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Constitutional Reform and Emergency Powers in Egypt and Tunisia

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Abstract

Legal mechanisms governing the state of emergency can play an important role in authoritarian rule and post-revolutionary transition periods. Egypt has experienced the terror of a regime empowered by emergency law. In Tunisia, emergency law was not so much an issue before but rather after the Jasmine revolution. Given the importance of emergency regulations in both cases, this article provides brief process-oriented accounts of the constitutional reforms triggered by the Arab Spring. It furthermore takes a critical look at how Egypt and Tunisia have redesigned these norms in the latest constitutions of early 2014. On the basis of criteria regarding the rule of law and mechanisms of crisis governance in modern democracies, this article then analyses and evaluates the key elements regarding checks and balances pertaining to emergency regulations in the 2014 constitutions.

Keywords

state of emergency – constitutional law – constitutional reform – Arab Spring – Tunisia – Egypt

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Emergency powers have been the backbone of autocratic regimes ever since constitution drafters invented the concept of states of emergency. However, the legal concept of a state of emergency does not only exist in dictatorial regimes. On the contrary, the state of emergency is particularly a feature of the democratic state for times of great distress and dangers, which threaten the very existence of the state. Sometimes state of emergency declarations fulfil mainly an administrative function, such as the mobilisation of emergency funds or of reservist military units. The strategic role of states of emergency imposed by repressive regimes, however, remains undisputed. Whereas in principle state of emergency laws are for the most part designed to give an extraordinary measure of flexibility and an extended reach to the executive to cope with a crisis, their effective use and their duration can suggest different end goals, such as the repression of enemies of a regime.

Constitutionalism was a central theme in the Middle East/North Africa (MENA) region in the end of the 19th and beginning of the 20th century.² It needed the Arab Spring to trigger new reform processes. With the Arab Spring, starting in Tunisia and Egypt in January 2011, particularly the MENA region now experiences an unprecedented wave of political and constitutional reforms. Both Egypt and Tunisia have recently completed their path to new constitutions. Consequently, it is interesting to see whether these new constitutions will be able to withhold the temptation of emergency powers. Because if constitutional reforms are indeed to lead to more democratic and liberal states, one of the crucial tests remains how states perform in crises.

This article analyses the prospects of democratic control and the rule of law in Tunisia and Egypt from the view of constitutional arrangements concerning states of emergency. The central thesis of this article is that experiences in Egypt and Tunisia concerning use and misuse of emergency powers determined the reform of constitutions after regime change in favour of improved democratic control mechanisms. Before these case studies, section (1) will outline key elements of checks and balances that derive from the principles of democracy and the rule of law for emergency regulations. The following two sections briefly outline the political and constitutional history of Egypt (2) and Tunisia (3) with a focus on emergency regulations. In addition, these sections analyse the legal norms concerning the state of emergency. The last analytical section (4) combines the analysis of both countries and subjects it to the theoretical criteria developed in section (1). The main question that this essay will address is whether the constitutional reforms triggered by the Arab Spring

2 Hugh Roberts, "The Struggle for Constitutional Rule in Algeria," *Journal of Algerian Studies* 3 (1998): 19–30.

improved emergency regulations in Egypt and Tunisia to be less prone to misuse. Due to the lack of empirical data and case law required to look at the material implementation of state of emergency regulations, the focus will be on formal constitutional change as shaping emergency practices in the future of the two case study countries.

1 Rule of Law and Democracy in Times of Crisis

Much of the debate about emergency powers and regulations focuses on the following phenomenon: Sometimes states reduce democratic control and act based on the virtue of necessity rather than the rule of law in order to protect the very norms (democracy and rule of law) that constitute the state. In other words, the double nature of the state as legal state – i.e. the state being synonymous with the law that governs all functions of the state (Kelsen), and the political state, which is the state as the result of the convergence of political forces determining also legal processes and outcomes (Schmitt) – becomes strikingly apparent in the crises that threaten the very existence of a state. This section will give a brief indicative overview of current research on state of emergency and develops a set of criteria regarding the principles of rule of law and democracy to be analysed in the subsequent case studies.

Emergencies require states to act faster (efficiency) and better (effectiveness) than would be possible within the limitations imposed by the constitution during normalcy. Typically, liberal democracies have mainly four tools to their disposition to achieve greater efficiency and effectiveness in times of crisis³:

- 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 democratic control (checks and balances) over the executive;
- d. installing accelerated judicial procedures.

Applying any combination of these four options has adverse effect on the principles of democracy and rule of law. This results in the paradox that in order to protect the democratic state in times of crisis the state has to become less democratic. In order for democracy to survive its state of emergency regime,

3 Cf. Andrej Zwitter, "The Rule of Law in Times of Crisis – A Legal Theory on the State of Emergency in the Liberal Democracy," *Archiv für Rechts- Und Sozialphilosophie* 98, no. 1 (2012): 95–111; 108.

modern constitutions tend to impose limitations on emergency powers, particularly through the principles of democratic control, urgency, proportionality, and rule of law.⁴ This approach Gross and Aoláin also call the “accommodation model” (discussed below).

The position of emergency law vis-à-vis the legal order (that is outside of it or within it) is best juxtaposed with two perspectives, Kelsen’s all-inclusive *identity thesis* and Schmitt’s conception of the state of exception in *Political Theology*. Guided by his *identity thesis* Kelsen concludes that, albeit fewer statutory constraints on executive and administrative organs in cases of national states of emergency, every organ always remains bound by the constitution. This is because law is the very reason of the existence of the organ and the source of its emergency powers.⁵ Emergency powers are contingent on the legal system and thus can only exist within this system. A Kelsenian approach would therefore see formal and material emergency norms as *lex specialis* to the normal state of affairs, a *lex generalis*.

Some elaborations regarding Schmitt’s views point out the nature of his concept of the state of exception as being one beyond times of normalcy – an extemporal condition to which normal laws do not apply.⁶ More precisely, however, Schmitt argues that this depends on the nature of the constitution. Schmitt’s position on the state of emergency is strongly shaped by his analysis of the role of the “commissary dictatorship” in Bodin as explicated in the *Dictatorship*.⁷ In this regard, it depends on the extent to which the constitution allows the executive organ to decide upon the existence of an emergency without parliamentary control. If this is paired with the executive being allowed to enact material laws without temporal limitation and/or with the mandate of the executive to change the formal laws regarding emergency powers, then one can speak of a Schmittian state of exception outside the legal order.⁸

4 Ibid., 110.

5 Hans Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law* (Oxford: Oxford University Press, 1997), 289–320.

6 For an excellent elaboration regarding Schmitt’s position and for placing Schmitt in a wider array of approaches see David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?,” *Cardozo Law Review* 27, no. 5 (2006): 2005–2040; and John Ferejohn and Pasquale Pasquino, “The law of the exception: A typology of emergency powers,” *International Journal of Constitutional Law* 2, no. 2 (2004): 210–239.

7 For an outstanding critical translation including the appendix in which Schmitt exhaustively analyses Article 48 of the Weimar Republic, which so famously fell prey to its own emergency regulation, see: Carl Schmitt, *Dictatorship – From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle*, trans. Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2012).

