

Egypt's Unbreakable Curse:

Tracing the *State of Exception* from Mubarak to Al Sisi

“One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good.”

(Giorgio Agamben, *State of Exception*)

Introduction

On 11th February 2011, nearly 30 years after becoming President of Egypt, Hosni Mubarak abdicated. Mubarak's decision came after 18 days of popular protests that enveloped the country and brought Egypt's diverse and divided population together under the slogan “the people want the fall of the regime”. The toppling of Mubarak also ended almost 44 years of continuous emergency legislation, which had been in operation since the 1967 Six Days War until the January 25th uprisings on 11th February 2011.¹ The longevity of said State of Exception was one of the main grievances behind the outbreak of the 2011 Uprisings, with its removal being one of the protesters' overarching aims. As with the other revolutionary demands, the lifting of the State of Emergency was incredibly short-lived, as the Supreme Council of Armed Forces (SCAF) kept it in place throughout the country's transition, and renewed it a mere two weeks after it expired on 31st May 2012. The fragile Muslim Brotherhood-led government also featured the state's transcendence of the rule of law when President Morsi issued a Constitutional Decree in November 2012, and Al Sisi's cabinet has *de facto* been ruling under Martial Law since the August 2013 *coup d'état* against Islamist President Mohamed Morsi. Five years after the start of the 2011 Uprisings, the country and its population are still existing under a State of Exception, as its continuous imposition seems to have become Egypt's unbreakable curse.

In recent years, a growing number of scholars have sought to engage with questions about political transition across Egypt. In particular, Tarek Osman, Carrie Wickham, and Mona el Ghobashy **REFERENCES PLEASE!** have provided their own explanations for the continuing lack of stability that has come to characterise the country. Our contribution to these debates is to suggest that by considering structural factors within Egyptian society, particularly within the context of the military and judiciary and their relationship with the state broadly, a greater awareness of events across the state can be achieved. In particular, by tracing the

¹ “Egypt and the Impact of 27 Years of Emergency on Human Rights”, *The Egyptian Organisation for Human Rights*, 28th May 2011, Available at: <http://en.eohr.org/2008/05/28/%E2%80%99Egypt-and-the-impact-of-27-years-of-emergency-on-human-rights%E2%80%9D/#more-22>

state of exception from Mubarak to al Sisi, we are able to identify a number of areas of continuity, particularly with regard to the role of the judiciary and military.

Varying interpretations of states of emergency and exception have been used by dictatorial regimes to consolidate and reinforce their powers since the creation of constitutions that allow the seizing of emergency powers. Repressive regimes routinely and strategically rely on a state of exception that goes beyond engaging with crises, but rather to stabilise a political leadership which failed to rely on popular legitimacy, deter protests and unrests, crackdown on opposition groups, and circumvent human rights obligations.

In recent years, a number of scholars have sought to engage with the changing politico-legal structures that are organising contemporary societies. Perhaps the most innovative of these approaches is the work undertaken by Giorgio Agamben, whose ideas, particularly found in *Homo Sacer*² and *State of Exception*³ explores the impact of some of these changing structural conditions. Agamben's *State of Exception* builds upon the work of Carl Schmitt⁴, to investigate how the suspension of laws within a state of emergency or crisis can become a prolonged state of being and, upon occasions, become a prolonged state of being that eventually deprives individuals of their citizenship. Here, Agamben's state of Exception is understood as the sovereign's ability to transcend the rule of law in the name of the public good in times of crisis and, in the case of Egypt, this can be seen in the recurrent imposition of prolonged states of Emergency on the country by different governing. Focusing on governments' increased power in alleged times of crisis, Agamben's theory can be used to track the severe implications that the recurring declaration of States of Emergency had on Egypt, in particular the decrease and sometimes complete suspension of constitutional rights and the endless breaches of human rights that have come to characterise the political environment in the country.

