

# From Manshiya to Alexandria:<sup>1</sup> Re-Examining the Process of Constitutionalizing and Normalizing the Emergency Status in Egypt

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## Abstract

Recent political and legal developments within the Arab region have resurrected previously dormant historical debates and endowed them with a new life and vitality. The theory of exceptionality has been prominent within these debates, being repeatedly reasserted in different constitutional drafts, and even celebrated, as a means through which political authority maintain and secure ‘the public order’.

Egypt long lasting rule relying on an emergency context has provided a worthy manifestation of how emergency rule have been installed in political and legal settings; and become presented as an only way to govern; in which it had been incorporated in different constitutions and manifested into a political exercise. We dedicate this article to witness these overlapping challenges to analyze why post-revolutionary regimes have failed to deliver a meaningful transformative constitutionalism that is based upon the principle of the rule of Law, and continued instead to rely on the emergency status as module of governance.

**Keywords:** Egypt, constitution, exceptionalism, emergency, revolution, rule of law

## 1. Introduction

Recent political and legal developments within the Arab region have resurrected previously dormant historical debates and endowed them with a new life and vitality. The theory of exceptionality has been prominent within these debates, being repeatedly reasserted in different constitutional drafts, and even celebrated, as a means through which political authority maintain and secure ‘the public order’.

Over the course of the 20<sup>th</sup> century, the debates about the state of emergency being a “profoundly elusive and ambivalent concept”<sup>2</sup> have been analysed in as an act of political governance. Thinkers like Agamben and Rossiter have been analysing the state of exception in the latter framework by introducing complex relations of the ‘legal’ and the ‘political’,<sup>3</sup> and introducing the presumption that it became a permanent module of governance

Ferejohn and Pasquino suggest how certain ‘modern’ difficulties encouraged the emergence of exceptionality as permanent governance, which are; “contemporary emergencies cannot easily be limited in time or space. This raises the specter of needing a permanent emergency regime.[...]Second, it is no longer clear prior to an emergency what powers are needed to cope with it.”<sup>4</sup> On the same level, Oren and Ní Aoláin observe the shifts of between the past and now and how we regard what is ‘exception’ as ‘normal’. This shifting discourse implies a further

<sup>1</sup> The Manshiya incident (1954), in which an Islamists tried to assassinate late president Gamal Abdel Nasser, was the first incident to set the grounds of legitimizing the emergency rule in the post-colonial era. The Alexandria refers to the Alexandria and Tanta bombings (2017) that gave current president El-Sisi the grounds to declare, and continuously extend, the emergency rule.

<sup>2</sup> Stephen Morton, *States of Emergency: Colonialism, Literature and Law* (Liverpool University Press, 2013), 2

<sup>3</sup> See Giorgio Agamben, *The State of Exception*, (Chicago: Chicago Press, 2005) and Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Management in the Modern Democracies* (Princeton University Press, 1948).

<sup>4</sup> John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers,” *I.CON* 2(2) 2004, 228. Retrieved from <https://doi.org/10.1093/icon/2.2.210>

expansion of measures, powers, and authorities.<sup>5</sup> It is noted that the process of normalization is attractive to political actors; in which “government and its agents grow accustomed to the convenience of emergency powers. Once they have experience the ability to operate with fewer restraints and limits they are unlikely to be willing to give up such freedom.”<sup>6</sup> Egypt long lasting rule relying on an emergency context has provided a worthy manifestation of how emergency rule had been installed in political and legal settings; and become presented as an only way to govern. The emergency rule had been incorporated in different constitutions and manifested into a political exercise. Ferejohn and Pasquino argue that the installation of the state of emergency within constitutions has two justifications; one of which is “standard republican institutions suitable for protecting liberty are too cumbersome to use in emergency situations and so special institutions are need to preserve the republic itself.”<sup>7</sup> The gap that is produced here is that “institutional and structural modifications that are installed as essential for crisis management may continue long past the termination of the original crisis.”<sup>8</sup>

The Egyptian revolution of 25 January had been flamed against this authoritarian structure, and fuelled by the demand to abolish the emergency status. Nevertheless, the state of emergency have been re-asserted in post-revolutionary constitutional documents and into current political practices. In this matter Gross and Ní Aoláin highlights that while authorities expand their powers depending on this normalization, “they are not the only ones who get used to the new normalcy [...]. Such normalization also carries with it a tranquilizing effect on the public’s critical approach toward emergency regimes.”<sup>9</sup>

For this, we dedicate this article to witness these overlapping challenges to analyze why post-revolutionary regimes have failed to deliver a meaningful transformative constitutionalism that is based upon the principle of the rule of Law, and, instead, continued to rely on the emergency status as module of governance. In this matter, we try to feature that this failure is related to three arguments. The first is that the exceptional ruling has been institutionalized in most of the political and legal settings since Nasserism; in which the revolution wasn’t able to change, nor did new constitutions introduce substantive changes to these dynamics. Second, that post-revolution regime used the exceptional status as way to legitimize their ruling through the political rhetoric of securitization, and thirdly the state of exception became normalized in the everyday political and legal settings.

To illustrate this, we engage first in the colonial roots of the emergency rule dated back to the British era and Nasserism. Historically, Egypt has been thriving upon the emergency status dating back to the post-colonial era. The Law no. 162 of 1958 was introduced in the Gamal Abdel-Nasser era as way to constitute and construct a military rule that envisages the colonial exceptionality rule. This Law has been considered a prominent document to base and construct continuous regimes and affirm them with exceptional power to control both the public and private sphere of citizens.

We dedicated section (3) to illustrate the continuous institutionalization process of the emergency status in the legal and political realm in Egypt in the era of Sadat and Mubarak. The reason is an attempt to feature a certain pattern that have been repeatedly re-asserted in different rulings and eventually shared similar characteristics; a continuous declaration of the emergency status without reasonable nor real grounds, establishing a parallel judicial military system, a production of legislative acts that maintain the settings of the emergency status, a reliance on a political rhetoric that fears either Islamists or Israel, and a continuous repression of other political actors.

The last section, we track the practices that occurred after the revolution. We argue that post-revolutionary changing regimes engaged in a process to ‘re-constitutionalize’ and normalize the exceptionality rule either through constitutional and legal texts, or through political practices, leading in this manner to oppress the demands of the revolutionists.

## 2. A ‘Deeply Rooted’ Exceptional Rule

The approach to understanding the historical roots of the emergency status is traced back to the British colonial era up until the coup that overthrew the Egyptian monarchy (1882-1952). The reference to such a historical era is

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<sup>5</sup> Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (UK: Cambridge University Press: 2006) 228.

<sup>6</sup> *Ibid.*, 230

<sup>7</sup> Ferejohn and Pasquale, “The Law of the Exception,” 233.