8 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: MIT Press, 1985), 7.

The emergency situation is an exceptional crisis, which results in certain extraordinary constitutional mechanisms.⁹ Exactly such crises and respective responses – the tragic events of September 11, 2001, the rise of terrorism and the almost unchecked and far-reaching legal responses to them, which were often based on emergency legislation – inspire Ackerman to design an emergency regime (the emergency constitution) that is less likely to be misused in the event of public fear.¹⁰ A similar motive drives Gross and Aoláin in *Law in the Times of Crisis*,¹¹ in which they examine three models of emergency regulations (accommodation model, law for all seasons, and extra-legality model) vis-à-vis human rights law, humanitarian law and regulations regarding terrorism. Central to their study is the question about how to strike a balance between the seemingly antithetical vectors of fundamental democratic principles and emergency powers that lead to an expansion of governmental powers and to the reduction of control and supervision mechanisms. Particularly the accommodation model, as archetypical template of democratic emergency models is of interest to this study. Within this model, a state tries to accommodate the needs imposed by the emergency by relaxing, or in small parts even suspending, legal and constitutional structures. This accommodation allows for the adherence to the principle of the rule of law. The “law for all seasons” model is commonly found in constitutional absolutism. Like the accommodation model, this model assumes legality of the measures taken in emergency situations, which makes them different from the extra-legality model. This last model relates to the theoretical approach of political realism and follows Schmitt’s approach of the political state unrestricted by legal norms during the state of exception, in which all that is necessary is legitimate.

Lazar rejects in her book, *State of Emergency in Liberal Democracies*, particularly the exceptionalist approach (extra-legality model), and argues in line with Dyzenhaus for an “inside approach” that allows moral norms to play a stronger role and holds political leaders better accountable.¹² With a view on

9 Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005). For an excellent etymological elaboration based on historical perspective of the terms related to states of emergencies see Chapter 1. A good and short historical summary can be found in: Giorgio Agamben, “A Brief History of the State of Exception,” *University of Chicago Press* <http://www.press.uchicago.edu/Misc/Chicago/009254.html>.

10 Bruce Ackerman, “The Emergency Constitution,” *The Yale Law Journal* 113, no. 5 (2004): 1029–1091.

11 Oren Gross and Fionnuala N Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

12 Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009).

the liberal democratic system, cases where the state would act outside the legal order would not satisfy the condition of the rule of law in the sense of the supremacy of the law, which is central also to the accommodation model. Contrasting the “Commonwealth Constitutions” (United Kingdom, Canada, and Australia) with legal positivism, Dyzenhaus argues for an aspirational conception of the rule of law. In this aspirational conception, laws pertaining to the emergency mechanisms should affect policy making particularly also as a moral rather than only as a legal resource. This, so Dyzenhaus, is better realized in “Commonwealth Constitutions”, which places moral factors higher regarding legality than the legal positivist traditions.¹³

There are a few more resources worth mentioning. For example, the edited volume of Ramraj and Thiruvengadam sheds further light on regional differences in regulating states of emergency with regards to Asia;¹⁴ Ron Cass explores in an insightful article the legal foundations of constitutional emergency mechanisms of the United States of America, which also regulates crises caused by natural disasters, such as by Hurricane Katrina;¹⁵ and Zwitter investigates in *Notstand und Recht* together with Heintze, Fister, Hertwig, and Roeder legal theoretical foundations and positive state of emergency law pertaining to International Law, European Law, and German and Austrian constitutional law.¹⁶ Regarding national emergency declarations vis-à-vis derogations of human rights, the State of Emergency Mapping project (STEM) has developed a database that tracks all human rights derogations on the basis of Article 4 of the International Covenant of Civil and Political Rights from 1998 to 2013.¹⁷

In summary, most of the literature regarding state of emergency regulations in national legal frameworks relates to this core problem of finding the right measure between effective emergency mitigation and democratic principles. Schmitt’s approach, in which the sovereign must be able to do what is necessary in order to face the emergency successfully (even if it is outside the boundaries of law), is contrary to Kelsen’s view that states can only act within the boundaries of law. This latter approach makes well-developed state of

13 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

14 Victor V. Ramraj and Arun K. Thiruvengadam, *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2010).

15 Ronald Cass, “The Rule of Law in Time of Crisis,” *Howard Law Journal* 51, no. 3 (2008): 653–676.

16 Andrej Zwitter, ed., *Notstand und Recht: Im Überblick: Rechtstheorie, Völkerrecht, Europarecht, deutsches- und österreichisches Recht* (Heidelberg: Nomos, 2012).

17 Andrej Zwitter, *State of Emergency Mapping: Database Project*, Phase 1, 2013, <http://emergencymapping.org/database.html>.

emergency regulations necessary and brands the former as “authoritarian democracies”.¹⁸ In other words, the accommodation model, as termed by Gross and Aoláin, or Lazar’s rejection of the exceptionalist approach both require core democratic principles that need to be preserved by checks and balances.

As can be observed in the Arab Spring countries, authoritarian regimes tend to violate these principles during states of emergency through: an unnecessary declaration, the undue extension of the emergency status, and/or the disproportional use of emergency powers. This is possible if constitutional checks and balances are not in place or do not work as designed. There is a variety of constitutional checks and balances that democracies have at their disposal to limit the abuse of emergency powers. For example, based on different European constitutional traditions one can derive the following mechanisms:¹⁹

- a. *Parliamentary control of the executive emergency powers*: Emergency powers are subject to *ex post* review by a parliamentary body.
- b. *Judicial control of the executive emergency powers*: Emergency decrees themselves or the grounds for their justification are subject to *ex post* review by a judicial organ.
- c. *Necessity and proportionality condition of declaration/extension of emergency powers*: Constitutions or other formal emergency regulations limit the mandate of executive organs to what is absolutely necessary (usually in combination with [a] and/or [b]).
- d. *Time limit of emergency powers*: Executive emergency powers are granted only for a certain time period, after which they might be prolonged (if provided by the formal emergency law).
- e. *Guarantees against changing formal emergency regulations (determining the beginning and end, as well as checks and balances)*: Constitutions can provide for a specific protection of formal emergency laws, e.g. that the executive’s emergency decrees cannot override the laws that were granting emergency powers in the first place.
- f. *Guarantees against changing general constitutional law*: More generally than [e], based on a hierarchical interpretation of emergency decrees vis-à-vis constitutional regulations, the executive might not be allowed to override constitutional law through decrees altogether.

18 Hans Kelsen, “Foundations of Democracy,” *Ethics* 66, no. 1 (1955): 31–32.

19 For further elaboration regarding European and International Law and illustration concerning Austrian and German constitutional and administrative law see: Andrej Zwitter, ed., *Notstand und Recht: Im Überblick: Rechtstheorie, Völkerrecht, Europarecht, deutsches- und österreichisches Recht* (Heidelberg: Nomos, 2012).

- g. *Preservation of civil liberties*: As also considered by international human rights standards, during times of exception certain civil liberties must not be subject to derogations.