Agamben's work, while innovative and important, focuses predominantly upon the Western world, as his ideas are grounded in ancient Rome and the French revolution. Yet to limit the application of such ideas to the Western world is remiss and ignores regions where some of these struggles over the very nature of society are at their strongest. Since the self-immolation of Mohammad Bouazzizi, a Tunisian street vendor, in late 2010, the Middle East has been a site of contestation, with rulers and ruled struggling to shape structural relations across the state. Such struggles have seen groups marginalised and framed as threats amidst processes of securitization and, within the context of politically framed threats, regimes have suspended normal politics and implemented states of exception. While this has occurred in a range of guises across the Middle East, our focus here is on the

² Giorgio Agamben, *Homo Sacer* (Stanford: Stanford University Press, 1995)

³ Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005)

⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 1987, originally published in 1922).

Egyptian case, which provides a number of cases since the uprisings of emergency legislation being passed within the context of the state of exception.

Since the toppling of Hosni Mubarak in early February 2011, Egypt has endured a period of political uncertainty, characterised by the number - and nature - of different regimes. One such government led by the Muslim Brotherhood President Mohammad Morsi, was toppled by a military supported *coup d'état* in July 2013. One of the reasons for the toppling of the government was the consistency of legal structures, which allowed for aspects of Mubarak's 'deep state' to remain, ultimately contributing to the downfall of the Morsi government.

To this end, our paper traces the state of exception in Egypt since the final days of the Mubarak regime to 3rd July 2016 - the 3 year anniversary of the toppling of Morsi - using it a means to explore power dynamics during the pre-revolution, transitional, and post revolutionary phases. In order to do so, this paper uses Giorgio Agamben's development of the 'state of exception' as a means to track power dynamics throughout the country's turbulent recent history, with the overarching aim of tracing the development and implications of different Emergency Laws being imposed on Egypt during the past 5 years. To this end, we begin our exploration with an exploration of Agamben's state of exception before turning to providing a brief contextual background of Emergency Laws in Egypt. We then turn to an exploration of the state of exception under Mubarak, SCAF, the Muslim Brotherhood and Al Sisi. In doing this, we aim to provide an analysis of the legal structures that shaped Egyptian politics in the 5 years after events in Tahrir Square, while also adding to debates on the state of exception, particularly its application in the non-Western world.

The State of Exception

At the heart of our inquiry is the concept of the state of exception, a political-legal concept enshrined within the idea of sovereignty. It is a concept that appears superficially intuitive yet with a deeper analysis, the concept reveals incongruence and is perhaps best characterised by engaging with contradictions stemming from sovereignty and the blurring of the legal and illegal, public and private, state and law, peace and war, everyday life and norms, the political and the juridical. Difficulty in conceptualising the concept is not aided by a number of terminology issues, with some states referring to the condition as martial law, or, in the Egyptian case Emergency Laws, yet the sentiment behind such language is the same as the juridical blurs with the political and the legal with the illegal.

The idea of the state of exception is found initially within the work of the German scholar Carl Schmitt, whose ideas sought to explore ideas of sovereignty and power, perhaps best remembered by the idea that the sovereign is the one with the ability to decide the exception. For Schmitt and later Agamben, the two concepts are interrelated and as such, understandings of the state of exception are bound up within debates about sovereignty and

ultimately understanding political life generally. In his work, Schmitt makes distinctions between states of exception within Commissarial Dictatorships and Sovereign Dictatorships, which feed into two different understandings as to how the exception occurs and the intentions behind it. Yet for Agamben, the state of exception “is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other.”⁵ Articulated another way, the state of exception is “the preliminary condition for any definition of the relation that binds and at the same time abandons the living being to the law”.⁶

The ability to decide on whether a situation is normal or exceptional and ultimately whether the law applies or not - for the law must apply for a situation to be normal - demonstrates manifest sovereign power. In a move from Schmitt’s work, Walter Benjamin’s ‘Theses on the Philosophy of History’ argues that this state of exception is no longer solely the exception, but rather it has become the norm within political life and it is from this position that Agamben begins his exploration.

When considering the emergence of the state of exception, two positions emerge, the first, which situates the exception as something external, political and extra-judicial, and the second, which posits that the exception exists within the sphere of the juridical order. For Agamben, both positions are problematic

The state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order.⁷

Indeed, the emergence of the exception is grounded in conditions of necessity, which Agamben initially locates within the work of Gratian, who suggested that it is preferable not to sing or listen to the mass than to celebrate it in places where it should not be celebrated, unless it happens because of a supreme necessity, for necessity has no law”. Other examples of necessity are included in Agamben’s work, all grounded within a Christian, Western tradition, yet moving beyond this, it is possible to locate necessity within the Islamic tradition too.⁸ Necessity is important for the emergence of the exception as it contains within it the justification for action. This justification is grounded within the very fabric of the state, yet creates an anomie, or zone of indistinction. From this justification, the state of exception is then an “‘illegal’ but perfectly ‘juridical and constitutional’ measure that is realized in the production of new norms”.⁹

⁵ Agamben, 2005, Op. Cit., p23.

