

# The Arab Uprising

## State of Emergency and Constitutional Reform

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Ever since the creation of constitutions that recognize the concept of states of emergency, dictatorial regimes have used emergency powers to consolidate their position. This is not to say that the legal mechanism of the state of emergency exists only in those regimes. On the contrary, the state of emergency is a feature of the democratic state.<sup>1</sup> Particularly during natural disasters (e.g., wildfires, tornadoes, etc.), governors in the United States declare states of emergency in the form of executive orders as a means of accessing federal emergency funds and/or mobilizing the National Guard. Because of this administrative function, state-of-emergency declarations happen in the United States more frequently than in other countries.<sup>2</sup> Clearly, such declarations are subject to consideration by the executive branch. Its consideration is based on whether an event can be handled within the boundaries of ordinary laws and regulations or whether it requires emergency powers.

The strategic role of states of emergency imposed by repressive regimes, however, remains undisputed. Thus, although in a general emergency, laws are for the most part designed to give an extraordinary measure of flexibility and extended reach to the executive to cope with a crisis, their effective use and duration can suggest different goals, such as the repression of a regime's enemies. Taking a look at the countries that recently experienced what is by now commonly known as the "Arab Spring," one finds that states of emergency were often put in place to

- stabilize a political leadership that had lost (or never had) popular legitimacy,
- preventively deter protests and unrests by threatening martial-law sanctions,
- crack down on unwanted opposition and defenders of human rights, and
- circumvent human rights obligations that would otherwise limit administrative detention and other powers of security and military forces.

Constitutionalism was a central theme in the Middle East / North Africa region at the end of the nineteenth and beginning of the twentieth century.<sup>3</sup> It needed

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the Arab Spring to trigger new reform processes. With that phenomenon, starting in Tunisia in January 2011, the Middle East / North Africa in particular now experiences an unprecedented wave of political and constitutional reforms. If the latter are indeed to lead to more democratic and liberal states, then one of the crucial tests remains how nations perform in states of emergency.

This article presents current constitutional developments in the context of the Arab Spring, analyzing the prospects of democratic control and the rule of law from the view of constitutional arrangements concerning states of emergency. Each section briefly outlines the political and legal background of the country under consideration and then examines legal norms concerning the state of emergency. Countries covered for the purposes of this article are those that, due to the Arab Spring, are engaged in large-scale processes of constitutional reform: Egypt, Libya, and Tunisia. First, though, the article identifies key elements of checks and balances that derive from the principles of democracy and the rule of law for emergency regulations.

### Conditions of the Rule of Law and Democracy

Emergencies require states to act faster (with urgency) and/or more effectively (better) than is possible within limitations imposed by the law during normal conditions. Typically, we observe that dictatorial regimes can enact ad hoc legislation for concrete problems of the executive; processes of legislative decision making and execution are faster since no majority consensus is necessary; and checks and balances exert little control on the executive.<sup>4</sup>

If this is a recipe for effectiveness and efficiency, then liberal democracies have mainly four tools at their disposal to deal with emergencies:

1. moving legislative power to the executive;
2. granting extended administrative power to the executive (vis-à-vis the rights of the citizen);
3. reducing the democratic control (checks and balances) over the executive;
4. installing accelerated judicial procedures (e.g., the martial law norm that civilians can be tried before military courts).<sup>5</sup>

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, modern constitutions impose limitations on emergency powers, particularly through the principles of democratic control, urgency, proportionality, and the rule of law.<sup>6</sup> As one may observe in the Arab Spring countries, authoritarian regimes tend to violate these principles during states of emergency through the unnecessary declaration, the undue extension of emer-

gency status, and/or the disproportional use of emergency powers. This is possible because constitutional checks and balances are not in place. The constitutional checks and balances that democracies have at their disposal to limit the abuse of emergency powers are as follows:

- parliamentary and/or judicial control of the executive's emergency powers,
- necessity of the actions taken under or the extent of emergency powers,
- proportionality of emergency powers to the extent of the threat posed by the emergency,
- time limit of emergency powers,
- guaranties against changing formal (i.e., laws that enable emergency powers) laws and constitutional law in general,
- limited executive-legislation powers, and
- preservation of civil liberties.

The principal question addressed by this article is thus whether the constitutional reforms triggered by the Arab Spring will improve emergency regulations by making them less prone to misuse. The following case studies illustrate the constitutional-reform processes and proposals for reforming state-of-emergency laws.