Particularly Schmitt's position and the elaboration above indicate that the centrality of emergency regulations must not be underestimated. Furthermore, given the role of emergency laws before, during and/or after the regime change in Egypt and Tunisia begs the question how lawmakers have taken into account the almost constitutive function exerted by emergency regulations for the rule of law and democracy. In *Emergency Politics*, Honig engages with how the factual emergencies exert normative power on shaping democracies.²⁰ In a similar fashion Rossiter elaborates the risks that constitutional reforms of emergency mechanisms might entail.²¹ Adapting his thoughts on the emergency government to be applicable to the post-Arab Spring constitutional reforms in Egypt and Tunisia, five risk factors will be of particular interest in the analysis of the new constitutions vis-à-vis the old ones:²²

- (1) Transitional state of emergency rule becomes permanent or reoccurring;
- (2) Acknowledgement that liberal institutions might not be sufficient to deal with recurring instabilities;
- (3) Utility of emergency powers for coup d'états and maintenance of power of reactionary forces;
- (4) Legal and political imprints left behind by old constitutional arrangements;
- (5) Individual abuses of emergency powers.

After an overview of the emergency regulations in the new Egyptian and the Tunisian Constitutions and the processes towards their completion, these five criteria and the criteria (a)-(g) above will guide the analysis of the state of emergency mechanisms. For the purpose of this article the author used where available official translations, translations by the UNDP and/or corroborated Arabic-English translations, which sets natural limits to the extent of interpretation possible. In addition, it is still unclear what parts of constitutional theory will endure and what new constitutional theories will develop in Egyptian and

20 Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press, 2009).

21 Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick, NJ: Transaction Publishers, 2002).

22 Ibid., 294–297.

Tunisian scholarship and jurisprudence. For these reasons this article tries to remain very close to the text of the constitutions.

2 State of Emergency in Egypt

Effectively, Egypt was under emergency declaration for 44 years beginning with the Arab-Israeli War of 1967 until after the revolution that removed Mubarak in 2011. During that time the state of emergency only was lifted for an 18 month period in 1980, but was re-imposed for another 31 years after Sadat's assassination in 1981. The state of emergency in Egypt was based on the Egyptian Constitution and since March 30, 2011, on the Constitutional Declaration adopted by the Supreme Council of Armed Forces (SCAF).²³

Notwithstanding the calls of the European Union to end the state of emergency in full before the presidential elections on the May 23, 2012,²⁴ the SCAF kept the state of emergency partially in force (for specific areas and in order to prevent thuggery) until it expired automatically on June 1, 2012.²⁵ The automatic end of the state of emergency did not abolish the material implementation law that still guides the execution of the state of emergency, which as will be shown below remains a serious concern. Furthermore, on June 13, 2012, Decree 4991/2012 was enacted 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.²⁶ This raised fears among human rights activists that the dreaded state of emergency norms would creep back into the new state.²⁷

23 Supreme Council of the Armed Forces, *Constitutional Declaration – Provisional Constitution of the Arab Republic of Egypt*, adopted on March 30, 2011, http://www.cabinet.gov.eg/AboutEgypt/ConstitutionalDeclaration_e.pdf.

24 Al-Masry Al-Youm, "EU Urges Egypt to Lift State of Emergency before Elections," *Egypt Independent*, May 15, 2012, <http://www.egyptindependent.com/news/eu-urges-egypt-lift-state-emergency-elections>.

25 Marc Lynch, "Ending Egypt's State of Emergency (Sort Of)," *The Middle East Channel – Foreign Policy*, January 24, 2012, http://mideast.foreignpolicy.com/posts/2012/01/24/ending_egypts_state_of_emergency_sort_of.

26 Sahar Ghoussoub, "Mubarak-Era 'Emergency Law' Creeps Back Into Egypt Politics," *Al-Monitor*, June 14, 2012, <http://www.al-monitor.com/pulse/politics/2012/06/the-state-of-emergency-is-return.html>.

27 Arabic Network for Human Rights Information (Cairo), "Press Release: Egypt Is a Military State! The Minister of Justice Decree Authorizes Military Police and Military Intelligence of the Judicial Arrest of Civilians," *allAfrica.com*, June 13, 2012, <http://allafrica.com/stories/201206140097.html>.

On November 22, 2012, President Mohammed Morsi issued a decree with which he granted himself sweeping powers. The logic behind this decree could be seen in the need for measures to get increasing instabilities under control. Furthermore, Morsi wished to counteract the Cairo Administrative Court which had referred a case concerning the legality of the Constituent Assembly to the Supreme Constitutional Court. Article VI of the decree was particularly problematic, which read: "The President may take the necessary actions and measures to protect the country and the goals of the revolution."²⁸ Morsi's decisions were to be legally binding and final until the new parliament would be elected, according to Article 11. Due to political pressure he later withdrew from this hard-line position.²⁹

Egypt's first new constitution (the 2012 Constitution) was signed into law by President Morsi on 26 December 2012. Two rounds of a referendum on the constitution resulted in 63% approving of the document, with a turnout of just over 30%.³⁰ After a popular-backed military coup d'état, the Egyptian constitution, in force for 6 months, was suspended again and on July 3, 2013, the army detained the President Mohammed Morsi of the Muslim Brotherhood party.³¹ The new interim president, Adly Mansour, issued a provisional constitutional declaration of 33 Articles in force until a revised constitution on the basis of the 2012 Constitution would be ready.³² In the meantime, the interim presidency declared a state of emergency on August 14, 2013, in order to provide the legal basis for the police to undertake two raids to clear Muslim Brotherhood protest camps.³³ These raids led to a death toll of about 600 and approximately

28 Al-Ahram, "English Text of Morsi's Constitutional Declaration," *Ahram Online*, <http://english.ahram.org.eg/News/58947.aspx>.

29 Al-Jazeera, "Egypt Judges Call for Nationwide Strike," *Al-Jazeera English*, November 25, 2012, <http://www.aljazeera.com/news/middleeast/2012/11/201211255459324484.html>.

30 BBC, "Egyptian Constitution 'Approved' in Referendum," *BBC News*, December 23, 2012, <http://www.bbc.co.uk/news/world-middle-east-20829911>.

31 Abigail Hauslohner, William Booth, and Sharaf al-Hourani, "Egyptian Military Ousts Morsi, Suspends Constitution," *The Washington Post*, July 4, 2013, http://www.washingtonpost.com/world/egypts-morsi-defiant-under-pressure-as-deadline-looms/2013/07/03/28fda81c-e39d-11e2-80eb-3145e2994a55_story.html.

32 Al-Ahram, "Egypt's Constitutional Declaration Issued, Defines Transitional Period," *Ahram Online*, July 8, 2013, <http://english.ahram.org.eg/NewsContent/1/64/76065/Egypt/Politics-/Egyptys-constitutional-declaration-issued,-defines-.aspx>.

33 David D. Kirkpatrick, "Hundreds Die as Egyptian Forces Attack Islamist Protesters," *New York Times*, August 14, 2013, http://www.nytimes.com/2013/08/15/world/middleeast/egypt.html?pagewanted=all&_r=0.