⁶ Ibid.

⁷ Ibid

⁸ Such a project is beyond the scope of inquiry, yet one possible way to do this is to refer back to the necessity of divinity.

⁹ Agamben, 2005, Op. Cit., p28

Of course, such conditions emerge as a consequence of structural facets of society and understanding such structural factors helps to engage with change within society.

the structure in which the state of exception [...] is realized *normally*. The sovereign no longer limits himself [...] to deciding on the exception on the basis of recognizing a given factual situation (danger to public safety): laying bare the inner structure of the ban that characterizes his power, he now de facto produces the situation as a consequence of his decision on the exception.¹⁰

The need to understand structural factors at the heart of political organisation is paramount, which Agamben devotes a great deal of time to unpacking. From this, it appears that the state of exception is grounded in the revolutionary-democratic tradition and from it, within Western democracies, this is our point of departure from Agamben's position. The mechanisms of law and politics that necessitate suspension in order for a state of exception to come into existence also operate within Egypt and this article aims to show that Agamben's work - and that of Schmitt - can also be applied to both the non-Western world and to authoritarian states. Although Agamben roots the state of exception in ideas of necessity found within the Christian tradition, such ideas of necessity can also be found within the idea that faith is necessarily conducted. Moreover, the acknowledgement that necessity implies subjectivity provides scope for application in different contexts, particularly as the conditions within which the sovereign determines that a state of exception is necessary are constructed by the sovereign in practice.

Agamben also stresses that such an exception must only be found within the democratic tradition and the embedding of the rule of law, which allows for the blurring of the legal and illegal; after all, such moves would be futile under an authoritarian ruler for whom the rule of law is initially suspended. In addition to the exploration of the state of exception within contemporary Egyptian history, our project also seeks to stress that the concept of the state of exception can also be applied to Egypt and with it, to certain authoritarian systems of government and indeed, the non-Western world broadly. While we do not seek to essentialise ideas of statehood across the world, there are a number of commonalities that support the idea that such a project is viable.

As Wael Hallaq suggests, there are 5 form properties possessed by modern states that are imperative for political organisation to be considered as a state. For Hallaq these are: its constitution as a historical experience; its sovereignty and ensuing metaphysics; its legislative monopoly; its bureaucratic machinery; and its cultural hegemonic engagement with the social order.¹¹ The acceptance of such a position provides an entry point for engagement with Agamben's ideas in the Muslim world and, for our inquiry, Egypt. Indeed, of these 5 form properties, Egypt possesses all 5, although it is in the metaphysical experience and cultural hegemonic engagement with the social order that the state differs from those considered by Agamben.

¹⁰ Ibid., p170

¹¹ Wael Hallaq, *The Impossible State* (New York: Columbia University Press, 2013) p23

Within the context of these 5 characteristics, two are of particular importance in our exploration, helping provide greater awareness of the conditions that can give rise to the state of exception. First, the metaphysics of state serves as both empirical and ideological grounding for exploration, facilitating awareness of institutional organisation and also the ideology at the heart of the construction of such institutions. Such a metaphysical position is then encapsulated within the concept of sovereignty that is both internal and external, a zone of indistinction itself. Identifying this empirically and ideologically helps to articulate the conditions that give rise to both the sovereign, which “gives birth to law”¹² but also the state of exception itself. Indeed, Hallaq’s definition of a state contains within it the very notion of the state of exception.

