Pickard 2012).

Figure 6.3 Libya – Constitutional Change

Yemen

On 18 March 2011, Snipers kill 52 protesters that flock to a sit-in at Sanaa University after Friday prayers. Two days later President Saleh dismissed the government. Subsequently, on 23 March, he declared a state of emergency for the

next 30 days (Robinson 2012). This declaration was approved by the parliament in an emergency meeting 163/164. Opposition parties, a minority in the House of Representatives protested. According to news reports, '[b]ased on this ratification, the Yemeni Constitution is suspended; demonstrations are forbidden; and the Yemeni repressive regime can officially censor the reports of media' (Iran English Radio 2011). Following protests the Gulf Cooperation Council (GCC) brokered two deals eventually leading to Saleh's resignation under the condition of amnesty for him and his staff shielding them from legal or judicial prosecution and the forming of a new cabinet under Prime Minister Mohamed Basindwer on 10 December 2011. On 16 May 2012, President Obama declares by executive order a state of emergency over the situation in Yemen in order to enforce the transition of the government and to support the US drone war against Al Qaida (The White House 2012; Zenko 2012). The government has declared to draft constitutional amendments and present it until the end of 2012. Furthermore, Yemen asked France and Germany to support the drafting of a new constitution to be put to referendum at the beginning of the next power transfer stage in February 2014 (Auswärtiges Amt 2012). Concerning emergency laws the current Yemeni Constitution is indeed comparable to many western constitutions. The relevant articles read as follows.⁴

Firstly, it is important to note that even given urgent circumstances (which include *a minore ad major* emergencies) the president cannot arbitrarily dissolve the parliament without popular referendum; and new parliamentary elections have to be held within 60 days following the dissolution. This is already an important limitation to powers of the president and also extends to emergencies. Furthermore, the specific emergency powers vested in the President by Art. 121 are of limited nature. Similar to the *German Grundgesetz* the Yemeni Constitution distinguishes between and limits to three circumstances in which the President can declare a state of emergency: war, internal discord, and natural disasters. Differently than the *German Grundgesetz* the Yemeni Constitution does not attach specific limited emergency powers to each of the circumstances and leaves this open. In as far, a lot of right criteria are provided by the constitution:

- parliamentary control
- dual time limitation:
- formal: one week if not approved by the parliament
- material: the declaration has to contain a time limit
- extension requires parliamentary approval.

Very problematic, however, is the fact that the emergency powers as such are not concretely limited by the constitution, which allowed President Saleh to suspend the constitution in its entirety. If the defection of key military commanders in

4 *Constitution of the Republic of Yemen*, amended via a Public Referendum held on 20 February 2001. English version accessible via: http://www.mpil.de/shared/data/pdf/yemen_constitution_2001_english.pdf.

defence of the protesters and other developments following the Yemeni uprising had not led to Saleh's resignation (Finn 2011), Yemen would have followed the path of the Weimar Republic. This shows that the omission of limitations of emergency powers can lead to devastating consequences.

Figure 6.4 Yemen – Constitutional Change

Algeria

The role of state of emergencies in Algeria is quite interesting. Algeria was under a state of emergency law since 1992. A state of emergency by issuance of Presidential Decree No. 92–44 of 9 February, 1992, was declared due to terrorist attacks (and imposed indefinitely). First the government declared that it would ‘not interfere with the democratic process inasmuch as the exercise of fundamental rights and freedoms continues to be guaranteed’ (Hatchard 1992). On 23 March 1992 the President declared in relation to international human rights obligations to derogate from article 9, article 12, article 17 and article 21 of the International Covenant of Civil and Political Rights (ICCPR). The declaration of the state of emergency was to deal with the Algerian civil but also stayed in force to prevent the Islamic Front of Salvation (FIS) to gain more political influence (Enhaili and Adda 2003).

The state of emergency was never lifted until 24 February 2011 (Bull and Lowe 2011), after public unrest broke out over food prices and unemployment in January 2011, killing 5 and injuring 800. On 10 May 2012, elections were held

in Algeria in which National Liberation Front party won the polls with 220 of 463 seats.

Bouteflika had invited 500 foreign observers for the election, including 150 from the European Union, who gave a qualified endorsement of the official results. [...] The observers monitored only a few of the more than 40,000 polling stations set up for the vote. (Middle East Online 2012)

Fifteen Islamic parties refused to take part in the government claiming widespread fraud that delegitimized the polls. 'The Islamist party, which until now had been a partner in the governing coalition, on Saturday (19 May), decided to return to the ranks of the opposition after a resounding 134 to 35 vote by the consultative committee' (Mansour 2012).