4,000 injured Morsi supporters.³⁴ Eventually, the latest constitution (further on, the 2014 Constitution) was fundamentally revised by a committee of experts (committee of 10) and a political committee (committee of 50)³⁵ and was put to public referendum on January 14 and 15, 2014. It received an approval of 98.1% with a participation rate of 38.6%.³⁶ This constitution was put to the test for the first time on October 25, 2014, when the new president, Abdel Fattah el-Sisi, declared a state of emergency in the north and centre of the Sinai Peninsula for 3 months after an attack killed 31 soldiers.³⁷ Shortly after the declaration of a state of emergency on the affected region, President Abdel Fattah el-Sisi ordered the destruction of civilian houses along Sinai's border with Gaza, which drew heavy criticism from the government's opponents.³⁸

Regarding the constitutional reform processes, it is important to note that the Egyptian constitution has been frequently changed and replaced even before the Arab Spring.³⁹ In 2006, Mubarak had promised to lift the state of emergency. Instead, the constitutional norms concerning the declaration of the emergency were amended and the state of emergency continued. A committee appointed by SCAF amended the constitution, which came into force in 2007, and revised the key constitutional norm regarding emergency powers (Article 148). The amendments resulted in a regulation that granted the president the power of issuing emergency declarations, but which needed to be submitted to the People's Assembly for a decision within 15 days. Article 148 did not impose a concrete (i.e. absolute) time limit, but merely required an indication of an envisioned end date, which made the permanency of the state of emergency possible.⁴⁰

34 Maggie Michael, "Death Toll Soars to 638 in Egypt Violence," *Associated Press*, August 15, 2013, <http://bigstory.ap.org/article/after-hundreds-killed-egypt-faces-new-uncertainty>.

35 Muhammad Mansour, "Members of Constitutional Committee of 50 Announced," *Egypt Independent*, September 1, 2013, <http://www.egyptindependent.com/news/members-constitutional-committee-50-announced>.

36 BBC, "Egypt Constitution 'Backed by 98%'," *BBC News Online*, January 19, 2014, <http://www.bbc.co.uk/news/world-middle-east-25796110>.

37 Al-Jazeera, "Egypt Declares State of Emergency in Sinai," *Al-Jazeera English*, October 25, 2014, <http://www.aljazeera.com/news/middleeast/2014/10/egypt-declares-state-emergency-sinai-2014102422836500878.html>.

38 Patrick Kingsley, "Why Egypt's Mass Evictions in Sinai Are a Risky Strategy," *The Guardian*, November 4, 2014, <http://www.theguardian.com/world/2014/nov/04/egypt-harsh-response-islamist-insurgency-sinai-could-backfire>.

39 The latest version can be found at: Constitution.net, "Egypt: Constitution, Including Amendments in 2005 and 2007," <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf>.

40 2007 Constitution, *Article 148*:

The 2012 Constitution included amendments to restrict the ability of the president to impose a lengthy state of emergency and gave an absolute time limit for the emergency period:⁴¹ Article 148 reduced the time of submission of the declaration to the House of Representatives to seven days; and if the House were to be dissolved, the Shura Council (the upper house, which was eliminated in the 2014 Constitution) would have the power to decide upon the continuation of the emergency declaration. Also an absolute time limit of six months (extendable to a maximum of one year upon public referendum) had been introduced in the 2012 Constitution.⁴² Despite these proposed amendments, which certainly improved parliamentary and popular control, such a constitutional regulation that gives priority to the time limitation (at least in the first period of seven days) over parliamentary control does not fully satisfy the requirements of checks and balances and the principles of the rule of law.

The final text of Article 154 (formerly Article 148) introduced other changes, which further restricted the time limit and made changes to procedural elements (paragraphs numbered by the author):⁴³

- (1) The President of the Republic declares, after consultation with the Cabinet, a state of emergency in the manner regulated by law. Such proclamation must be submitted to the House of Representatives within the following seven days to consider it.

"The President of the Republic shall proclaim a state of emergency in the manner prescribed by law. The proclamation must be submitted within the following fifteen days to the People's Assembly for a decision. In case the People's Assembly is dissolved, the matter shall be submitted to the new Assembly at its first meeting. 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."

Constitution.net, "Egypt: Constitution, Including Amendments in 2005 and 2007," accessed May 23, 2012, <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf>.

41 Egypt State Information Service, "Amendments of the Constitution 2011," http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=204; Nathan Brown and Michele Dunne, "Egypt's Draft Constitutional Amendments Answer Some Questions and Raise Others," *Carnegie Endowment for International Peace*, March 1, 2011, <http://carnegieendowment.org/2011/03/01/egypt-s-draft-constitutional-amendments-answer-some-questions-and-raise-others>.

42 Article 148, 2012 Constitution, accessible in English translation via: Nariman Youssef, "Egypt's draft constitution translated," *Egypt Independent*, December 2, 2012, <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

43 Draft dated December 2, 2013 of the Constitution of the Arab Republic of Egypt Prepared pursuant to Article 29 of the Constitutional Declaration dated July 8, 2013; unofficial translation prepared by International IDEA (www.idea.int).

- (2) 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.
- (3) In all cases, the declaration of a state of emergency must be approved by a majority of members of the House of Representatives. 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. In the event the House of Representatives is dissolved, the matter is submitted to the new House in its first session.
- (4) The House of Representatives cannot be dissolved while a state of emergency is in force.

The main procedure remained the same in all three constitutions (2007, 2012 and 2014 Constitutions), namely the same initiation of the constitutional emergency status through a discretionary act of the president. This very central role to declare a state of emergency gives the president also the power to shape the content of these powers in line with material emergency law (see below) and to define the time period within the given limitations. The consultation mechanism with the cabinet seems to have mostly symbolic and organisational function as the constitution does not foresee a veto right of the cabinet. As already stipulated in the 2012 Constitution, the 2014 Constitution further reduced the interim period from 15 to 7 days. After this period, the House of Representatives has a constitutional right to approve or abstain from approving the presidential declaration. This can be considered a proper safeguard, which subjects executive emergency powers to legislative approval. The interim period of 7 days between the declaration and the submission of the declaration to the House of Representatives, however, remains very problematic. During this time, the president's powers are not subject to any checks and balances. One can recognize a Schmittian conception of extra-legality, which is characterized by the centrality of power in the highest administrative office. "Souverän ist, wer über den Ausnahmezustand entscheidet" (sovereign is he, who decides over the state of exception),⁴⁴ says Schmitt, and one can qualify this by adding "and who then holds all powers that are necessary to overcome the time of exception." The arrangement in the 2014 Constitution allows the president exactly that, to decide over the state of emergency and to do for 7 days what he deems necessary to end this emergency. Since the 2014 Constitution eliminates the upper house (Shura Council), when the House of

44 Schmitt, *Political Theology*, 14.

Representative is dissolved, it can only approve of the emergency declaration once a new House of Representatives reconvenes. This could, hence, result in the situation that the president could remain in absolute and unchecked power. He could potentially (that is *de facto* not *de jure*) even prevent the House of Representatives from reconvening by, for example, having police forces denying access to the parliamentary building. If one is reminded of Article 48 of the Weimar Constitution, one is not entirely mistaken; the Reichstag was also the only control mechanisms of the *Reichspräsident*. The introduction of the prohibition of dissolving the House of Representatives in the last paragraph of Article 154, simply means that a president, who would want to take over absolute power, would have to take care of the timing of initializing the state of emergency.