<sup>8</sup> Gross and Ní Aoláin, *Law in times of Crisis*, 238.

<sup>9</sup> *Ibid.*, 236.

based on the argument which Alzubairi claims that the British 'heritage' is still 'deeply rooted' in Egypt,<sup>10</sup> including in the exceptional measures that is applied on the nowadays Egypt.

The idea of examining the colonial roots of establishing the exceptional regime has been witnessed in several literature in order to examine the legal and political implications of such practices on current regimes. For example, Morton considers the emergency status as a technique of power to maintain sovereignty, and thus became examined in the political and social structure of the colonial entities.<sup>11</sup> Ramraj and Thiruvengadam examine this in relation to the legacy of implanted colonial 'constitutionalism' and their production of emergency regimes in the context of South Asia.<sup>12</sup>

It should be noted that uncovering the relation between colonial rule and emergency power and its current application means an understanding of the historical process of constitutionalism, containing of legal texts and practices, that were witnessed, transplanted, and applied in the colonial areas. Understanding constitutionalism would help to contribute in "the way reserve and emergency powers were transplanted in the legal sphere."<sup>13</sup>

AlZubairi argues that the British relied on the concept of 'necessity' to establish exceptional system like the state of emergency, which eventually freeze the application of a legal system.<sup>14</sup> The reliance on such status from the British had its motives in which Reza explains; he addresses how the British accommodated the path for such status by removing the military actions from the jurisdictions of courts. He also explains (quoting Brown) that the British "relied on the emergency powers to impose new taxes on the many non-British foreigners who were in Egypt at the time."<sup>15</sup> In addition, the British had relied on what is called 'martial law', which means "the suspension of ordinary law and the temporary government of a country or parts thereof by military tribunals."<sup>16</sup>

After independence, Reza explains how the rulers of Egypt had copied the same exercise of their processors, which proves how the British granted rulers the same exceptional powers that colonists enjoyed;<sup>17</sup> thus instead of transplanting constitutionalism, they transplanted a rule of exceptionality. Alzubairi concludes how the transplanting of such regimes led to a pressure on colonies to adopt an "imperfect democratic systems," which was achieved through transplanting "exceptionalism such as emergency and emergency-like powers, special courts, and detention without trial, and incorporated them in national security laws and measures."<sup>18</sup> Thus, exceptionalism became rooted into early political exercises in the area. Zlotowska argues that "[i]n the Egyptian case colonial history taught the republican government (the President) that ruling the country by using the emergency provisions may be useful[.]"<sup>19</sup>

The charismatic leader Gamal Abdel-Nasser came into power (1952-1970) with an already constructed legitimacy from the Egyptian public. The Army Free officers had overthrown a dynasty rule in the 1952 revolution in which he extracted his legitimacy from these events. Cook suggests that lacking a clear ideology had its consequences till now; he suggests that they "oversaw the development of an authoritarian political order that endured, albeit in modified form, until early 2011."<sup>20</sup>

The emergency status was declared from the 1952 until 1956 as Egypt was in a status of transition until the promulgation of the 1956 constitution. However, Nasser vision was concentrated to strengthen a military rule, Cook states that the situation of martial laws that were imposed from the British was exploited from Nasser and

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<sup>10</sup> Fatemah AlZubairi, "The Role of Colonialism and Neo-Colonialism in Shaping Anti-Terrorism Law in Comparative and International Perspectives: Case Studies of Egypt and Tunisia" (Phd. Thesis, York University, 2017) 9. Accessed on May 2018 [https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/33509/Alzubairi\\_Fatemah\\_2017\\_PhD.pdf?sequence=2&isAllowed=y](https://yorkspace.library.yorku.ca/xmlui/bitstream/handle/10315/33509/Alzubairi_Fatemah_2017_PhD.pdf?sequence=2&isAllowed=y)

<sup>11</sup> Morton, *States of Emergency*, 2.

<sup>12</sup> Victor V. Ramraj and Arun K., Thiruvengadam, eds, *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2010). Quoted in Alzubairi, "The role of colonialism", 68-69.

<sup>13</sup> Ibid, 69.

<sup>14</sup> See Alzubairi, "The Role of Colonialism", 43, 63.

<sup>15</sup> Sadiq Reza, "Endless Emergency: The Case of Egypt." *New Criminal Law Review* vol.10 4 (2007), 535. Accessed on May 2018 [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1855&context=fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1855&context=fac_articles_chapters)

<sup>16</sup> Gross and Ní Aoláin, *Law in times of Crisis*, 31.

<sup>17</sup> Reza, "Endless Emergency", 552.

<sup>18</sup> Alzubairi, "The Role of Colonialism".

<sup>19</sup> Paula Zlotowska, "Trends in Egyptian Constitutional Law after 1952: Maintaining Strong Presidential Power in the Reality of Middle East Affairs." *Internetowy Przegląd Prawniczy* 7 29 (2017), 121. Access on May 2018 [https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/47476/zlotowska\\_trends\\_in\\_egyptian\\_constitutional\\_law\\_after\\_1952\\_2016.pdf?sequence=1&isAllowed=y](https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/47476/zlotowska_trends_in_egyptian_constitutional_law_after_1952_2016.pdf?sequence=1&isAllowed=y) (note omitted).

<sup>20</sup> Steven Cook, *The Struggle for Egypt: From Nasser to Tahrir Square*, (London: Oxford University Press: 2011), 40.

his fellow free officers in order to leverage their political advantages, he examines how this started from the process of re-writing “the British era military regulations.”<sup>21</sup>

The process of legislating the emergency framework was the first introduction of a process of military institutionalization and for a state of exceptionality. A look to the post-revolution constitution of 1956 gives a better examination. The constitution introduced for the first time the ‘emergency status’, Article (144) from the constitution gave the power to the president to declare the emergency. The declaration shall be submitted to the House of Representatives within the following fifteen days to decide what its opinion on those affairs. If the House of Representatives is dissolved, the president presents the matter to the new parliament in its first session.<sup>22</sup>

In addition, several legislative work had been introduced to secure a powerful stand either for the president or the military. Most importantly is the Emergency Law of 1958, which is valid till now, and was the basis of repetitive and emergency rule. In addition to a 1954 Law that had strengthen the military’s emergency powers,<sup>23</sup> Law no 119 for 1964,<sup>24</sup> and Law no 25 for 1966,<sup>25</sup> were introduced, which gave the president exceptional powers.