Internally the declaration of the state of emergency in 1992 followed Article 93 Algerian Constitution,⁵ which states:

(1) When the country is threatened by an impending danger to its institutions, to its independence or to its territorial integrity, the President of the Republic decrees the state of exception.

(2) Such a measure is taken after referring to the President of the People's National Assembly, the President of the Council of Nation and the Constitutional Council, and hearing the High Security Council and the Cabinet.

(3) The state of exception entitles the President of the Republic to take exceptional measures dictated by the safeguard of the independence of the Nation and the institutions of the Republic.

After the unrest President Bouteflika promised constitutional reforms to the protesters and said that he would resign in April 2014, however until today there have not been any significant changes in the Algerian constitution and on 20 November the Interior Minister Dahou Ould Kablia stated that the constitutional reform process was postponed which led opposition leaders to doubt whether the president will even resign in 2014 (Ouali 2012). Therefore, it remains to be seen if the lifting of the state of emergency in Algeria will be followed up by constitutional changes or democratic reforms.

5 The Constitution of the People's Democratic Republic of Algeria {Adopted on: 19 Nov 1976 / ICL Document Status: 28 Nov 1996}.

Figure 6.5 **Algeria – Constitutional Change**

Syria

As Egypt, Syria is (or better, was) one of the usual suspects when it comes to the permanency of states of emergency. Syria was under a state of emergency⁶ since after the 8 March Revolution in 1963, which led to the instalment of the National Council of the Revolutionary Command (NCRC), a group of military and civilian officials dominated by Ba'ath members assuming all executive and legislative authority.

On February 23, 1966, a group of army officers carried out a successful, intra-party coup, imprisoned President Hafiz, dissolved the cabinet and the NCR, abrogated the provisional constitution, and designated a regionalist, civilian Ba'ath government. The coup leaders described it as a 'rectification' of Ba'ath Party principles. [...] On November 13, 1970, Minister of Defense Hafiz al-Asad effected a bloodless military coup, ousting the civilian party leadership and assuming the role of prime minister. (Department Of State. The Office of Electronic Information 2012)

The state of emergency decree, however, stayed intact until 21 April 2011, when President Bashar Al-Assad approved the legislature's bill lifting the emergency

⁶ Resolution No. 2 of the National Council of the Revolutionary Command on 03/08/1963.

law by Decree No. 161 and abolished the Supreme State Security Court by Decree No. 53 (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 2012). This measure was described as a merely political concession, because the panel of legal experts that drafted the bill was ‘charged with examining potential legislative measures that would simultaneously preserve national security and allow the revocation of the law, which permitted arrest without charge and banned political protests’ (Posner 2011). The same day Al-Assad also approved Legislative Decree No. 54 regulating the right of peaceful assembly of citizens.⁷ These legal changes followed widespread protests throughout Syria against the authoritarian rule of the Ba’ath Party as part of the domino effect of the uprisings that had started in Tunisia. All political reforms and even the changing of the constitution did not calm the protests and ‘the siege of Homs’ as well as recently the ‘massacre of Houla’ dominate the news (Chao 2012).

Even if the old emergency law has been abolished, it was replaced by a just as repressive legal system and widespread violence spills over into neighbouring Lebanon raising voices of fear of a full-scale civil war in Syria (Charbonneau 2012). This warrants a look at the state of emergency regulations provided by the new constitution, which came into force on 27 February 2012.⁸

Whereas the constitution stipulates that the President needs a two third majority in Council of Ministers to declare and end a state of emergency (Art. 103) the role of the People’s Assembly is to merely acknowledge it in its first session. The constitution does not foresee any control mechanism other than the two-thirds majority in the Council of Ministers. If that was not concerning enough, Art. 113 allows the President to pass laws under the condition of necessity, which the People’s Assembly can only revoke with a two thirds majority *ex post facto*. Furthermore, Art. 114 in conjunction with Article 117 can be considered a card blanche for the President to resort to whatever short term means he deems necessary in great danger, which coincides with the President’s role as Commander in Chief of the military (Art. 105) and absolute legal immunity for all of his acts (except for high treason, Art. 117). This can lead to the conclusion that the current constitution sees two forms of emergency powers of the President: short-term uncontrolled emergency powers and emergency powers by decree and with approval of the Council of Ministers. The latter emergency powers, since they are not limited by time and cannot be otherwise revoked, provide thereby unlimited emergency powers to the president. One might argue that Art. 146 (1)⁹ can be read that the

7 For a list of bills approved 2000–2012 see: <http://www.sana.sy/section.html?&req=shownews&topicid=13&newlang=eng>.

8 Syrian Constitution, entry into force on 27 February 2012 by presidential decree 94/2012. For an English version of the constitution see: <http://www.sana.sy/print.html?sid=401178&newlang=eng>.