Finally, the question of extension, which was the most pressing issue regarding the Egyptians' experience of approximately 44 years of state of emergency, has been dealt with differently in the 2007, 2012, and the 2014 Constitutions. Table 1 shows that, while both succeeding constitutions brought considerable improvements over Mubarak's 2007 Constitution, both dealt very differently with the possibility of extension. The tenor of the 2012 Constitution was on preventing any extension that was not approved by direct democratic *votum* through a public referendum. Although this solution would give popular legitimacy to an extension, it seems mostly to be a result of fearing the misuse of an extension rather than trying to find a workable solution, since public referenda during emergencies might be hard to organize. The 2014 Constitution opted for the indirect democratic approval through the House of Representatives by two-thirds majority. It remains somewhat unclear whether the two-thirds concerns a presence-quorum or a consent-quorum. The wording of "House-members" (in Arabic: أعضاء المجلس) suggests that it concerns a consent-quorum off all members whether present or not, which is quite a high hurdle. Moreover, the 2014 Constitution reduced the time limitations beyond the 2012 Constitution from 6 months (total 12 months) to 3 months (total 6 months) maximum initial declaration period. Both constitutions, however, contain a potential design flaw when it comes to the time limitation. One can distinguish between relative and absolute time limitations. Relative time limitations will make the declaration subject to necessity and install a continuous oversight by one of the powers that did not declare the emergency (usually either the supreme court or the parliament).⁴⁵ By opting for an absolute limitation, which requires the Egyptian president to specify at the outset the period of declaration and thus makes the extension dependent on the length of the initial period, the president would

45 Zwitter, "The Rule of Law in Times of Crisis", 98–100.

TABLE 1 *Emergency declaration extensions in comparison*

	Safeguard	Initial period	Extension period	Total period
2007 Constitution	"approval of the Assembly"	"limited period"	<i>not determined</i>	<i>unlimited</i>
2012 Constitution	"approval in a public referendum"	"not exceeding six months"	"only be extended by another similar period"	<i>12 months</i>
2014 Constitution	"approval of two-thirds of House members"	"not exceeding three months"	"only be extended by another similar period"	<i>6 months</i>

have to initialize the declaration process anew if he had misjudged the duration of the emergency.

The human rights provisions in the constitution are protected against derogations in times of emergency by the limitation clause of Article 92, which states:

Rights and freedoms of individual citizens may not be suspended or reduced. No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation.

This guarantee is similar to many western constitutional interpretations and limits the state of emergency decrees vis-à-vis the rights of citizen.

The material emergency law triggered by a declaration of emergency, *Emergency Law No. 162 of 1958*,⁴⁶ puts this limitation clause, however, somewhat in context. This law was triggered again by a declaration of President Mansour on August 13, 2013 when clashes between Muslim Brotherhood supporters and the police were growing more substantial.⁴⁷ Since the material emergency law (*No. 162 of 1958*) still exists, it is worthwhile to take a closer look at it in its present form. This law provides among other provisions the right to curb any civilian assembly, impose censorship, close stores, seize companies, and detain persons with forced hard labour and without trial for six months, plus a fine of 40,000 Egyptian Pounds (approximately 5,700 US Dollars). This material implementation norm of the formal constitutional regulation holds the greatest potential for abuse and human rights violations if it is not properly

46 Emergency Law n°162/1952: Official Gazette of 28 September 1958, N°28, Bis.

47 Al-Ahram, "State of Emergency: What Does It Imply?," *Ahram Online*, August 14, 2013, <http://english.ahram.org.eg/NewsContent/1/64/79036/Egypt/Politics-/State-of-emergency-What-does-it-imply-.aspx>.

revised. The recent developments around the government's effort to create a new emergency law are very disputed. According to NGOs and news reports the government intended 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," wrote one critic.⁴⁸

With regards to constitutional emergency powers, the following two provisions surrounding state of emergency powers might need further revisions in order to comply with liberal-democratic standards: Article 71 (censorship during war or public mobilization), and Article 156 (the right to issue decrees with the force of law in urgent cases). Article 156 in particular can become a dangerous tool of misuse, as former President Morsi's actions have foreshadowed with a similar decree that granted him absolute powers in November 2012. This regulation effectively allows the president to establish law for urgent cases (which are not further defined), when it is not possible to convene the House of Representatives for an emergency session. The House of Representatives can retroactively revoke these declarations once it reconvenes. Given the experience of the Egyptian people with emergency legislation, these two regulations – coupled with the main regulation regarding the centrality of power within the office of the president – surprise considerably.

Given the Egyptian experience of a state ruled through emergency powers for 44 years, a very strict (absolute) time limitation does not surprise. A relative time limitation would have to be under constant review by one of the other constitutional powers (an Emergency Parliament or the Supreme Court). During Morsi's presidency the Supreme Court played a vital role in keeping the President's powers at bay. It is therefore striking that Egypt has not chosen to include a judicial control mechanism of emergency powers. Despite this potential omission, the drafters of the 2014 Constitution seem to have selected as tight an emergency regulation as they could conceive without entirely throwing overboard the 2007 and the 2012 constitutions. Before taking a closer look at the extent to which the 2014 Constitution fulfils the theoretical criteria for democratic control and rule of law set above, I will briefly discuss the Tunisian process from dictatorship to democracy with a focus on its emergency regulations.

48 This was the reaction of lawyer and activist Malek Adly on his Twitter account; available at: Heba Afify, "The New Faces of the Emergency Law," *Egypt Independent*, November 22, 2012, <http://www.egyptindependent.com/news/new-faces-emergency-law>.

3 State of Emergency in Tunisia

President Zine El Abidine Ben Ali did not rely for his rule on a continuation of emergency law and neither did his predecessor President Habib Bourguiba. Still under President Bourguiba's rule, the last instance of a state of emergency before the Jasmine 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 begun all over the country on January 1, 1984. A demoralized police appeared to be unable to bring the protests under control. Two days later, Bourguiba declared the state of emergency. This allowed army units to be deployed, which used automatic weapons against crowds as well as barricades in the streets of Tunis, to bring violence, lootings and destruction of symbols of the regime under control. As a reaction to the protests 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 led to more repressive policies and a security apparatus, which was not dependent on emergency powers. When Ben Ali eventually became president, this security apparatus was ready for his autocratic leadership.⁴⁹

Only on January 14, 2011, the day that President Ben Ali fled the country in the face of anti-government protests, he declared the state of emergency. This state of emergency, which was initially set indefinitely, was extended repeatedly until October 2012.⁵⁰ After attacks on the American Embassy, the state of emergency was reauthorized again on October 5, 2012.⁵¹ Until November 2012 the state of emergency was only extended 30 days at the time. However on November 1, the Tunisian president extended the state of emergency until January 2013, which was seen as a fairly dangerous move given the transitional process Tunisia was in.⁵² According to the political analyst Salah Eddine Jorchi, the decision was taken due to continuing social tensions, gun smuggling from Libya to Tunisia,

49 Ibid.

50 France24, "Emergency Law Extended until the End of July, Official Statistics Indicate 338 Killed during the Revolution," *France24*, May 5, 2012, <http://www.france24.com/ar/print/786721?print=now>.