Following the promulgation of the Emergency Law of 1958, the state of emergency became an authoritative one.<sup>26</sup> The problematic 1958 Law along its amendments has been the basis to continuous emergency declarations commencing from that date to now. It gives exceptional and broad power to the president of the republic. It allows a declaration of emergency whenever ‘the security or the public order’ is threatened, whether by a war or the eruption of a war, internal disturbances, public disasters, or the spread of an epidemic (Article 1). The vagueness of such words like ‘internal disturbances’ or the ‘eruption of a war’ create a ‘legitimate ground’ for declaring any situation that would fit into the broadness of this term. The declaration of the emergency is in the hands of the president - which means rising presidential supremacy over any power. According to the law, any declaration shall include the reasons of the situation, the territory it covers and its duration (Article 2).

The Law grants in article 3 vast authorities that are vested to the president of the republic, which made this law to be considered as one of the most “dangerous and most restricting laws for human rights and freedoms.”<sup>27</sup> It has severe consequences on the application of human rights, and the application of separation of power doctrine. In accordance to this article, the president can order in a written or oral order certain measures,<sup>28</sup> which involve restrictions on the freedom of persons in their right to movement, and their right to gathering. The questionable measure is the president ability to arrest and detain suspects without being restricted to the Criminal procedure law.

The emergency framework was targeted to establish a powerful military rule by manipulating the institutional system. Nasser wanted to “[expand] his political base by expanding the role of the state and brought in different groups into its umbrella.”<sup>29</sup> The Law of 1958 helped to establish a parallel legal system, by constructing exception courts.<sup>30</sup>

In addition, the law, which gives power to suppress any political participation, and paralyzes any freedom of expression helped to shape the early political life of Egypt as a space that fits one authority. Cook suggests that

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<sup>21</sup> Ibid., 81.

<sup>22</sup> A translation of the Egyptian 1956 Constitution is available at [https://digitalcommons.maclester.edu/classics\\_honors/22/](https://digitalcommons.maclester.edu/classics_honors/22/)

<sup>23</sup> Reza, “Endless emergency.” 536.

<sup>24</sup> The law is available in Arabic at: <https://manshurat.org/node/12945>

<sup>25</sup> Reza, “Endless emergency.” 540.

<sup>26</sup> Ibid., 537

<sup>27</sup> Salwa AlDaqnawi, “Tada'yyat Istimrar Qanon Al-Tawari' ala Al-Tatwor Al-Democrati fe Masr: 1981-2008,” *Majlat AlBohoth AlMalayia wal Tejarya* 3 (2014), 504. Accessed on May 2018 <http://search.mandumah.com/record/777842>

<sup>28</sup> Article 3 “(i) Restrict people's freedom of assembly, movement, residence, or passage in specific times and places; arrest suspects or [persons who are] dangerous to public security and order [and] detain them; allow searches of persons and places without being restricted by the provisions of the Criminal Procedure Code; and assign anyone to perform any of these tasks. (2) Order the surveillance of letters of any type; supervise censorship; seize journals, newsletters, publications, editorials, cartoons, and any form of expression and advertisement before they are published, and close their publishing places. (3) Determine the times of opening and closing public shops, and order the closure of some or all of these shops. (4) Confiscate any property or building, order the sequestration of companies and corporations, and postpone the due dates of loans for what has been confiscated or sequestered. (5) Withdraw licenses of arms, ammunitions, explosive devices, and explosives of all kinds, order their submission, and close arms stores. (6) Evict some areas or isolate them; regulate means of transport; limit means of transport between different regions.”

<sup>29</sup> K.V. Nagarajan, “Egypt's Political Economy and the Downfall of the Mubarak Regime,” *International Journal of Humanities and Social Science* 3 10 (2013), 23. Accessed on May 2018 [https://www.ijhssnet.com/journals/Vol\\_3\\_No\\_10\\_Special\\_Issue\\_May\\_2013/3.pdf](https://www.ijhssnet.com/journals/Vol_3_No_10_Special_Issue_May_2013/3.pdf).

<sup>30</sup> Nathan J. Brown, “Nasserism's Legal Legacy: Accessibility, Accountability, and Authoritarianism.” in *Rethinking Nasserism: Revolution and Historical Memory in Modern Egypt*, ed. Elie Podeh and Onn Winckler (Florida: University Press of Florida, 2004) 135.

“the codification of the Emergency Law came at a time when the regime confronted no organized opposition and was clearly intent on keeping it that way.”<sup>31</sup> This aligns with his political vision in which he considered that the “political stability in Egypt was undermined by the system of political pluralism that had existed during the monarchical era,”<sup>32</sup> and it would “disorient society during the implementation of the regime's developmental goals.”<sup>33</sup>

In the run of Nasser's rule, two emergency declarations (1956-1964) and from (1967-1970) were declared, both in response to war with Israel. Depending on external threat, narrative is also considered a way to govern; Hanafi considers that there are four ways to which an exceptional state is considered a method of governance, one of which is creating new categorizations, he explains in this matter, how Agamben perspective to sovereignty is relying on the strategic or situational practices of authority.<sup>34</sup> However, the context varied, the breakthrough of the 1967 war was a major turning point, the defeat of Nasser in the six days war with Israel affected his ‘heroic image’ which he derived his legitimacy from. Binger analyzes how his “image suffered a marked decline”<sup>35</sup> since these events, in that period, the emergency status was renewed until his death in 1970. One can suggest that the era in which his image was disoriented from the public lead to rely on the emergency power to re-construct a ‘legitimate’ rule.

One can conclude that the use of Emergency powers, which derived from colonial practices to thrive and maintain their sovereignty and population control, it had continuously shaped, constructed, and formed the political settings in the current Egyptian context, where ‘normality’ is actually the status of emergency.

### 3. The Era of Anwar Sadat and Mubarak

President Anwar Sadat, a member of the free army officers (1970-1981) came to power with a legacy of an emergency declaration that Nasser had left and a charismatic gap he tried to fill. He introduced the 1971 constitution, which lasted until the 2011 uprisings. Article (148) states that the president of the Republic shall proclaim a state of emergency in the manner prescribed by the law. It states further that the Emergency status shall be for a limited period, which may not be extended unless by approval of the Assembly.

While Sadat revealed a tendency towards abolishing the emergency law, the above mentioned article referred that the emergency should be prescribed by law (referring in this matter to the problematic law of 1958) in which Sadat didn't do any further step to amend, abolish, or freeze its application. In addition, the article is vague towards the duration of the emergency application, using words like ‘a limited period’. In addition, the constitution authorized a legislative power for the president in emergency contexts, these exceptional powers continued to frame the political settings in Egypt in an exceptional module, abolishing in this matter any real attempt for any separation of power doctrine.