## Egypt

Egypt is one of the most prominent cases of the misuse of emergency laws. Effectively, Egypt has remained under declaration of a state of emergency since the Arab-Israeli War of 1967. The state of emergency was lifted for an 18-month period in 1980 but was reimposed after Anwar Sadat's assassination in 1981. The state of emergency in Egypt derived from the Egyptian constitution and since 30 March 2011, from the constitutional declaration adopted by the Supreme Council of Armed Forces (SCAF).<sup>7</sup>

Both the constitution in the version of 2007 and the 2011 constitutional declaration referred to general law to determine the manner in which an emergency is declared (see Article 148, 2007 constitution, and Article 59, 2011 constitutional declaration). Notwithstanding calls from the European Union to end the state of emergency in full before the presidential elections on 23 May 2012, legal analyst Nathan Brown had already predicted that the SCAF would keep the state of emergency partially in force for some areas to prevent thuggery until it expired automatically on 1 June 2012.<sup>8</sup>

The automatic end of the state of emergency did not abolish the material law that guides its execution, which, as shown below, remains a serious concern. Fur-

thermore, on 13 June 2012, Decree 4991/2012 was released, allowing military forces to detain people who violate certain provisions of the penal code (otherwise, only the police are permitted to do so) and thus fill a legal void until adoption of the new constitution.<sup>9</sup> This action raised fears among human rights activists that the dreaded state-of-emergency norms would creep back into the new state.<sup>10</sup>

Regarding the constitutional drafting process, oppositional groups heavily disputed the legitimacy of the Constituent Assembly as 12 liberals withdrew from it on 16 November 2012 after five Copts had already withdrawn. These withdrawals were the result of the Muslim Brotherhood not allowing discussion of all articles of the new constitution in the assembly.<sup>11</sup> Furthermore, on 22 November President Mohammed Morsi issued a decree giving himself sweeping powers. One can see the reasons for this decree in the need to bring increasing instability under control and to counteract the Cairo Administrative Court's referral of a case concerning the legality of the Constituent Assembly to the Supreme Constitutional Court. According to Article VI of the decree, "The President may take the necessary actions and measures to protect the country and the goals of the revolution."<sup>12</sup> Morsi's decisions were to be final until election of the new parliament and not subject to appeal, according to Article II, but political pressure later forced him to withdraw from this hard-line position.<sup>13</sup>

Egypt's new constitution (2012) was signed into law by President Morsi on 26 December 2012 after two rounds of polling resulting in an approval rate of 63 percent and a turnout of only 30 percent.<sup>14</sup> After a military-supported popular coup d'état, the Egyptian constitution, in force for six months, was suspended by the army, which also ousted the Muslim Brotherhood's president on 3 July 2013.<sup>15</sup> New interim president Adly Mansour issued a provisional constitutional declaration of 33 articles in force until the preparation of a revised constitution on the basis of the 2012 document.<sup>16</sup> The Committee of Ten (10 constitutional experts and judges) handed to the president a radically redrafted constitution, which a Committee of Fifty would discuss.<sup>17</sup> However, the legitimacy of the Committee of Fifty, which supposedly represented all societal stakeholders, was not entirely undisputed.<sup>18</sup> Regarding presidential powers, Brown predicted that they

might be whittled down constitutionally a bit in the amendments. Even in early 2013, courts had begun to interpret its authority a bit restrictively and, for all the charges of "Brotherhoodization" of the state, Morsi hardly seemed to be able to exert much control over the military and security services. His successor—unless he comes from those parts of the state—is likely to fare no better.<sup>19</sup>

In the meantime, the interim presidency declared a state of emergency on 14 August 2013 in order to provide the legal basis for the police to undertake two

raids to clear Muslim Brotherhood protest camps.<sup>20</sup> These raids killed about 600 and injured approximately 4,000 Morsi supporters.<sup>21</sup>

In 2006 President Hosni Mubarak promised to lift the state of emergency; instead, constitutional norms concerning the declaration of the emergency were amended, and it continued. Article 148—the key constitutional article guiding the declaration, presented on 26 February 2007 by a committee appointed by the SCAF—was amended in the revised constitution of 2007. It granted the president the power to declare a state of emergency, which needed to be submitted to the People's Assembly for a decision within 15 days. The fact that Article 148 did not impose an absolute time limit made the permanency of the state of emergency possible.<sup>22</sup>

The proposed amendments, included in the latest 2012 constitution, would restrict the ability to impose a lengthy state of emergency and assign an absolute time limit to the emergency period.<sup>23</sup> The amended text of Article 148 reduced the time of submission of the declaration to the House of Representatives to seven days and, if dissolved, would provide the Shura Council (the upper house) with the power to decide upon continuation of the emergency declaration. Furthermore, an absolute time limit of six months (extendable to one year upon public referendum) had been introduced.<sup>24</sup> By comparison, the old regulations allowed the declaration to remain in force for up to three years.<sup>25</sup> Despite these proposed amendments, which definitely improved parliamentary and popular control, it remains highly doubtful that such a constitutional regulation would satisfy both the requirements of checks and balances and the principles of the rule of law, as outlined above.