51 Press TV, "Tunisia Extends State of Emergency," *PressTV*, October 5, 2012, <http://www.presstv.ir/detail/2012/10/05/265018/tunisia-extends-state-of-emergency/>.

52 AFP, "Tunisia Extends State of Emergency after Attacks," *Gulf News*, November 1, 2012, <http://gulfnews.com/news/region/tunisia/tunisia-extends-state-of-emergency-after-attacks-1.1097153>.

and to save the touristic season.⁵³ The continuation of emergency powers in the Summer of 2013, had predominantly to do with an on-going military struggle together with Algeria against Uqba Ibn Nafaa brigade, a group with alleged ties to Al Qaida in the Islamic Maghreb occupying a stronghold on Mount Chaambi.⁵⁴

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 relied on mere consultation with the President of the National Constituent Assembly and the Prime Minister (Article 11 paragraph 7) for checks and balances.⁵⁵ This regulation was a holdover from the old constitution (Article 46), which added as the only limitation that the President was not allowed to dissolve the parliament or to present a motion of censure against the government.⁵⁶

The National Constituent Assembly (NCA) together with 6 commissions was working on the finalization of the Constitution. On August 6, 2013, the NCA suspended its work due to a political assassination of a secular opposition member in the NCA, Mohammed Brahmi on July 25, 2013. This assassination constituted the second political murder after the secular journalist Chokri Belaid had been shot on February 6, 2013. This first assassination had already led to a severe political crisis, a reshuffling in the Government and the resignation of Prime Minister Hamadi Jebali (from the Ennahda party).⁵⁷ These events further

53 Sana Ajmi, "State of Emergency in Tunisia Extended Until the End of This Month," *Tunisia Live*, April 1, 2012, <http://www.tunisia-live.net/2012/04/01/state-of-emergency-in-tunisia-extended-to-next-april/>.

54 Tam Hussein, "Tunisia's Militant Struggle: Elusive Militants of Chaambi Mountains Could Be Linked to Algeria," *The Huffington Post uk*, August 1, 2013, http://www.huffingtonpost.co.uk/tam-hussein/tunisias-militant-struggle_b_3687394.html; Jamel Arfaoui and Walid Ramzi, "Jebel Chaambi Heroes Describe Border Horror," *Magharebia*, May 31, 2013, http://magharebia.com/en_GB/articles/awi/reportage/2013/05/31/reportage-01.

55 "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.

56 Article 46, 1959 Tunisian Constitution, adopted on June 1, 1959, Amendment on July 12, 1988, ICL Document Status: 1991.

57 Roua Khelifi, "Ennahdha Deems Decision to Suspend NCA 'Coup d'Etat'," *Tunisia Live*, August 7, 2013, <http://www.tunisia-live.net/2013/08/07/ennahdha-deems-decision-to-suspend-nca-coup-detat/>.

complicated the already disputed legitimacy of the Tunisian draft constitution, which in part related to the inclusion of provisions referring to Tunisia as an Islamic state, a neglect of international law in the drafts, and the NCA's refusal to accept advice from their own expert commissions.⁵⁸ Finally, on March 6, 2014, President Moncef Marzouki lifted the state of emergency that lasted during the whole time of the constitution-drafting process since its initiation by President Ben Ali in January 2011. This was seen as a first positive step towards the normalization of political affairs in Tunisia.⁵⁹

On January 26, 2014, the new constitution (further on: the 2014 Constitution) was approved by the National Constituent Assembly with 200 of 216 votes (4 abstained and 12 voted against).⁶⁰ Unfortunately, the regulation of emergency powers in the 2014 Constitution has, in its various forms through August 2012,⁶¹ December 2012,⁶² and June 2013,⁶³ not seen much improvement over the old constitution.⁶⁴

58 Ridha Jenayah interviewed by the author, July 26, 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").

59 Carlotta Gall, "Tunisia Lifts 3-Year State of Emergency," *The New York Times*, March 6, 2014, <http://www.nytimes.com/2014/03/07/world/africa/tunisia-ends-emergency-rule.html>.

60 BBC, "Tunisia Assembly Passes Constitution," *BBC News Online*, January 27, 2014, <http://www.bbc.co.uk/news/world-africa-25908340>.

61 Preliminary Draft Constitution of the Tunisian Republic (published by the National Constituent Assembly the week beginning 13 August 2012), Council of Europe, European Commission for Democracy through Law (Venice Commission), <http://www.venice.coe.int/docs/2012/CDL-REF%282012%29035-e.pdf>.

62 United Nations Development Programme in Tunisia produced non-official English translation in December 2012.

63 For an excellent overview of constitution drafts see International IDEA's website which also provides translations in French and English: <http://www.constitutionnet.org/country/constitutional-history-tunisia>.

64 Article 46: "(1) In case of imminent peril menacing the institutions of the Republic, the security and independence of the country and obstructing the regular functioning of the public powers, the President of the Republic may take the exceptional measures necessitated by the circumstances, after consultation with the Prime Minister and the President of the National Parliament.

(2) During this period, the President of the Republic may not dissolve the National Parliament and no motion of censure may be presented against the Government.

(3) These measures cease to have effect as soon as the circumstances that produced them come to an end. The President of the Republic addresses a message to the National Parliament on this subject."

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

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 (the paragraph numbering was added by the author):⁶⁵

- (1) 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.
- (2) 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.
- (3) 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.
- (4) 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.

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

65 Final Constitution of the Tunisian Republic adopted on January 26, 2014.

This unofficial translation was first prepared by UNDP and then reviewed by International IDEA: http://www.constitutionnet.org/files/2014.01.26_-_final_constitution_english_idea_final.pdf.

to be merely a symbolic and coordination measure designed in analogy to the French constitution.⁶⁶ 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 practice accept and support.

What remains in the final version is one additional element to its predecessor, namely the right of the Speaker or 30 of the members of the House of Representatives to refer the presidential emergency decree to the Constitutional Court after a waiting period of at least 30 days. Put very clearly, the 30 days waiting period is twice as long as allowed in Egypt's 2007 Constitution. Within this period the 2014 Constitution does not provide any safeguards and hardly any limitations to the President's emergency powers. After the 30 days waiting period the parliamentary control mechanism can initiate the Constitutional Court's reviewing mandate of the presidential decree. The Constitutional Court has 15 days to rule upon the legality of the declaration and will for that purpose have to more closely define the circumstances, which warrant a declaration of emergency and particularly what constitutes an "imminent danger ... hampering the normal functioning of the state." A positive step taken with the 2014 Constitution is that with the declaration of an emergency, the parliament is automatically in permanent session, potentially providing democratic control over the presidential emergency powers. This construct attempts to counteract the dissolution of the parliament by emergency powers. Whether it is an effective control mechanism remains to be seen.