The second concept is cultural engagement, which provides the conditions through which ideas and the state of exception can thrive. The journey from colonialism to independence - and having overthrown the yoke of oppression - is a prominent feature of the state of exception, helping to establish the state and with it, the embodiment of law.¹³ Building upon this, exploration with the conditions and cultural relations that manifest in the state help to shape the nature of its legal system and, ultimately, the state of exception. When combined, these two concepts help to explore the nature of the state of exception and the relationship that regimes have with peoples. We then seek to consider these two concepts within the context of the state of exception in four different cases. To this end, we seek to offer a genealogy of the concept of the state of exception within Egypt since the onset of the uprisings. We consider the nature of rulers and the construction of particular threats, to understand the conditions within which the state of exception is applied. The concept of the state of exception then provides an analysis of the structural conditions within which agency operates and identifying these structures provides scope for greater discussion of agency within particular timeframes. As such, this paper helps to do two things: 1) to better understand the nature of Egyptian politics after the Arab Uprisings along with the seemingly transient nature of threats and 2) to demonstrate the application of the state of exception in the non-Western world.

State of Exception and Modern Egyptian History

The almost uninterrupted existence of various states of exception is arguably one of the defining characteristics of contemporary Egyptian history. Across the 20th century, the imposition of martial law - then emergency law - has characterised political eras and shaped the security landscape. To understand the prominence of such processes, we must return to the British occupation in World War 1, where the first instance of such a move was Martial Law No. 15/1922, imposed for the first time in 1914. British Martial Law stayed in place until

¹² Ibid., p29

¹³ It is worth stressing that Hallaq argues that the Islamic state is an impossible state, yet in considering the cultural engagement, one can ground state experience within the context of being shaped by Islam.

1922, after Egyptian authorities passed a law that granted the United Kingdom protection from any civilian or criminal responsibility for actions committed during the previous four years.¹⁴ After 1922, the country lived free from any such legal restrictions for almost 17 years, until World War II broke out, when once again, Martial Law would restrict action in Egypt until the end of the conflict in 1945. Martial Law was declared for a third time by Egyptian authorities in May 1948 with the desired aim of protecting Palestinians against the Israeli Invasion. Law No. 15/1922 was amended into Law No. 73/1948, holding that it was permissible to declare a state of emergency to ensure the safety of the Egyptian Army in Palestine.¹⁵ These episodes merely set a precedent for what was to come, as it was the Nasser Era that established the seemingly unbreakable link between governance and State of Exception in Egypt, ostensibly as a means of restricting action and ensuring the safety of the ruling elite.

In July 1952, while under Martial Law No. 73/1948, the Free Officers Revolution broke out, yet Gamal Abdel Nasser and his companions did not need to declare a state of emergency in order to secure themselves and achieve their goals, thanks to the popular support that came with the removal of the British-supported monarchy. Emergency Law No. 162/1958, which would come to determine the development of the country's history up until the 2011 Uprisings, was applied for the first time in 1967 during the Six Days War and the country has remained under an almost uninterrupted state of exception ever since. What makes Law No. 162/1958 pivotal in understanding the implications of a continuous state of emergency in Egypt is its inclusion in the 1971 Constitution, which ruled the country until Mubarak's removal and has since being used by both the Morsi and Al Sisi's administrations as a blueprint for their own constitutional declarations. In particular it is article 148 of the 1971 Constitution that really allows for a state of exception to *de facto* rule the country undisturbed, as it gives the presidency power to declare a state of emergency whenever it sees fit without imposing a time restriction on it, aside for saying that extensions granted by the legislative bodies would be required after the first 15 days.

"The President of the Republic shall proclaim a state of emergency in the manner prescribed by the law. Such proclamation must be submitted to the People's Assembly within the following fifteen days so that the Assembly may take a decision thereon. In case of the dissolution of the People's Assembly, the matter shall be submitted to the new Assembly at its first meeting. In all cases, the proclamation of the state of emergency shall be for a limited period, which may not be extended unless by approval of the Assembly."¹⁶

Together with Art. 148, Law No.162/1958 authorized the president to "restrict freedom of assembly, detain suspects for up to six months without a hearing, and conduct searches

¹⁴ "Egypt and the Impact of 27 Years of Emergency on Human Rights", <http://en.eohr.org/2008/05/28/%E2%80%9Cegypt-and-the-impact-of-27-years-of-emergency-on-human-rights%E2%80%9D/#more-22>

¹⁵ Ibid.

¹⁶ Egyptian Constitution of 1971 <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/34111/67289/F-39389390/EGY34111.pdf>

without a warrant during a state of emergency”, essentially granting the presidency undisputed powers.