Emergency Law no. 162 of 1958—the material emergency law, triggered by a declaration of emergency—came into play again by a declaration of President Mansour on 13 August 2013 when clashes between Muslim Brotherhood supporters and the police became more substantial.<sup>26</sup> Among other provisions, this law provides the right to curb any civilian assembly, impose censorship, close stores, seize companies, and detain persons, forcing them to perform hard labor without trial for six months and fining them 40,000 Egyptian pounds (approximately \$5,700 US).<sup>27</sup> This implementation norm (Emergency Law no. 162 of 1958) holds the greatest potential for abuse and human rights violations if it is reinstated in a similar manner after the reform processes conclude. Currently, developments concerning the government's effort to create a new emergency law are hotly disputed. According to nongovernmental organizations and news reports, the government intends simply to transfer many of the old regulations into ordinary criminal law and allow other regulations to remain 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.”<sup>28</sup>

With regard to constitutional emergency powers, the Committee of Fifty will have to take a particularly close look at the 2012 constitution’s powers of the president that scholars and some Egyptian diplomats consider even more extensive than those granted by the old constitution (compare Articles 101 [the right to propose laws], 104 [the right to object to laws], 146 [the right to declare war], 147 [the right to appoint civil and military personnel], 148 [the right to invoke emergency powers, see above], and 150 [the right to call for a referendum]). If the SCAF can keep favorable constitutional provisions as they currently are and if a strong presidential system remains the other power in the state, then the political stability of Egypt might become structurally weak. Possible constitutional options, which could ameliorate this structural breaking point of political conflict, could reduce presidential powers in favor of a stronger ministerial system balanced by parliamentary oversight (also over the military).

Moreover, the following articles surrounding state-of-emergency powers would need revision in order to comply with modern standards: 11 (regarding ethics, public morality, and public order); 48, paragraph two (censorship during war or public mobilization); 131 (the right to issue decrees with the force of law in urgent cases); and 215 (unclear role of a yet-to-be-established National Media Council). Article 131 in particular could prove dangerous since Morsi’s presidential decree foreshadowed a similar one that granted him absolute powers in November 2012 before the 2012 constitution came into force.

## Libya

On 29 January 2011, *AlJazeera* reported that the regime of Mu‘ammar Gadhafi in Libya had cancelled all football games, declaring a state of emergency and security alert at the beginning of the revolutions in Tunisia and Egypt out of fear that the unrest could infect Libya as well.<sup>29</sup> Around 20 February, protests escalated in Libya leading to a de facto state of emergency due to internal armed conflict. At the end of February, Italy suspended a treaty of friendship forbidding warfare and military confrontation.<sup>30</sup> On 17 March, the United Nations (UN) Security Council, acting under chapter 7 of the UN Charter, unanimously adopted Resolution 1973, imposing a no-fly zone over Libya, the freezing of assets, and an arms embargo. Moreover, it authorized

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.<sup>31</sup>

On 27 October, the council decided unanimously to end the North Atlantic Treaty Organization's (NATO) Civilian Protection Mandate over Libya.<sup>32</sup>

The Kingdom of Libya was de facto established with the entry into force of the constitution on 7 October 1951, installing a constitutional and hereditary monarchy under King Idris. Given the time of its inception, this document was relatively progressive. As a control mechanism, it limited the king's emergency powers by requiring approval of the parliament for their continuation.<sup>33</sup>

The Revolutionary Command Council issued the Constitutional Proclamation of 1969, the legal document in force after the government of King Idris was overthrown in that year, intending to replace it with a real constitution.<sup>34</sup> That never occurred, however. The Declaration on the Establishment of the Authority of the People, which created the General People's Congress, existed parallel to the constitutional proclamation.<sup>35</sup> That proclamation regulated both martial law (Article 24) and emergencies (Article 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."<sup>36</sup>

In addition to these two documents, the *Green Book*, which laid out 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."<sup>37</sup>

Although not indicated otherwise, the end of the NATO mandate seemed to mark the end of the state of emergency de facto externally imposed by the conflict. De jure, however, one might assume that the state of emergency either formally ended with the dissolution of the General People's Congress and the passing of the new "Constitutional Declaration" on 3 August 2011 (see below)—or it did not end at all.<sup>38</sup> A report in the April 2012 *Malta Today* clarified this constitutional confusion, noting that the Libyan government considered reinstating the state of emergency due to the risk of a renewed outbreak of violence.<sup>39</sup> 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 a constitutional declaration, indicating no current declaration of a state of emergency.<sup>40</sup> Formally, this would be a bit problematic since the declaration does not

provide for emergency measures. The only basis of such a declaration would be Article 17, which in sentence three provides *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.”<sup>41</sup> A draft of a new emergency law had already been published by the interim government, which, according to the *Libya Herald*, states that authorities are allowed to enact the following measures: “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; [and] declare any area to a military zone under the control of a military commander.”<sup>42</sup>

On 14 November 2012, the first elected government of Libya was sworn in replacing the interim government.<sup>43</sup> 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.<sup>44</sup> On 16 July 2013, the General National Congress—the successor of the National Transitional Council—passed an electoral law to install the 60-member commission to draft the future constitution.<sup>45</sup>

Options for a draft constitution include using the 1951 constitution (in its form of 1963), which, according to Mohammed Ben Ghalbon, chairman of the Libyan Constitutional Union, has the advantage of already providing for a federal system and establishing the legal basis to reclaim Libya’s seat in the UN.<sup>46</sup> Of course, many articles would have to be amended. Regarding use of the 1951 constitution’s state-of-emergency regulations, two provisions are of especial concern: 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 or proportionality constraints. 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 guarantees or, preferably, even the abolishment of Article 195. The federal-system option as provided by the 1951 constitution (removed by the 1963 amendments, which led to severe social instabilities), however, might offer a way out of the political deadlock caused by tribal politics and regional militias claiming their



own role in the political process. But this option would prove viable only if it accounts for the political and economic changes of the last 60 years.<sup>47</sup>