The political rhetoric of Sadat became centralized on the ‘rule of law’.<sup>36</sup> The reliance on such rhetoric is analyzed in different ways; the first is a suggestion that he used it “to overcome a tremendous legitimacy deficit left by the failures of Nasserism”, the other suggestions is Al-Sadat tried to construct the regime's legitimacy based on this rhetoric in order “to distance himself from [the Nasserism's] failures.”<sup>37</sup>

Anwar Sadat lifted the emergency status before a year of his assassination by the Islamists. This step was sequence to the David Camp peace treaty with Israel in 1978. While there is no literature that suggest any implicit answer why Sadat had left the emergency status, one can argue that it is related to his policies that turned to external affairs,<sup>38</sup> and attempted to attract foreign investments, thus wanting to achieve such a ‘democratic’ image before the international community and foreigner investors. His policies in regards to Islamists had changed. This turn of events lead to change the subject of threat from Israel to Islamists.<sup>39</sup>

<sup>31</sup> Cook, *The struggle for Egypt*, 82.

<sup>32</sup> Gamal Selim, *The International Dimensions of Democratization in Egypt: The Limits of Externally-induced change*, (Switzerland: Springer International Publishing, 2015), 30.

<sup>33</sup> Ibid.

<sup>34</sup> Sari Hanafi, “Muqadima,” in Giorgio Agamben, *halat alestethna': alensan al-haram* (Egypt: Madarat for Research and Publishing, 2015), 28.

<sup>35</sup> Leonard Binger, “Gamal ‘Abd al-Nasser: Iconology, Ideology, and Demonology,” in *Rethinking Nasserism*, 46.

<sup>36</sup> Elie Podeh and Onn Winckler “Introduction: Nasserism as a Form of Populism,” in *Rethinking Nasserism*, 6.

<sup>37</sup> Tom Ginsburg and Tamir Moustafa, “Introduction: the Functions of Courts in Authoritarian Politics,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed., Tom Ginsburg and Tamir Moustafa (Cambridge: Cambridge University Press: 2008), 11.

<sup>38</sup> Nagarajan, “Egypt's Political Economy,” 28.

<sup>39</sup> Złotowska, “Trends in Egyptian Constitutional Law,” 126.

In the day where former President Anwar Sadat had been assassinated in 1981, the emergency status had been declared by his successor Hosni Mubarak until his removal from office. Mubarak's ruling under the legacy of Sadat's 1971 Constitution, relied also on his rhetoric of 'fearing the spreading of Islamists' to justify the continuous emergency status and its extensions.

Nevertheless, his first declaration to a state of emergency didn't provide any justifications on the reasons the emergency was declared.<sup>40</sup> The process of deep institutionalization of the emergency status thus was moving in a linear process of rationalizing this status. Jamal examines how the rationalization of the emergency status was seen as a "tool in the fight against Islamist radicals."<sup>41</sup>

The duration of his thirty years rule can implicitly indicate that the emergency status has been institutionalized in all the political, social, and economic conditions. AlDaqnawi claims - and we agree - that the emergency status had been dissolved into the political and legislative systems to which it became a form of governance in the Egyptian context.<sup>42</sup> Moustafa refers to the emergency status in Egypt as the "bedrock of regime dominance."<sup>43</sup>

Ruling based on the Emergency Law, and the 1971 constitutional framework, entailed that the direct impact of the status of emergency due to the long duration of this, is the demolition of any real separation of power. "Emergency powers under Mubarak blurred the separation of power between the executive, legislative and judicial branches of government."<sup>44</sup> The 'legal' granted authorities entail that the president is hijacking political, social, economic, legal and military areas, without any consultation from any other political or legal institution. This contributed to fragmented political hierarchies, where the Egyptian political order was characterized in an executive supremacy stamp. Presidents, who would exercise this executive prerogative at times of crisis, by manipulating insecurity, intended also to increase their own "prestige, influence and share of political power."<sup>45</sup>

Building upon this, a set of handicapped institutions were constructed, they maintained the emergency status and couldn't challenge its application. The parliament in the Mubarak era continuously approved all the extensions that Mubarak demanded to maintain the emergency rule, leading eventually to a thirty years of approved emergency extensions. In addition, the emergency law was not the only legal set to regulate a 'state of exception' in Egypt; other legislative acts approved by the parliament had tried to emphasize this framework. Salam examines how "some codes were ratified to turn the country's legal and political system into a complete state of emergency regime," such laws are 'article 86 (bis) of the penal code (and) part of counter-terrorism code adopted in 1992.'<sup>46</sup>

The supreme constitutional court of Egypt (SCC), which the SCC Law No. 48/1979 granted it the power of judicial review is no different than the Parliament in relation to the emergency status. While it has been characterized in the 90s as being 'active' due to its progressive ruling in regard of political and civil rights; the court has never expressed any challenges to the constitutionality of this law, or its application.<sup>47</sup>

The court not only "delayed issuing a ruling on the constitutionality of civilian transfers to military courts"<sup>48</sup> which is in the core implications of the emergency status, but it has also ruled in favor of the state security courts declaring them as constitutional, Moustafa sees this reluctance to restraining the functions of these exceptional courts "would likely have resulted in a futile confrontation with the regime."<sup>49</sup>

In the judicial sphere, the emergency status created military and state security courts, in which Moustafa explains how they "formed a parallel legal system with fewer procedural safeguards, serving as the ultimate regime check

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<sup>40</sup> Ahmed ElDakak, "Approaching Rule of Law in Post-Revolution Egypt: Where We Were, Where We Are, and Where We Should Be," *UC David Journal of International Law and Policy* 18 2 (2012), 286. Accessed on May 2018 <http://hrlibrary.umn.edu/research/Egypt/Approaching%20Rule%20oP%20Law%20in%20Post-Revolution%20Egypt.pdf>.

<sup>41</sup> Amaney Jamal, *Barriers to Democracy: The other Side of Social Capital in Palestine and the Arab world*, (Princeton: Princeton University Press, 2007), 118.

<sup>42</sup> AlDaqnawi, "Tada'yyat Istimrar Qanon Al-Tawari" 504.

<sup>43</sup> Tamir Moustafa, *The struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, (Cambridge University Press: 2007), 48.

<sup>44</sup> Housam Darwish, "Ruling Against Revolution: The Judiciary and the Restoration of Authoritarianism in Egypt," *Middle East Review* 5 (2018), 73. Accessed on May 2018 [http://www.ide.go.jp/library/Japanese/Publish/Periodicals/Me\\_review/pdf/201803\\_02.pdf](http://www.ide.go.jp/library/Japanese/Publish/Periodicals/Me_review/pdf/201803_02.pdf)

<sup>45</sup> David Jenkins, "The Lockean Constitution: Separation of Powers and the Limits of Prerogative." *McGill Law Journal* 56 (3): 556. Accessed on May 2018 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1945696](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945696).

<sup>46</sup> Ralf Salam, *Egypt Freedom of Expression Between Emergency and Suppression*, (Switzerland: EHRO books, 2017), 91.