9 Article 146 – The mandate of the Supreme Constitutional Court is as follows: 1. Control over the constitutionality of the laws, legislative decrees, bylaws and regulations.

Supreme Constitutional Court is vested with such a power to control emergency decrees. This seems doubtful, as the court can only control the constitutionality, thus the declaration, and not *in casu*, since Art. 103 does not stipulate any material or formal legal definition of emergency.

Syria, therefore, remains a continuous concern not only regarding the ongoing conflict but also in legal terms. Whatever the outcome of the crises might be – the constitution remains in desperate need of reform.

Figure 6.6 Syria – Constitutional Change

Tunisia

Tunisia is a bit of a case of exception to the rule. Although ruled by a *de facto* autocratic regime under Ben Ali, his powers stemmed not from a continuation of emergency law to limit parliamentary control and to extend executive powers. Still under President Bourguiba's regime the last instance of a state of emergency before the latest revolution was the Bread Riots of 1984. After the government had declared that prices for bread and other cereals would be doubled, and in protest of the repressive practices of the regime, turmoil began all over the country on 1 January 1984. A demoralized police appeared to be unable to bring the protests under control and on 3 January a state of emergency was declared. This allowed army units to be deployed, which used automatic weapons against crowds as well as barricaded in the streets of Tunis to bring violence, lootings and destruction of symbols of the regime under control. According to reports 89 Tunisians died in the disturbances, at least

938 others were injured and over 1,000 others were arrested. Prime Minister Mzali appointed Brigadier General Zine el Abidine Ben Ali as the director of national security within the Ministry of Interior. Despite contrary promises of the government Ben Ali's appointment lead to more repressive policies (Global Security 2012).

Only on 14 January 2011, the day then President Ben Ali fled the country in face of anti-government protests, he declared another state of emergency. This state of emergency, that was initially set indefinitely, was extended now for the fifth time to the end of July 2012 (France24 2012). The decision on the issuance of the last decree issued by President Moncef Marzouki was taken after consultation with President of the Constituent Assembly Mustapha Ben Jaafar and Prime Minister Hamadi Jebali (Mzioudet 2012). According to the political analyst Salah Eddine Jorchi, the decision was taken due to a continuing social tension, gun smuggling from Libya to Tunisia, and to save the touristic season (Ajmi 2012).

This state of emergency was perpetually extended, again on 5 October after attacks on the American Embassy, which were triggered by the publishing of the anti-Muslim film 'Innocence of Muslims' (PressTV 2012). Until November 2012 the state of emergency was only extended 30 days at the time. However on 1 November the Tunisian president extended the state of emergency until January 2013, which was seen as a fairly dangerous move with regard to the transitional process Tunisia is in (AFP 2012).

Before the coming into force of the 2014-Constitution, the state of emergency in Tunisia was declared in accordance with the Interim Constitution, which provided the President with unlimited emergency powers that rely for checks and balances on mere consultation with the President of the National Constituent Assembly and the Prime Minister (Article 11 paragraph 7).¹⁰ This regulation was taken over from the old constitution (Article 46), which as only limitation added that the President was not allowed to dissolve the parliament or to present a motion of censure against the government.¹¹

The National Constituent Assembly (NCA) together with 6 commissions was working on the finalization of the Constitution. On 6 August 2013, the NCA suspended its work due to a political assassination of a secular opposition member in the NCA, Mohammed Brahmi on 25 July 2013. This assassination constituted the second political murder after the secular journalist Chokri Belaid had been shot on 6 February 2013. This first assassination had already led to a severe political

10 'Le Président de la République a les attributions suivantes: (7) Proclamer les dispositions et les mesures exceptionnelles en cas de circonstances entravant le fonctionnement régulier des pouvoirs publics, après consultation du Président du Gouvernement et du Président de l'Assemblée Nationale Constituante et à condition que ces deux derniers ne s'y opposent pas'. Loi constituante n° 2011-6 du 16 décembre 2011, relative à l'organisation provisoire des pouvoirs publics.