## Tunisia

Tunisia is a case of exception to the rule when it comes to the use and misuse of emergency powers. Although the country is ruled by an autocratic regime, President Zine El Abidine Ben Ali's powers did not stem from a continuation of emergency law to limit parliamentary control and extend executive powers. Before the latest revolution, the last instance of a state of emergency was the Bread Riots of 1984, under President Habib Bourguiba's regime. After the government declared that prices for bread and other cereals would double and in protest of the repressive practices of the regime, turmoil began on 1 January 1984 all over the country. A demoralized police force appeared unable to control the protests, so on 3 January, declaration of a state of emergency allowed the deployment of army units, which used automatic weapons against crowds and barricaded the streets of Tunis to curtail violence, lootings, and destruction of symbols of the regime. According to reports, 89 Tunisians died in the disturbances, at least 938 others were injured, and more than 1,000 were arrested.<sup>48</sup> Prime Minister Mohammed Mzali appointed Brig Gen 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 not dependent on emergency powers.<sup>49</sup>

Only on 14 January 2011, the day that President Ben Ali fled the country in the face of antigovernment protests, did he declare another state of emergency. Initially set indefinitely, this state of emergency was extended until October 2013.<sup>50</sup> After attacks on the American Embassy, the state of emergency was perpetuated again on 5 October 2012.<sup>51</sup> Until November 2012, the state of emergency was extended only 30 days at the time. However, on 1 November the Tunisian president prolonged it until January 2013—a fairly dangerous move, considering Tunisia's current transitional process.<sup>52</sup> According to political analyst Salah Eddine Jorchi, the decision was prompted by continuing social tension, gun smuggling from Libya to Tunisia, and risk to the tourist season.<sup>53</sup> The continuation of emergency powers in the summer of 2013 stemmed from an ongoing military struggle with Algeria against the Uqba Ibn Nafaa Brigade, a group with alleged ties to al-Qaeda in the Islamic Maghreb, occupying a stronghold on Mount Chaambi.<sup>54</sup>

At the time of this writing, the state of emergency in Tunisia remains in effect in accordance with the interim constitution, which gives the president unlim-

ited emergency powers that rely for checks and balances on mere consultation with the president of the National Constituent Assembly (NCA) and the prime minister (Article 11, paragraph 7).<sup>55</sup> This regulation derived from the old constitution (Article 46), adding only the limitation that the president was not allowed to dissolve the parliament or present a motion of censure against the government.<sup>56</sup>

The NCA, together with six commissions, worked toward finalizing the constitution. On 6 August 2013, the NCA suspended its work because of the political assassination of Mohammed Brahmi, a secular opposition member in the NCA, on 25 July 2013. His death constituted the second act of political assassination after the shooting of secular journalist Chokri Belaid on 6 February 2013, which led to a severe political crisis, a reshuffling in the government, and the resignation of Prime Minister Hamadi Jebali (Ennahda).<sup>57</sup> These events have added to an already disputed legitimacy of the Tunisian draft constitution, caused in part by the inclusion of norms referring to Tunisia as an Islamic state, a failure to include reference to international law, and the NCA's refusal to accept advice from its own expert commissions.<sup>58</sup>

Unfortunately, the draft constitution's regulation concerning the state of emergency in its various forms throughout August 2012, December 2012, and June 2013 has seen a progressive deterioration, making it little different from the old constitution of 1957.<sup>59</sup> As in the latter document, Article 79 of the draft constitution of June 2013 provided that before the president can declare a state of emergency, he must consult the president of the parliament and the prime minister. The advice of these two representatives of the legislative and executive, however, is not binding. What remains in the current draft is one additional element to its predecessor—namely, the right of the president of the parliament or two-thirds of its members to refer the presidential emergency decree to the constitutional court after a waiting period of at least 30 days. Put very clearly, this waiting period is twice as long as the one regulated by the 2007 constitution of Egypt. In addition, the two-thirds majority required in the parliament presents an unusually high hurdle. In combination, these regulations would render the mechanisms of temporal limitation and parliamentary control almost useless. Further, in combination with the mere consultative function of the prime minister and president of parliament before the declaration of an emergency, the current draft constitution remains quite vulnerable to misuse. The only positive side is that with the declaration of an emergency, the parliament automatically goes into permanent session, potentially providing democratic control over the presidential emergency powers, thus counteracting the dissolution of the parliament by emergency powers (Ar-

ticle 79, draft constitution of June 2013). Its effectiveness as a control mechanism remains doubtful.