<sup>47</sup> Ginsburg and Moustafa, "Introduction," 15.

<sup>48</sup> Tamir Moustafa, Law versus the State: The Judicialization of Politics in Egypt. *Law & Social Inquiry* 28 (4) 2012, 903.

<sup>49</sup> Ibid, 906.

on challenges to its power.”<sup>50</sup> In addition, their verdicts cannot be appealed. Furthermore, One of direct impact of emergency laws is the increasing role of security institutions within the political system and the violations of rights and freedoms,<sup>51</sup> which eventually had strengthen a ‘police state’ in Egypt, securing by this any potential coup.<sup>52</sup>

The continuous oppression of political and civil rights had led to a restrictive environment for any political party to raise other than Mubarak’s National Democratic Party (NDP). Islami examines this relation by arguing that the elements that the state of emergency managed to hold and banned the establishment of political parties with a religious character.<sup>53</sup>

#### 4. Re-Constitutionalizing the Emergency Status

The Egyptian people began to mobilize, on the 25<sup>th</sup> January 2011 setting in process a motion that would ultimately result in the overthrow of an authoritarian regime that had endured for 30 years. A month later, after unprecedented unrest, Omar Suleiman, Mubarak’s Vice-President declared that Mubarak would no longer be President. The Supreme Council of the Armed Forces (SCAF) was delegated executive powers and assumed responsibility for leading the transition period and establishing the basis for free elections.

Before the January 2011 revolution, the last decision issued by former President Hosni Mubarak to renew the state of emergency was Resolution No. 126 of 2010, intended to end the state of emergency in 2012. Despite the outbreak of the January revolution in 2011, which was one of its major demands to end the state of emergency, the later continued until the end of the period specified by the decision of Hosni Mubarak on 2012.

This period of transition lead to a military rule headed by Mohamed Hussein Tantawi. SCAF started the process of constitutional designing appointing in this matter a constitutional reform committee, to propose amendments to the suspended 1971 constitution. The reform committee proposed 19 amendments in March (to be submitted for a public referendum), one of which of these amendments is article 148 regarding the emergency status. The amendment related to the emergency status relies on the approval of the People’s assembly, and the approval of a public referendum if the state of emergency is due to more than six months.

The first proposed amendment after a revolution is important to analyze, and should be understood in regard of the whole proposed post-revolution constitutionalism. Generally speaking, SCAF proposed amendments to the prior 1971 constitution indicated that the vision was a ‘reformatory’ step of a pre-existing political dynamics, and not a drastic change and refusal to the whole rooted authoritarian settings which thrived upon the exceptionality context. Opponents complained that the very idea of returning to the 1971 constitution was an “impermissible return to a rejected past,”<sup>54</sup> in which the remaining of the same old institutional structure “did not provide a conclusive break from the past.”<sup>55</sup> This means that political dynamics that emerged from the emergency ruling did not have a real chance to be altered.

While this amendment is considered as an improvement (not making the emergency status solely on a presidential prerogative) Moustafa, takes into account the relation between granting people’s assembly this power and the idea of having a reliable elected people’s assembly, he states that “its effectiveness rests on a truly representative people’s assembly and clean elections.”<sup>56</sup> Nevertheless, the article maintained its legal gaps and the fact that there are no real restrictive limitations regarding the extension or its application.

Interestingly, SCAF declared that a ‘constitutional declaration’ shall be submitted to run the interim period regardless of the results of the polling (which eventually was approved by 77% votes) replacing in matter the 1971 constitution. The constitutional declaration maintained the same module of 1971 constitution, along the March amendments, which kept the provisions regarding the emergency status as explained above.

It gave prerogative power to SCAF, which included legislative and executive functions. This ‘supra-constitutional’

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<sup>50</sup> Moustafa, *The struggle for constitutional power*, 8.

<sup>51</sup> Markz Swasya Le Hqoq AlEnsan, “Qwanen Altawari’ wa Atharha ala AlHuriyyat Al-amma,” *Dirasat Eilamiyya* 123 (2006), 163. Accessed on May 2018 <http://search.mandumah.com/record/730336>.

<sup>52</sup> Islam Islami, “Political history of modern Egypt,” *ILIRIA International Review* 6. 191 (2016), 202. DOI 10.21113/iir.v6i1.231.

<sup>53</sup> *Ibid.*, 203.

<sup>54</sup> Kristen A Stilt, “The End of “One Hand: The Egyptian Constitutional Declaration and the Rift between the “People” and the Supreme Council of the Armed Forces,” Faculty Working Papers 208 (2012). Accessed on May 2018 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1207&context=facultyworkingpapers>

<sup>55</sup> Tamir Moustafa, “Drafting Egypt’s Constitution: Can a New Legal Framework Revive a Flawed Transition,” paper series 1 (2012), 4. Accessed on May 2018 <https://www.brookings.edu/wp-content/uploads/2016/06/new1-Drafting-Egypt-New-ConstitutionEnR03.pdf>.

<sup>56</sup> Tamir Moustafa, “It’s not a Revolution Yet,” *The Middle East Channel*, 28 February 2011, accessed on May 2018, <https://foreignpolicy.com/2011/02/28/its-not-a-revolution-yet/>

power was seen as a way to control the drafting of a new constitution.<sup>57</sup> SCAF drew on the same exceptionality module, as based on the proposed constitutional amendments made in 2011, it requires a referendum in the event of a state of emergency, but SCAF decided to extend the emergency until one day before the anniversary of the revolution, starting on January 25, 2012. SCAF promised to end the emergency status as soon as the circumstances end,<sup>58</sup> the political narrative to justify an emergency status was weak, especially as one of the demands of the revolution was to end the emergency status. The legal justification to keep the emergency status on call is Article (62) of the constitutional declaration, which assures the validity of all the regulations decided before the publication of the mentioned declaration,<sup>59</sup> which eventually makes the Decree of 2010 issued by Mubarak, valid.

Nevertheless, not only SCAF didn't entail to the demands of the revolution to change the long lasting 'emergency-quo', it proposed an amendment to the Emergency law that further broaden its application. Depending on this amendment, an emergency status can be declared in the events of "acts of thuggery, attacks against the freedom to work, the sabotage of institutions, the disruption of transportation, the obstruction of roads and the deliberate broadcasting or spreading of false news, rumors or statements."<sup>60</sup> It has also issued Decree no 4991/2012 which allows military forces to detain people who violate certain provisions of the penal code.<sup>61</sup> Moustafa argues that SCAF wanted to eventually create a legal vacuum to gain its interests.<sup>62</sup>

When the first post-revolutionary elections were held in 2012, Mohamed Morsi was elected as President and Islamist parties commanded a majority within the parliament. The Constituent Assembly then began to draft a new constitution. The 2012 Constitution did not significantly diverge from the model that preceded it and it failed to address the wider public concerns that had given rise to the uprising in the first instance.