11 Article 46, Tunisian 1959-Constitution, Adopted on: 1 June 1959 Amendment on: 12 July 1988 ICL Document Status: 1991.

crisis, a reshuffling in the Government and the resignation of Prime Minister Jebali (Ennahda) (Khelifi 2013). These events have further added to the already disputed legitimacy of the Tunisian draft constitution, in part caused by the inclusion of norms referring to Tunisia being an Islamic state, a neglect of international law in the drafts, and the NCA's refusal to accept advice from their own expert commissions.¹²

On 26 January 2014, the new constitution (further on: 2014 Constitution) was approved by the National Constituent Assembly with 200 of 216 votes (4 abstained and 12 voted against the constitution) (BBC News 2014b). Unfortunately, the regulation of emergency powers in the 2014-Constitution has in its various forms throughout August 2012, December 2012, and June 2013, not seen much improvement over the old constitution.

Article 80 of the 2014 Constitution constitutes the formal emergency law, which regulates the declaratory procedure, checks and balances, limitations and the end of the state of emergency. Like the old constitution, Article 80 paragraph 1 provides that before the president can declare a state of emergency, he has to consult the Speaker of the Assembly of the Representatives of the People and the Head of Government. The advice of these two representatives of executive and legislative is, however, not binding. As in the Egyptian 2014 Constitution, this consultation seems to be merely a symbolic and coordination measure designed in analogy to the French constitution.¹³ In addition to this old mechanism, the president has to inform also the President of the Constitutional Court. Also this information requirement is no real control mechanism of emergency powers, but simply alerts the constitutional court of the existence of a state of emergency. In practice, both mechanisms might function as informal control mechanisms in which the representatives of the three powers can advise the President about the extent of emergency powers they will in practical application accept and support.

Even though Tunisia is not one of the prime suspects that misused the declaration of state of emergency current constitutional reforms need to take a good look at the emergency regulations they want to become law. The reason for a lack of need to declare the state of emergency until 14 January 2011 must be sought in an extremely repressive security state, which suffocated all potential resistance already at its roots. Considering the new gained freedoms of the Tunisian people, transitional justice processes dismantling the old regimes security apparatus and the deep rift between Islamist and secular factions the new constitution continued a similar system of state of emergency regulations which lacks strong control mechanisms, time limitations and other constraints to the declaration and the execution of emergency powers.

12 Ridha Jenayah interviewed by the author, 26 July 2013, Sousse Tunisia. Dr. Jenayah is professor for public law and was chairman of the NCA Media Commission of Experts ('S/Commission des experts chargés de la réforme des médias au sein de la Haute Instance chargée de la Réalisation des Objectifs de la Révolution / HIROR').

13 Article 16, French Constitution of 1958 in the version of 23 July 2008, <http://www.assemblee-nationale.fr/english>.

Figure 6.7 Tunisia – Constitutional Change

Figure 6.8 Average Constitutional Change

Conclusion

In general one can distinguish between two rather clear cut cases concerning the role of the state of emergency before, during and, as it applies, after the Arab Uprising. Syria, Algeria and Egypt were under a permanent, long-term state of emergency that was used to curb civil and political rights and to strengthen and protect an unpopular government against popular demands.

The average concerning the constitutional development with regard to state of emergency laws suggests that particularly during the transitional period between two constitutions the safeguards seem to be reduced. The observed reduction stems, however, only from two cases, Egypt and Tunisia. Libya actually saw an improvement during the transitional phase in the area of the necessity/proportionality condition.

The formulation of state of emergency norms as was shown is quite diverse. It is certainly not justified to state that all authoritarian regimes and less democratic states can impose states of emergencies to their liking and without limitations. Of course, the usual suspects (particularly Syria and Egypt) make a strong case. However, legally speaking this is not generally the case. Tunisia under Ben Ali for example, used quite different repressive tools of control, such as a very invasive security apparatus and detention laws that made the declaration of state of emergencies less relevant. Even when laws governing state of emergencies seem to be well developed it strongly depends on the political setup of the state (composition of the government, exclusiveness of the polis, and appointment of judges) how effective checks and balances can control declarations of states of emergency. Yemen, which under President Saleh was governed essentially by one party, the General People's Congress. Lessons from Syria and Egypt definitely teach that constitutional norms, which provide the executive the power to establish special (military) courts, are detrimental to rule of law and democracy particularly in states of emergency.

The Arab Spring resulted in concrete legal change in Libya, Tunisia and Egypt. This is, however, not to say that Algeria and Yemen did not experience the start of political processes, which are yet to usher in new policies and maybe even new or at least amended constitutions. Syria remains an unpredictable case and a moral tragedy. One can only hope that once a political discourse becomes possible in Syria, people will seize the opportunity to reform a constitution, which has caused so much hardship as a result of cleverly designed norms interacting to grant sweeping presidential powers.

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