Article 17 (draft constitution of June 2013) provides a legal basis for using the army in support of civil authorities in cases of emergency. This provision might become particularly problematic because use of the regular military within the country is generally a disputed topic in the literature.<sup>60</sup> Below constitutional level, Decree 78-50 of 1978 regulates the details of state-of-emergency declarations and emergency powers.<sup>61</sup>

Even though Tunisia is not one of the prime suspects that misused the declaration of a state of emergency, current constitutional reforms need to take a good look at the emergency regulations they want to become law. One must ascertain why a state of emergency was not declared until 14 January 2011 in an extremely repressive security state that suffocated all potential resistance at its roots.<sup>62</sup> Considering the newly gained freedoms of the Tunisian people, the prevalent political instability, the threat of political assassinations and terrorist attacks, and the deep rift between Islamist and secular factions, the new constitution must take particular precautions with regard to a new emergency system. It must do so because both the current and old constitutional regulations completely lacked any control mechanisms, viable time limitations, or other constraints to the declaration and execution of emergency powers.

## Conclusion

It is certainly not justified to state that all authoritarian regimes and less democratic states can impose states of emergency to their liking and without limitations. 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 Spring. Egypt, on the one hand, was under a permanent, long-term state of emergency used to curb civil and political rights and to strengthen and protect an unpopular government against popular demands. After the coup that removed Mubarak from power, the state of emergency was deemed necessary to provide increased security as a means of dealing with protests that emerged after a continuation of struggles between secular and Islamist political powers. Thus, pre-Arab Spring Egypt constitutes a strong case for the misuse of emergency powers over an extended period of time. On the other hand, Tunisia under Ben Ali used quite different repressive tools of control, such as a very invasive security apparatus and detention laws that made the declaration of states of emergency less relevant. Pre-Arab Spring Libya, run by the arbitrary rule of an individual

dictator, did not experience a legal, long-term state of emergency, which was not necessary due to the lack of a constitution.

When looking at how different constitutions formulate state-of-emergency laws, one finds quite diverse approaches. The Libyan 1951 constitution, just as the previous Egyptian constitutions, gives power to an individual—the king (and in Egypt, the president)—to declare an emergency and gives parliament the only real check against misuse. As it did before the revolution, Tunisia opted for a very ineffective consultation mechanism among president, prime minister, and president of the parliament. In all three cases, the parliament plays a role in determining the continuation of the state of emergency. One can see the weakest role of a parliament in the current Tunisian draft constitution, which requires the president of parliament or two-thirds of its members to wait for 30 days before referring the decree to the constitutional court.

Independently of the eventual outcomes, the constitutional reform process in all countries—specifically and tangibly in Egypt and Tunisia—was accompanied by a political fragility in which political assassinations and protests were able to destabilize new governments. In the above cases, one can identify several potential dangers that might accompany the transitional periods induced or accompanied by states of emergency:<sup>63</sup>

1. Transitional state-of-emergency rule becomes permanent or reoccurring: Mubarak's rule, similar 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 reforms, the political instability caused by political fragmentation and factions trying to hijack or derail these reform processes might lead to instabilities that could prompt a more permanent emergency rule to continue.
2. Acknowledgement that liberal institutions might not be sufficient to deal with reoccurring instabilities: Political assassinations and similarly destabilizing events (terrorists in the Chaambi Mountains) could result in an overemphasis on powers of the executive, both in times of normalcy and emergency when redesigning the constitutions.
3. Utility of emergency powers for coups d'état and maintenance of power of reactionary forces: The ambivalent role of Egypt's military in intervening whenever it observes an unfavorable development must be observed with caution. Likewise, Algeria has experienced rule through emergency powers. Until the successful conclusion of a political and legal power transition, civil society will have to keep an eye open for 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 installment of a new transitional regime threaten to delegitimize the reform processes. Tunisia's perpetual state of emergency also weakens the popular legitimacy of the government. Furthermore, using the old constitutions as templates in Tunisia, Libya, and Egypt might be a trust-instilling measure, but it risks perpetuating the weaknesses of the old constitutions. Like its Arab Spring brethren, Libya might use its 1951 constitution as a template. If it decides to do so, the introduction of functional Western and non-Western models of checks and balances will be necessary to reduce the likelihood of misuse of state-of-emergency powers. Libya might even opt for a federal system, which would transfer some emergency powers to the level of the provinces or states.
5. Individual abuses of emergency powers: Morsi's presidential declaration, with which he granted himself sweeping powers, remains a possibility in the 2012 constitution (see Article 131). Egypt has experienced the abuse of presidential powers, which causes the population to react with massive mobilization whenever it feels that the acts of presidents have gone too far. Consequently, installing a strong presidential system might not be advisable and could prove disadvantageous for legitimizing the position of presidents in Egypt's future. The same might hold true for Libya.

Even if laws governing states of emergency seem well developed, the effectiveness of checks and balances in controlling emergency powers strongly depends upon the political setup of the state (composition of the government, exclusiveness of the police, and appointment of judges). The experience before and after the Arab Spring resulted in concrete legal change in Libya, Tunisia, and Egypt. However, in terms of the important role that the state of emergency currently plays in Tunisia and how the constitutional draft might regulate it, Tunisia becomes a case of concern regarding the misuse of emergency powers. Similarly for Egypt, one can predict that, given the political volatility and the constitutional draft currently discussed, state-of-emergency declarations and violence exerted under the legal justification of emergency powers will continue to haunt the Egyptian people, who are already weary of constitutional dictatorships. As for the state-of-emergency regulations becoming constitutional law in Libya, it is simply too early to make any predictions.