In contrast to Egypt, Tunisia has opted for a relative time limitation. This means that the declaration does not have to end after a certain time (unless the decree itself contains an end date). Whether the emergency declaration remains in force is dependent on whether the circumstances of its declaration still exist; at least *de lege* the legal basis of the declaration ceases to exist when the crisis is gone. Whether this is *de facto* the case will depend on the President addressing the nation declaring that the emergency has ended. The 30 days waiting period together with the Constitutional Court's time horizon can result in 45 days (or more) of a state of emergency. Below the constitutional level, decree 78-50 of 1978 still regulates the details of states of emergency declarations and emergency

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

powers.⁶⁷ Particularly, Article 2 is of interest concerning the state of emergency declarations that followed after January 14, 2011, as it limits the period of a single declaration to a maximum of 30 days. Since this obviously contradicts the current Constitution, this decree will have to be revised. In practice, however, some extensions of more than 30 days were imposed in the interim period without regard for this law.⁶⁸

Article 18 of the 2014 Constitution provides a legal basis for the army to be used in support of civil authorities in cases of emergency. This provision might become particularly problematic, as the use of the regular military within the country is generally a disputed topic in the literature and for example is strongly restricted in Germany.⁶⁹

Of note is also the limitation clause of Article 49 paragraph 3, which states similarly to the Egyptian version:

[t]he limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.

Also this formulation is very much in parallel to other human rights legislations (e.g. the European model) and jurisprudence and functions as a guarantee to the essence of the norm that can never be revoked.

Finally, also Tunisia knows two forms of the executive's mandate of issuing decree laws (Article 70) in the case the assembly is dissolved:

- (1) the President and the Head of Government together can establish decree laws; these laws have to be *ex post* ratified by the assembly during the next ordinary session (but are effective immediately);

67 Décret n° 78–50 du 26 janvier 1978, réglementant l'état d'urgence; for Arabic and French versions see: <http://www.legislation-securite.tn/fr/node/28159>.

68 Tunis Afrique Presse, "Tunisia: State of Emergency Extended to Three Months - Presidency," *Tunis Afrique Presse*, July 8, 2013, <http://allafrica.com/stories/201307090563.html>; Wiem Melki, "State of Emergency Extended until March 2012," *Tunisia Live*, January 3, 2012, <http://www.tunisia-live.net/2012/01/03/state-of-emergency-extended-until-march-2012/>.

69 See Jana Hertwig, 'Staatsnotstandsrecht in Deutschland' in Andrej Zwitter, ed., *Notstand und Recht: Im Überblick: Rechtstheorie, Völkerrecht, Europarecht, deutsches- und österreichisches Recht* (Heidelberg: Nomos, 2012).

- (2) the Assembly can authorise the Head of Government by three-fifth majority for a period of 2 months to issue decree-laws on certain subject matters; these laws have to be ratified immediately after the end of this period.

A limitation to these decree laws (Article 70 paragraph 3) is that they may not alter the legislative system. This suggests that the decree-laws can in fact change ordinary law and to some degree maybe even other constitutional elements (translated as “organic law”). This norm remains somehow opaque in its systematic embeddedness and requires further legal-theoretical exploration as well as jurisprudence to determine its final delineations.

Even though Tunisia is historically not one of the prime suspects regarding the misuse of emergency powers, future reforms need to seriously consider the design of the emergency regulations in the current 2014 Constitution. The reasons for a lack of emergency declarations until January 14, 2011 likely relate to the extremely repressive security state which stifled any potential resistance at its roots.⁷⁰ While it was precisely the commitment to compromise and collaboration between the secularist and Islamist factions that finally produced a workable constitutional formula, this necessarily safeguarded the 2014 Constitution from a potential misuse of its emergency powers. Considering the newly gained freedoms of the Tunisian people, the prevalent political instability, the threat of political violence, and the rift between Islamist and secular factions, the legislation as well as the judiciary must take further precautions with regard to the functioning of the constitutional crisis mechanisms, as both the current and the old constitutional regulations lack strong control mechanisms.

4 Egypt's and Tunisia's Constitutions in Comparison

When looking at how different constitutions formulate state of emergency laws, one finds quite diverse approaches. Both the 2014 Constitution of Egypt and the 2014 Constitution of Tunisia put the power to declare a state of emergency into the hands of the President. In principle, for the sake of expediency such an approach works quite well and is not unlike other Western constitutions such as the French Constitution of 1958.⁷¹ Also in parallel to the French Constitution, the Tunisian 2014 Constitution opted for a consultation mechanism between

70 Christopher K. Lamont and Hla Boujneh, “Transitional Justice in Tunisia: Negotiating Justice during Transition,” *Politicka Misao: Croatian Political Science Review* 49, no. 5 (2012): 32–49.

71 Article 16, French Constitution of 1958.

the president, the Head of Government, and the Speaker of the Assembly of Representatives (the parliament), and added the right of the Speaker or 30 members of the Assembly to initiate the control mechanism of the Constitutional Court after 30 days. According to the Egyptian 2014 Constitution, the President needs to consult the Cabinet before declaring a state of emergency. In Egypt, in order for an emergency declaration to remain in force the House of Representatives has to confirm it within seven days. The Egyptian constitution lacks, however, a judicial control mechanism. In both the Egyptian and the Tunisian constitution, the Parliament plays a central role in determining the continuation of the state of emergency, once directly and once through the indirect control mechanism of a Constitutional Court review mechanism.

The Egyptian 2014 Constitution does not stipulate the conditions that would warrant a state of emergency declaration and thus gives some discretion to the President, although this might change with a new implementation law. Also the Supreme Court might in the course of time develop a systematic interpretation, which could limit the president's discretion. In comparison, the Tunisian Constituent Assembly has chosen to give a very precise legal definition for states of emergency in the form of a double-sided clause. One element refers to the nature of the emergency as "imminent danger threatening the nation's institutions or the security or independence of the country, and hampering the normal functioning of the state." The other element is that this warrants only measures "necessitated by the exceptional circumstances." This puts a two-fold limitation on emergency declarations. Firstly, it imposes the hurdle of immediacy – no long-term issues can be addressed. Secondly, the powers are limited by the requirement of proportionality with the emergency at hand. Moreover, this legal definition gives the Constitutional Court a concrete baseline against which to judge the legality of an emergency declaration and its proportionality if requested by the Parliament (i.e. the Speaker or 30 members).

A very positive point in both constitutions is that both provide a limitation clause that prohibits changes imposed on human rights that would violate the essence of the respective rights (Article 49 of Tunisian 2014 Constitution, Article 92 of Egyptian 2014 Constitution). This point, however, must be seen vis-à-vis the regulation in both constitutions that allow the executive branch to issue decree laws. This is not *per se* uncommon. The Austrian constitution,⁷² drafted by Hans Kelsen himself, has opted for a similar decree-law power of the President with an *ex post* control mechanism of the Parliament. Given the

72 Article 18 paragraphs 3–5, Austrian Constitution of 1934 in the version of BGBl. I Nr. 164/2013; a comparative German-English version can be found here: http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf.

experience with President Morsi's decree that granted himself sweeping powers, the Egyptian constitution might have opted, nonetheless, to include a more explicit limitation to this decree power. Table 2 below summarizes the above findings in an overview.