While Morsi was the first Islamist and civilian president to rule over Egypt, hopes were high to abolish the emergency status, taking also into account that the Islamists were the most group affected by the previous emergency rule. Nevertheless, that was not the case, the legal framework concerning the state of exceptionality reflected Morsi's aspiration to emphasize the 'brotherhoodization'<sup>63</sup> of the regime through this 'exceptionality'.

The process of 'constitutionalism' that was led by Morsi was highly criticized, not only the process was rolling in a violent context, but the assembly approved 100 articles in a 17 hour televised session,<sup>64</sup> leading to no real debate over what vision of transformative constitutionalism shall be produced. One can conclude that Morsi's urge to draft a constitution was driven by the need to legalize his rule; without a Constitution, Muslim Brotherhood "had no institutional or legal weapons to safeguard their electoral victories[.]"<sup>65</sup> This fear lead Morsi to introduce several constitutional article that favors the military, as a way to secure against any *coup d'état*.

These concerns were given further credence when Morsi granted himself unlimited power in the name of 'the revolution'. In September 2012, Morsi issued a constitutional declaration till the drafting of a new one, it contained a Decree that grants him the power to take any necessary actions in the name of the revolution, it has also gave all his legislative work an immunity from any judicial review. This step was seen as a way "to get increasing instabilities under control and to counteract that the Cairo Administrative Court had referred a case concerning the legality of the Constituent Assembly to the Supreme Constitutional Court."<sup>66</sup> However, the declaration stipulated a tendency towards an 'exceptionality ruling' which emphasized the emergency status in a merely broader structure, it gave "the president the power to issue emergency-style "measures" at any time for vague reasons and without declaring a state of emergency."<sup>67</sup>

In 2012 constitution, the emergency status was re-introduced in article (148). The mentioned article was seen 'positive' as it has stipulated a role of the parliament in the decision making of the declaration and restricted the extension of the emergency period due to a public referendum. However, the basic legal gaps that were witnessed

<sup>57</sup> Stilt, "The End of "one Hand",".

<sup>58</sup> ElDakak, "Approaching Rule of Law," 304.

<sup>59</sup> Ibid., 303.

<sup>60</sup> Ibid., 304

<sup>61</sup> Andrej J. Zwitter, "Arab Spring: State of Emergency and Constitutional Reform," *SSRN Electronic Journal*, 0ADAD. doi:10.2139/SSRN.2369374.

<sup>62</sup> Moustafa, "Drafting Egypt's Constitution," 3.

<sup>63</sup> A term used by Nathan Brown

<sup>64</sup> Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, (Oxford University press: 2017), 249.

<sup>65</sup> Darwisheh, "Ruling Against Revolution," 78.

<sup>66</sup> Zwitter, "Arab Spring: State of Emergency, 5.

<sup>67</sup> "Egypt: Morsy Decree Undermines Rule of Law," *Human Rights Watch* 26 November 2012, accessed on May 2018 <https://www.hrw.org/news/2012/11/26/egypt-morsy-decree-undermines-rule-law>



in previous constitutions continued to appear. For example, it didn't put any affirmative restrictions, or provide any safeguard for certain human rights. Meyer-Resende discusses how these provisions are considered insufficient in relation to the fact that Egypt has been under the state of emergency rule for a long time.<sup>68</sup>

In addition, other controversial articles were emphasized on the constitution, granting the president the power to legislate in emergency contexts, and the power to uphold the separation of power for the president (Article 132), which does not make any legal sense to hold the task of checks and balances in the hand of the executive.

Moreover, his winning after the revolution shaped his political rhetoric to 'protect' and 'maintain' the goals of the revolution to justify this exceptionality. This controversial relation was seen clearly in in 'Law no 96 for 2012 for the protection of the revolution'. The law emphasized the 'deep state' dilemma and the exceptionality settings by constructing a new prosecution and court especially 'to protect the revolution' (article 3); it also grant the public prosecutor or his representative the power to detain suspects (article 5). In addition, article 4 introduced new crimes to the penal code containing broad and vague terms which are "insulting and resisting the authorities, destruction of public property, impeding transportation, press crimes, intimidation and terrorizing."<sup>69</sup>

In Morsi short-lived rule as a president, he declared the emergency status once in January 2013 restricting its application to only 3 provinces; Ismailia, Bor Said and Suez. The declaration lead to a more bloody riots in which dozens were killed. It is seen that Morsi use of emergency laws to silence any opposition or threat to power was a way to returning to "old authoritarian tricks".<sup>70</sup> In a televised address reacting to the declaration, justifying his emergency declaration, he states: "I have said I am against any emergency measures but I have said that if I must stop bloodshed and protect the people then I will act[.]"<sup>71</sup>

#### 4.1 El-Sisi Rule

Mohamed Morsi was thrown over by a *coup d'état* driven by SCAF. In the immediate aftermath of Morsi's removal, the country was led by Adly Mansour, who served as an interim President. The state of emergency was declared once in 2013 the events of Raba' Al-Adwya.<sup>72</sup> Adly Mansour justification of the declaration was based on 'the security and order of the nation face danger due to deliberate sabotage, and attacks on public and private buildings and the loss of life by extremists groups,'<sup>73</sup> in which the political rhetoric shifted back to the fear of Islamists. Zwitter argues that the real reason for the August 2013 emergency declaration was "to provide the legal basis for the police to undertake raids to clear Muslim brotherhood protests camps."<sup>74</sup> The result of this was a death toll of 600 people from Morsi supporters.<sup>75</sup>

The process of drafting the 2014 constitution began when a presidential decree appointed 10 legal members (who were responsible for initiating the process) and a Constituent Assembly of 50 members (who were responsible for reviewing the draft) - the Assembly contained "professional syndicates, labour and trade unions, industrial and cultural associations, the security forces, and minority groups."<sup>76</sup> Islamists, however, were conspicuous by their absence.

After 48 hours of deliberation, the Constituent Assembly approved a draft version, which was then submitted to a public referendum which was approved by 98% of those who voted (on a 38.6% turnout). The referendum took place amidst considerable political unrest. Political opponents engaged in street fighting; terrorists launched attacks; and the general public appeared apathetic and disengaged. In addition, a large number of Islamists boycotted the referendum.<sup>77</sup>

<sup>68</sup> Michael Meyer-Resende, "Egypt: in-depth analysis of the main elements of the new constitution," *Directorate-General for external politics* (2014), 13. Accessed on August 2020, [https://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET\\_NT\(2014\)433846\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2014/433846/EXPO-AFET_NT(2014)433846_EN.pdf)

<sup>69</sup> "Egypt: Morsy Decree Undermines Rule of Law".