All current drafts and applicable constitutions—particularly the development of norms regarding powers that belong to state-of-emergency regulations (including the aspects of derogations of civil liberties during times of urgency)—

need close scrutiny. Because the current constitutional systems are extremely prone to misuse, careful revisions as laid out in the theoretical framework above are indispensable.

Most countries revise their constitutions continuously. There is no reason and no need to expect the perfect constitution within such a short period of time. However, the importance of completing the first round of reforms with a constitution that preserves major liberties and is compatible with international law cannot be overstated. This is why it is imperative that the public remain observant of the abuses of executive powers and demand amendments and reforms when it is necessary for the greater good of the peaceful coexistence of citizens.

## Notes

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

2. Based on ongoing research of the State of Emergency Mapping (STEM) Project at Research in Ethics and Globalisation (REG). "GSG [Globalisation Studies Groningen]-REG," University of Groningen, accessed 13 August 2013, [http://www.rug.nl/research/globalisation-studies-groningen/sections/reg/stem-\\_state-of-emergency-mapping](http://www.rug.nl/research/globalisation-studies-groningen/sections/reg/stem-_state-of-emergency-mapping). All Website.

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

4. Andrej Zwitter, "The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy," *Archives for Philosophy of Law and Social Philosophy* 98, no. 1 (2012): 107.

5. *Ibid.*, 108.

6. *Ibid.*, 110.

7. "The Constitution of the Arab Republic of Egypt, 1971 (As Amended to 2007)," Constitution.net, accessed 6 March 2014, <http://www.constitutionnet.org/files/Egypt%20Constitution.pdf>; and Supreme Council of the Armed Forces, *Constitutional Declaration 2011*, adopted on 30 March 2011, World Intellectual Property Organization, accessed 6 March 2014, <http://www.wipo.int/wipolex/en/details.jsp?id=13112>.

8. Marc Lynch, "Ending Egypt's State of Emergency (Sort Of)," *Foreign Policy*, 24 January 2012, [http://mideast.foreignpolicy.com/posts/2012/01/24/ending\\_egypts\\_state\\_of\\_emergency\\_sort\\_of](http://mideast.foreignpolicy.com/posts/2012/01/24/ending_egypts_state_of_emergency_sort_of). See also Al-Masry Al-Youm, "EU Urges Egypt to Lift State of Emergency before Elections," *Egypt Independent*, 16 May 2012, <http://www.egyptindependent.com/news/eu-urges-egypt-lift-state-emergency-elections>.

9. "Mubarak-Era 'Emergency Law' Creeps Back into Egypt Politics," *Al-Monitor*, accessed 24 February 2014, <http://www.al-monitor.com/pulse/politics/2012/06/the-state-of-emergency-is-return.html>.

10. "Egypt Is a Military State! The Minister of Justice Decree Authorizes Military Police and Military Intelligence of the Judicial Arrest of Civilians," AllAfrica, 13 June 2012, <http://allafrica.com/stories/201206140097.html>.

11. Tamim Elyan, "Egypt Liberals Quit Assembly Drafting Constitution," Reuters, 18 November 2012, <http://www.reuters.com/article/2012/11/18/us-egypt-constitution-idUSBRE8AH0EO20121118>.

12. "English Text of Morsi's Constitutional Declaration," *Ahram Online*, 22 November 2012, <http://english.ahram.org.eg/News/58947.aspx>.

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

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

15. Abigail Hauslohner, William Booth, and Sharaf al-Hourani, "Egyptian Military Ousts Morsi, Suspends Constitution," *Washington Post*, 3 July 2013, [http://www.washingtonpost.com/world/egypts-morsi-defiant-under-pressure-as-deadline-looms/2013/07/03/28fda81c-e39d-11e2-80eb-3145e2994a55\\_story.html](http://www.washingtonpost.com/world/egypts-morsi-defiant-under-pressure-as-deadline-looms/2013/07/03/28fda81c-e39d-11e2-80eb-3145e2994a55_story.html).

16. "Egypt's Constitutional Declaration Issued, Defines Transitional Period," *Abram Online*, 8 July 2013, <http://english.ahram.org.eg/NewsContent/1/64/76065/Egypt/Politics-/Egyptys-constitutional-declaration-issued,-defines-.aspx>; and "Full Text of the July 2013 Egyptian Constitutional Declaration," Carnegie Endowment for International Peace, accessed 6 March 2014, <http://egyptelections.carnegieendowment.org/2013/07/15/full-text-of-the-july-2013-egyptian-constitutional-declaration>.

17. Gamal Essam El-Din, "UPDATED: Amended Draft of Egyptian Constitution Passed to President," *Abram Online*, 20 August 2013, <http://english.ahram.org.eg/NewsContent/1/64/79525/Egypt/Politics-/UPDATED-Amended-draft-of-Egyptian-constitution-pas.aspx>.