The constitutional reform process in Egypt and Tunisia was accompanied by political fragility, in which political assassinations and protests were able to destabilize new governments. In the above cases, one can identify several

TABLE 2 *Reactive reform of new constitutions in Egypt and Tunisia*

	Egypt	Tunisia
Parliamentary control of the executive emergency powers	Yes, direct	Yes, indirect by initiating judicial control
Judicial control of the executive emergency powers	No	Yes, but conditional on initiation
Necessity and proportionality condition of declaration/extension of emergency powers	No, discretion of the president; <i>but</i> constitution indicates specification in implementation law	Yes, stipulated by constitution <i>and</i> possible specification through constitutional court
Time limit of emergency powers	<i>Absolute</i> , somewhat inflexible but president can reissue decree	<i>Relative</i> , problematic as to 30 days period until control is possible
Guarantees against changing formal emergency regulations (determining beginning, end, and checks- and balances)	<i>Not explicitly</i>	<i>Not explicitly</i>
Guarantees against changing general constitutional law	<i>President can issue decree laws</i> ; Morsi's decree provided a negative precedent, but in general not problematic due to control mechanisms	<i>President and Head of Government together can issue decree laws</i> ; requires jurisprudential and legal-theoretical clarification
Preservation of civil liberties	Yes	Yes

potential dangers that might accompany the transitional periods induced or accompanied by states of emergency:⁷³

- (1) *Transitional state of emergency rule becomes permanent or recurring:* Mubarak's rule (similarly to the situation in Algeria) testifies to the danger of state of emergency regimes becoming permanent. Even though Egypt and Tunisia seem to be in the process of genuine transformations and have recently finalized their constitutional reforms, the continuing political instability might lead to a continuation of some sort of permanent emergency rule.
- (2) *Acknowledgement that liberal institutions might not be sufficient to deal with recurring instabilities:* Political assassinations and similarly destabilizing events (terrorists in the area of Mount Chaambi) seem to have resulted in an overemphasis of powers of the executive both in times of normalcy and of emergency when designing the new constitutions. Both 2014 Constitutions have opted for keeping a very central role of the president and kept the control mechanisms applicable relatively weak. This general tendency prevails despite the fact that the absolute time limit in the Egyptian 2014 Constitution might be too inflexible. Inflexibility is not compensating for the lack of other control mechanisms, but rather weakens the crisis response capability. This can make emergency powers too rigid to be cautiously and proportionally applied, i.e. it might even force the executive to take drastic measures in order to ensure that the desired effect is being achieved within this absolute time period. To some extent this might be overcome with the development of case law in the future practice of the Supreme Court.
- (3) *Utility of emergency powers for coup d'états and maintenance of power of reactionary forces:* The ambivalent role of Egypt's military in intervening whenever it observes an unfavourable development has to be observed with caution. Until a political and legal power transition has been successfully concluded and normal politics have become a routine, civil society will have to keep a sharp eye on attempts to seize power through events that would justify declaring the state of emergency anew.
- (4) *Legal and political imprints left behind by old constitutional arrangements:* The suspension of Egypt's 2012 Constitution and the military instalment

73 These five points are loosely based on Rossiter but modified regarding their applicability to Arab Spring countries and constitutional reforms; Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick, NJ: Transaction Publishers, 2002), 294–297.

of a new transitional regime threatened to delegitimize the reform processes. Even after the referendum that approved the 2014 Constitution, the country's political system is highly fragile. Tunisia's perpetual state of emergency also weakened the government's popular legitimacy. Furthermore, using the old constitutions as templates in Tunisia and Egypt might be a trust-building measure, but could also perpetuate the weaknesses of the old constitutions and might lead to a frequent use of emergency measures as seen by the interim periods that saw continuous extension of emergency powers.

- (5) *Individual abuses of emergency powers*: Morsi's presidential declaration, with which he granted himself sweeping powers, remains a possibility in the Egyptian 2014 Constitution (see Article 156 – presidential decrees with legal force), which is highly alarming. Since Egypt has experienced the abuse of presidential powers, which causes the population to react with massive mobilization when it deems acts of presidents have gone too far, reinstalling a strong presidential system might not have been advisable and disadvantageous for legitimizing the position of presidents in Egypt's future. Tunisia has chosen for a similar legal decree power of the executive branch (the President together with the Head of Government). This is principally not uncommon but should be viewed with caution.

5 Conclusion

The drafters of the laws governing states of emergency in Egypt's and Tunisia's 2014 Constitutions seem to have chosen for relatively weak control mechanisms regarding the principles of rule of law and democracy. Both constitutions were not sufficiently able to emancipate themselves enough from old templates. Obviously it strongly depends on the political make up of the state (composition of the government, exclusiveness of the *polis*, and appointment of judges) how effective checks and balances can control emergency powers. Also, the experiences before and after the Arab Spring resulted in concrete legal change in Tunisia and Egypt. However, judging from the important role that the state of emergency played in Tunisia and how the 2014 Constitution regulates it raises concerns regarding the potential future misuse of emergency powers. Similarly for Egypt, one remains wary that given the political volatility and the design of emergency mechanisms, state of emergency declarations and violence exerted under their legal justification might continue to haunt the Egyptian people. Cases like the October 2014 declaration of a state of

emergency in the Sinai peninsula should be observed with great care both by human rights advocates as well as political observers to help further adjust the functioning of state of emergency mechanisms in Egypt.

On a positive note, the protection of civil liberties through the introduction of limitation clauses seems to improve the protection of human rights during emergencies and limits their potential derogation. However, on a more critical note, specifically the right of the executive branch to issue decrees with the force of law independent of an imminent threat raises serious concerns, since this was exactly the type of regulation used by President Morsi to grant himself sweeping powers in 2012. Because the current constitutional systems are, given the relatively weak nature of checks and balances, quite prone to misuse, future careful revisions as laid out in the theoretical framework above would be strongly recommended. This could include for example an automatic mandate of the Constitutional Court to check legality and necessity of emergency declarations in combination with a deletion of waiting periods in both constitutions. Furthermore, the Egyptian implementation law as referred to in Article 154 of the 2014 Constitution needs careful and extensive revisions.

Most countries revise their constitutions continuously. There is no reason and no need to expect the perfect constitution within three years after a revolution changed the complete political system of a country. Of course remnants of the old constitutions can remain sometimes due to pride about the historical heritage, or even for the sake of oversight during the transitional process. The importance of successfully completing the first round of reforms with a constitution that preserves major liberties and is compatible with international law cannot be overstated. This was eventually a big success in both Egypt and Tunisia. There are, however, some issues still to be dealt with. This is why it is imperative that the public remains observant of the abuses of executive powers. In the end it is the people and the press that function as the conscience of the state and as constant reminder that a constitution is never finished and can always be improved upon.