<sup>70</sup> Dashiell Bennett, 'Morsi's Emergency Law only Makes Matters Worse in Egypt,' *The Atlantic* January 28, 2013, accessed on May 2018 <https://www.theatlantic.com/international/archive/2013/01/emergency-law-only-makes-matters-worse-egypt/319000/>

<sup>71</sup> "Egypt's Morsi Declares 'state of emergency'," *Al-Jazeera*, 28 January 2013, accessed on May 2018. <https://www.aljazeera.com/news/middleeast/2013/01/2013127195926600436.html>

<sup>72</sup> Protests against the removal of Mohamed Morsi

<sup>73</sup> 'Egypt Declares state of Emergency,' *Al-Jazeera* 14 August 2013 accessed on May 2018 <https://www.aljazeera.com/news/middleeast/2013/08/201381413509551214.html>

<sup>74</sup> Zwitter, "Arab Spring: State of Emergency, 6.

<sup>75</sup> Ibid.

<sup>76</sup> Meyer-Resende, "Egypt: in-depth analysis," 7.

<sup>77</sup> Ibid, 8.

The constitution of 2014 stipulates in article (154) the emergency status dynamics. It affirms the president right to declare the status of emergency after consulting the parliament, and then submitted to the House of representative in seven days. In addition, the constitution added a positive track to limit the duration of the emergency status; it can be declared for three months, and extended to another three months with the approval of a two-third majority of the Parliament. While the limitation and the involvement of the parliament was seen as a positive step, the constitution lacked to provide safeguard protection as it “does not mention that some rights may not be derogable even in a state of emergency as required by the [International Covenant on Civil and Political Rights].”<sup>78</sup> And doesn't put any limitation on the broad and vague basis why the emergency status could be declared.

In addition, it failed to provide a substantive protection against the re-emergence of such rule, as it has a legal gap. It could be noted that after the passage of several days at the conclusion of the six-month period, the president is permitted to renew the state of emergency. This gap has been utilized by the El-Sisi regime to further extend the emergency status regardless of the limitation.

In 2013, General Marshal Abdel Fatah El-Sisi immediately after the success of his military coup asked the public to give him the authority to use exceptional measures to ‘fight terror’. This step was considered an unprecedented step in declaring states of emergency without any parliamentary ratification or public approval by a referendum, which could be interpreted as passing over any constitutional requirements to declare a state of emergency. His action was immediately interpreted by security forces as a green light to unfettered authority to kill, detain persons, search homes and monitor communications without a judicial warrant.<sup>79</sup>

Egyptian concerns about the emergency status have renewed after bomb attacks in Alexandria and Tanta bombings. The Palm Sunday bombing of a Coptic church culminated in the declaration of a state of emergency on 9 April 2017. This was the first time that El-Sisi had declared a state of emergency and it was the first time that a state of emergency had been declared in all the regions. After an initial three months passed, the Parliament on 4 July 2017 approved the extension of the emergency status for a further three months. This contributed to fears that the ‘emergency status’ was becoming part of normal governance.

Brown has previously suggested that the state of emergency has little to do with law; in his view, it is, instead, intended to politically legitimize the new regime.<sup>80</sup> The legal gap becomes evident after the six months period had passed. After the six months period - the constitutionally permitted time to declare the emergency status - El-Sisi has declared a new presidential decree on October 2017 no 510/2017. It was approved by parliament unanimously on 22 October 2017. The renewal was justified as it was not an extension as there was an interval of two days before declaring the new emergency status. According to article (1) of the presidential decree, the emergency status is declared for three months all over the country without any specification of a certain geographical place and without any clear details why it has been renewed. However, article (2) of the presidential decree is filled with vague and broad terms, which states: “armed forces and the police are to take the necessary measures to counter the threat of terrorism and its financing; to maintain security in the country; and to protect public and private property and the safety of citizens.” Article (3) which delegates the prime minister the power from the president witnessed the most serious consequences. Egyptian Prime minister issued Decree no.2156/2017 which shifts the jurisdiction of criminalized acts in 10 different laws including protests, assembly, pricing and supply, and freedom of worship to the jurisdiction of the state security courts as long as the emergency status is operating. The consequences of shifting the jurisdiction from ordinary courts to state security courts entailed jeopardizing the right to a fair trial for all citizens that were tried under this. These decrees not only extend and protect an unconstitutional status with vague terms and broad powers; but they “do not specify any particular measures that were to be authorized under the [State of Emergency], nor has much information been made public about what measures have been implemented in practice[.]”<sup>81</sup>

The parliament renewed the Emergency status on 13 January 2018. The declaration that was issued for the approval of the extension did not provide any information about the councils that had attended, nor whom approved this

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<sup>78</sup> Ibid, 13.

<sup>79</sup> Salam, *Egypt Freedom of Expression*, 93.

<sup>80</sup> Nathan Brown, *Egypt is in a state of emergency. Here's what that means for its government*. Washington Post, 2017. Retrieved from [https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/13/egypt-is-in-a-state-of-emergency-heres-what-that-means-for-its-government/?utm\\_term=.9cacc93d4e06](https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/13/egypt-is-in-a-state-of-emergency-heres-what-that-means-for-its-government/?utm_term=.9cacc93d4e06)

<sup>81</sup> International Commission of Juristes, *Egypt: A Return to a Permanent State of Emergency?*, 2018. Retrieved from: <https://www.icj.org/wp-content/uploads/2018/09/Egypt-Return-to-State-of-Emergency-Advocacy-Analysis-brief-2018-ENG.pdf>

extension.<sup>82</sup> One can notice how the Parliament could not take a stand in front of the long history of emergency rule in Egypt, failing to protect human rights in Egypt regardless of the provided legal basis.

The role of SCC both in Morsi and El-Sisi regime was reluctant. While The Egyptian political system has been growing the “inability of the Supreme Constitutional Court (SCC) to have any impact on lawmaking or constitutional growth.<sup>83</sup> a turned to events has been witnessed in 2013 when the SCC finally disputed a case which was originally submitted in 1993, in addition to its ruling on the anti-protest law.