18. Maria Caspani, "Infographic: Egypt's Constituent Assembly," Thomson Reuters Foundation, 3 September 2013, <http://www.trust.org/item/20130903155620-wae6d/>.

19. Nathan J. Brown, "Mrs. Lincoln's Egyptian Constitution," *Foreign Policy*, 20 August 2013, [http://mideast.foreignpolicy.com/posts/2013/08/20/mrs\\_lincoln\\_s\\_egyptian\\_constitution?wp\\_login\\_redirect=0](http://mideast.foreignpolicy.com/posts/2013/08/20/mrs_lincoln_s_egyptian_constitution?wp_login_redirect=0).

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

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

22. "Constitution of the Arab Republic of Egypt, 1971."

23. "Amendments of the Constitution 2011," Egypt State Information Service, accessed 6 March 2014, [http://www.sis.gov.eg/En/LastPage.aspx?Category\\_ID=204](http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=204); and Nathan J. Brown and Michele Dunne, "Egypt's Draft Constitutional Amendments Answer Some Questions and Raise Others," Carnegie Endowment for International Peace, accessed 20 February 2014, <http://egyptelections.carnegieendowment.org/2011/03/03/egypt%e2%80%99s-draft-constitutional-amendments-answer-some-questions-and-raise-others>.

24. Nariman Youssef, "Egypt's Draft Constitution Translated," *Egypt Independent*, 12 February 2012, <http://www.egyptindependent.com/news/egypt-s-draft-constitution-translated>.

25. Lisa Reynolds Wolfe, "Cold War Legacy: Egypt's Emergency Law 162 of 1958," *Cold War Studies*, 1 February 2011, <http://www.coldwarstudies.com/2011/02/01/cold-war-legacy-egypts-emergency-law-162-of-1958/>.

26. Emergency Law no. 162/1958: Official Gazette of 28 September 1958, no. 28, Bis.; and "State of Emergency: What Does It Imply?," *Abram Online*, 14 August 2013, <http://english.ahram.org.eg/NewsContent/1/64/79036/Egypt/Politics-/State-of-emergency-What-does-it-imply-.aspx>.

27. "Emergency Law [no. 162/1952 in translation]," Carnegie Endowment for International Peace, accessed 6 March 2014, <http://egyptelections.carnegieendowment.org/2010/09/09/emergency-law>.

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

29. James M. Dorsey, "Libya Bans Soccer Matches in Fear of Anti-Government Protests," *Bleacher Report*, 30 January 2011, <http://bleacherreport.com/articles/590352-libya-bans-soccer-matches-in-fear-of-anti-government-protests>.

30. Nathania Zevi and Stacy Meichtry, "Italy Suspends 'Friendship' Treaty with Libya," *Wall Street Journal*, 26 February 2011, <http://online.wsj.com/news/articles/SB10001424052748703796504576168774016612758>.

31. United Nations Security Council, Resolution 1973, 3, par. 4.

32. United Nations Security Council, Resolution 2016 (2011), S/RES/2016 (2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/567/10/PDF/N1156710.pdf?OpenElement>.

33. "[Article 70,] Libya's Constitution, Promulgated by the 'National Constituent Assembly' on 7th October 1951," accessed 6 March 2014, <http://www.libyanconstitutionalunion.net/constitution%20of%20libya.htm>. The most substantial problem of this constitution would have been Article 195, which allowed for the suspension of its provisions.

34. "Libya - Constitution" (Adopted on 11 December 1969) (ICL Document Status 1992), accessed 24 February 2014, [http://www.servat.unibe.ch/icl/ly00000\\_.html](http://www.servat.unibe.ch/icl/ly00000_.html).

35. "Libya - Declaration on the Establishment of the Authority of the People" (Adopted on 2 March 1977) (ICL Document Status 2 March 1977), accessed 24 February 2014, [http://www.servat.unibe.ch/icl/ly01000\\_.html](http://www.servat.unibe.ch/icl/ly01000_.html).

36. "Libya - Constitution."

37. Mu'ammarr Gadhafi, "The Green Book," accessed 4 September 2013, <http://web.archive.org/web/20100820193107/http://www.geocities.com/Athens/8744/readgb.htm>; and [Helen Chapin Metz,] "The Green Book," Library of Congress, accessed 6 March 2014, <http://countrystudies.us/libya/80.htm>.

38. John L. S. Simpkins, "Libya's Legal System and Legal Research," *GlobaLex*, January 2008, <http://www.nyulawglobal.org/Globalex/Libya.htm>.

39. Matthew Vella, "Libya Mulls Declaring State of Emergency," *Malta Today*, 5 April 2012, <http://www.maltatoday.com.mt/en/newsdetails/news/world/Libya-mulls-declaring-state-of-emergency-20120405>.

40. "Draft Constitutional Charter for the Transitional Stage: The Constitutional Declaration," passed by the Interim National Transitional Council on 3 August 2011, publicly announced on 10 August by Abdul Hafiz Ghoga, vice president, [http://portal.clinecenter.illinois.edu/REPOSITORY-CACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9j-LA742IFN3d70VnOYueW7t67gWXEs3XiVJjxM8n18U9W8vAoO7\\_24166.pdf](http://portal.clinecenter.illinois.edu/REPOSITORY-CACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9j-LA742IFN3d70VnOYueW7t67gWXEs3XiVJjxM8n18U9W8vAoO7_24166.pdf).

41. *Ibid.*, 5.

42. "Congress Draft State of Emergency Law Published," *Libya Herald*, 27 September 2012, <http://www.libyaherald.com/2012/09/27/gnc-draft-state-of-emergency-law-published/>.

43. Marie-Louise Gumuchian and Ali Shuaib, "Libya Swears in First Elected Government," *Reuters*, 14 November 2012, <http://www.reuters.com/article/2012/11/14/us-libya-government-swearing-idUSBRE8AD15F20121114>.

44. "Libya Declares Emergency Law in Southern Regions," *Russia Today*, 17 December 2012, <http://rt.com/news/libya-south-borders-emergency-164/>.

45. Rhiannon Smith, "Women Left Behind As Libya's Constitution-Drafting Moves Forwards," *OpenDemocracy.net*, 22 July 2013, <http://www.opendemocracy.net/rhiannon-smith/women-left-behind-as-libyas-constitution-drafting-moves-forwards>.

46. Mohammed Ben Ghalbon, ["I Call Upon the Transitional Council to Adopt the Constitution of the Independence Era,"] *Asharq Al-Awsat*, 13 June 2011, <http://www.libyanconstitutionalunion.net/aaa25feb2011.htm#aaa4eng>.



47. Duncan Pickard, "Libya's Constitution Controversy," *Foreign Policy*, 5 September 2012, [http://mideast.foreignpolicy.com/posts/2012/09/05/libyas\\_constitution\\_controversy](http://mideast.foreignpolicy.com/posts/2012/09/05/libyas_constitution_controversy).

48. "The Riots of 1984 and Their Aftermath," GlobalSecurity.org, accessed 24 February 2014, <http://www.globalsecurity.org/military/world/tunisia/politics-1984.htm>.

49. Ibid.

50. "Tunisia: President Zine al-Abidine Ben Ali Forced Out," *BBC News*, 15 January 2011, <http://www.bbc.co.uk/news/world-africa-12195025>.

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

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

53. Sana Ajmi, "State of Emergency in Tunisia Extended until the End of This Month," Tunisia Live, 1 April 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," *Huffington Post*, 1 August 2013, [http://www.huffingtonpost.co.uk/tam-hussein/tunisias-militant-struggle\\_b\\_3687394.html](http://www.huffingtonpost.co.uk/tam-hussein/tunisias-militant-struggle_b_3687394.html); and Jamel Arfaoui and Walid Ramzi, "Jebel Chaambi Heroes Describe Border Horror," *Magharebia*, 31 May 2013, [http://magharebia.com/en\\_GB/articles/awi/reportage/2013/05/31/reportage-01](http://magharebia.com/en_GB/articles/awi/reportage/2013/05/31/reportage-01).

55. *Loi constituante n°2011-6 du 16 décembre 2011, relative à l'organisation provisoire des pouvoirs publics*, Centre pour le contrôle démocratique des forces armées, accessed 6 March 2014, <http://www.legislation-securite.tn/fr/node/30479>.

56. Tunisian Constitution (Adopted on 1 June 1959) (Amendment on 12 July 1988) (ICL Document Status 1991), accessed 24 February 2014, [http://www.servat.unibe.ch/icl/ts00000\\_.html](http://www.servat.unibe.ch/icl/ts00000_.html).

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

58. Ridha Jenayah, interview by the author, Sousse, Tunisia, 26 July 2013. Dr. Jenayah, a professor of public law, 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. "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/webforms/documents/?pdf=CDL-REF\(2012\)035-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)035-e); "Draft Constitution of the Republic of Tunisia" (unofficial English translation produced by United Nations Development Programme in Tunisia), 14 December 2012; and "Draft Constitution of the Republic of Tunisia" (unofficial French translation produced by United Nations Development Programme in Tunisia), 1 June 2013. Dr. Amor Boubakri, University of Sousse, provided the author with both unofficial UNDP translations.

60. See Jana Hertwig, "Staatsnotstandsrecht in Deutschland," in Zwitter, *Notstand und Recht*, 111–59.

61. *Décret n°78-50 du 26 janvier 1978, réglementant l'état d'urgence*, Centre pour le contrôle démocratique des forces armées, accessed 6 March 2014, <http://www.legislation-securite.tn/fr/node/28159>.

62. Christopher K. Lamont and Héla Boujneh, "Transitional Justice in Tunisia: Negotiating Justice during Transition," *Politička Misao: Croatian Political Science Review* 49, no. 5 (2012): 32–49.

63. These five points are loosely based on Rossiter but modified regarding their applicability to Arab Spring countries and constitutional reforms. Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Brunswick, NJ: Transaction Publishers, 2002), 294–97.