In case no. 17 of 2013, the SCC of Egypt issued that article (1) which gives the president the authority to detain, arrest, and search persons and places without complying to the provisions of the criminal procedure code is unconstitutional. In its ruling, the Court explained “that Emergency Law was an exceptional system, intended to support the executive branch and to provide it with certain measures limiting its public rights and freedoms in order to meet urgent circumstances that threatened the public safety or national security of the country.” And that the authority specified by the Emergency Law, consisting of the President of the Republic or his deputy, must comply with the specific purpose of the Emergency Law when taking any of the measures provided for in Article 3 of the law. Nevertheless, the court while assuring that Egypt is based on the principle of the rule of law according to the constitution of 2012, it didn't engage in the general validity of such law which abuses the rule of law.<sup>84</sup>

Analyzing the timing of the ruling could undermine a presumption that the SCC wanted to take an affirmative step regarding the emergency rule. First of all, as Brown suggests, the ruling was declared in a non-emergency status; which in effect had “little immediate impact.”<sup>85</sup> Second, the ruling declared in the sensitive transitional era could be understood in two ways in which; either the SCC wanted to reposition itself as a powerful actor that can take a place in the drafting process of an upcoming constitution, or to reposition itself as the guardian of the constitution; aiming to gain a legitimacy and popularity it has lost since most of its judges were former NDP (National Democratic Party) members. In addition, Brown which describes this step as a bold one, examines that this “boldness may have been encouraged by that fact that at that time, the presidency was momentarily in Islamists hands.”<sup>86</sup>

The second ruling was in regard of the law concerning the organization of the right to public meetings, processions and peaceful demonstration referred to as the anti-protest law, which was passed in 2013 by the interim president Adly Mansour. The law sets limitations on the protests, grants the security apparatus with great power in relation to canceling or postponing protests (article 10), using power against protestors, and set financial penalties. It also gives the minister of interior the power to 'secure spaces'.

The SCC ruling contained two sections. The first is upholding the constitutionality of the articles 7, 8 and 19 that require protestors to give notice and that pose penalties. The second section, is declaring the unconstitutionality of article 10 which gives the power to security apparatus to cancel or postpone protests. Brown and Hamzawy comment on this ruling by stating that it had “little immediate impact” as the already imprisoned will not benefit from it;<sup>87</sup> they further notice that “Security bodies have all kinds of tools to shut down a demonstration — not all of which through formal legal channels.”<sup>88</sup>

Even if the emergency law is challenged, the El-Sisi regime had approved several laws in addition to the protest-law that institutionalize the exceptionality rule in the political and legal system. For example, Law no.92 of 2017 that create a supreme council for the administration of the media, which censor publications and broadcasts and

<sup>82</sup> “AlParlman Almasri Yoqarer Tamded AlTawari' Thlathat Ash-hor,” *Al-Jazeera* 9 January 2018, accessed on May 2018 <http://www.aljazeera.net/news/arabic/2018/1/9/البرلمان-المصري-يقر-تمديد-الطوارئ-ثلاثة-اشهر>

<sup>83</sup> James Feuille, “Reforming Egypt's Constitution: Hope for Egyptian Democracy?,” *Texas International Law Journal* 47 1 (2011).

<sup>84</sup> The Supreme Constitutional Court of Egypt, Case No. 17, 2013, <http://www.sccourt.gov.eg/SCC/faces/RuleViewer.jspx> (translated by the first author).

<sup>85</sup> Nathan Brown, “Egypt is in a state of emergency; here's what that means for its government,” *Washington post* 13 April 2017, accessed on May 2018 [https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/13/egypt-is-in-a-state-of-emergency-heres-what-that-means-for-its-government/?utm\\_term=.9cacc93d4e06](https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/13/egypt-is-in-a-state-of-emergency-heres-what-that-means-for-its-government/?utm_term=.9cacc93d4e06)

<sup>86</sup> Brown, “Egypt is in a state of emergency”.

<sup>87</sup> Nathan Brown and Amr Hamzawy, “An Egyptian Court Just Struck down Part of a Repressive New Law. Here's What that Means,” *Washington Post*, 6 December 2016, accessed on May 2018 [https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/06/an-egyptian-court-just-ruled-on-the-new-protest-law-heres-how-it-matters/?noredirect=on&utm\\_term=.63d6eba5d8a2](https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/06/an-egyptian-court-just-ruled-on-the-new-protest-law-heres-how-it-matters/?noredirect=on&utm_term=.63d6eba5d8a2)

<sup>88</sup> *Ibid.*

decide upon granting license. Another example is the NGO Law that aims to restrict civil society organization.<sup>89</sup>

The declaration of the emergency has always backed up a certain rhetoric since its first declaration in the Nasser era. It was either to secure a revolution, to counter terrorism, or to stop the rise of Islamists. However, with a close reading to the historical timeline of the use of the emergency status, we agree with Reza that the “continuous emergency rule in Egypt has been essential to the very existence of the state.”<sup>90</sup> The continuous declarations have led to the creation of a structure where the president has a grip of all powers; it has also led to a deadlock institution lacking any power of checks and balances.

Nevertheless, powers like creating special courts and using special measures to 'secure public order' have contributed to the creation of an environment of suppression where there is no political opposition. Over the years, the Egyptian regime has used the emergency powers for political purposes to arrest and suppress any opposition, leading to securing its place and raising the status of the military. This explains why during the protests demanding the removal of the military rule in Egypt, El-Sisi has turned to what his ancestors have turned to, which is a series of emergency declarations. Emergency powers become essential for the survival of an authoritarian regime and a “key tool for the government to consolidate and maintains its political power.”<sup>91</sup> The consequences of such acts have led to create an environment lacking any human rights basis, breaches included “police brutality, mass arrests, administrative detention, forced disappearance, torture, military trials and the death penalty.”<sup>92</sup>

## 5. Conclusion

The post-revolutionary constitutional processes introduced constitutional changes that denounced the durability of the emergency status, or provided the parliament a role in the approval process. However, real and substantive changes either in constitutional texts or in practice have not been witnessed.

The article witnessed the continuity of a same pre-existing ruling pattern that thrives upon ‘exceptionality’ since the British era. It features similar characteristics involving the militarization of Egypt, a dependency on security institutions, and a production of legal acts series that maintain and uphold this rule. It also highlighted that the role of other institutions were incumbent; SCC had been progressing but not yet able to deliver a drastic change to this context. While the parliament continued to play a negative passive role by approving all the emergency extensions.

This proves that the use of emergency status had been ‘normalized’ and ‘institutionalized’ aiming to control the population and securitize Egypt; making the basis of the Egyptian political system characterized by the hegemony of ‘security’ over what is ‘legal’.

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<sup>89</sup> “Egypt's Emergency Law Explained,” *Al-Jazeera*, 11 April 2017 accessed on May 2018 <https://www.aljazeera.com/indepth/features/2017/04/egypt-emergency-law-explained-170410093859268.html>

<sup>90</sup> Reza, “Endless emergency,” 544.

<sup>91</sup> Ibid, 547.

<sup>92</sup> K. Salameh, *Why Has Egypt Been Under Emergency Rule for the Past Hundred Years?* (Doctoral dissertation, University of Western Sydney, 2018), 165. Retrieved from: <https://researchdirect.westernsydney.edu.au/islandora/object/uws%3A50510>

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