Other articles contained in the 1971 Constitution allowed the state to further misuse extraordinary powers in times of crisis without the necessity of declaring a state of emergency. For example, Art. 74 authorises the president to enact extraordinary measures “should there emerge an instant and grave risk that threatens national unity or safety of the motherland or obstructs the performance by State institutions of their constitutional role”, also requiring the presidency to hold a referendum on such actions within 60 days.¹⁷ Historically, the emergency clause contained in Art. 148 has been crucial in maintaining Egypt under an almost uninterrupted state of exception since 1967. Although briefly lifted by President Anwar Sadat, it was quickly reinstated after his assassination and was routinely extended in the following three decades under Mubarak’s presidency.¹⁸ Egypt was ruled with an uninterrupted state of exception from 1981 to February 2011 and Walter Benjamin’s comment about living in a perpetual state of exception appears to ring true. Having established the conditions under which emergency laws were established, we now explore their manifestation within post Arab Uprisings Egypt.

The Mubarak Era

Hosni Mubarak was appointed president following the assassination of Anwar Sadat in 1981, and proceeded to re-impose the 1958 Emergency Law, taking advantage of the political chaos enveloping the country. Under the Emergency Law, state censorship was widespread, just as police power to incarcerate and detain prisoners without charges, and the undetermined suspensions of citizens’ constitutional rights.¹⁹ It should not come as a surprise that the status of the Emergency Law was one of the main grievances behind the outbreak of the 2011 uprisings.²⁰ While his powers grew, Mubarak became increasingly concerned about individual and regime security and, over the course of a 30 year rule, this eventually led to his downfall. The short-lived political openness characteristic of the first years of Mubarak’s rule gave place to a flawed electoral system that allowed the ruling National Democratic Party (NDP) to regularly defeat its opponents, mirroring what happened during the previous regimes, and turning Egypt into a one-party state in all but name.²¹ The subsequent record of widespread torture and Human Rights’ violations undoubtedly added to the growing

¹⁷ Ibid.

¹⁸ Marsot, A., *A History of Egypt: From the Arab Conquest to the Present* (Cambridge: Cambridge University Press, 2007), pp. 165-170

¹⁹ Schenker, D., “Egypt’s Enduring Challenges”, *The Washington Institute for Near East Policy*, Policy Focus No. 110, p. 3

²⁰ Madrigal, A., “Egyptian Activists’ Action Plan: Translated”, *The Atlantic*, 27 January 2011

<http://www.theatlantic.com/international/archive/2011/01/egyptian-activists-action-plan-translated/70388/>

²¹ Zahid, M., “The Egyptian nexus: the rise of Gamal Mubarak, the politics of succession and the challenges of the Muslim Brotherhood”, *The Journal of North African Studies*, Vol. 15, No. 2, (2010), pp. 217-219

resentment and grievances of the Egyptian Population, but censorship and state control limited political space and the expression of such grievances.²²

Several Human Rights groups recorded and condemned the escalation of human rights during Mubarak's rule, perpetrated under the guise of "emergency measures". Relying on a interpretation of terrorism painted with a very broad brush, Mubarak used the imposition of a perpetual state of exception as a means to suppress his political adversaries, such as the Islamist group Muslim Brotherhood, and to slowly erode the very concept of citizenship and all the rights that came with it. That is the case as, under a state of exception ruled by the 1971 Constitution, police powers were extended, censorship became the norm, along with the suspension of constitutional rights.²³ Articles 54 to 56, regulating freedom of assembly, came to embody the extent to which the government was transcending its own powers, as they stated that "Citizens shall have the right to association as defined in the law. It is prohibited to establish societies whose activities are hostile to the social system, clandestine or have a military character is prohibited." and "Public meetings, processions and gatherings are allowed within the limits of the law."²⁴ However, under a state of emergency, the laws concerning freedom of assembly, speech, and public gatherings were made to drastically restrict the already narrow political space, prohibiting gatherings of more than five people and leaving little to no room for non-governmental political activities. In particular, they allowed for the indefinite detention without trial and hearings of civilians by military courts,²⁵ something that is now mirrored in the Constitution that was approved in 2014 by the Al Sisi government.

This meant that under a state of exception, the Mubarak government was allowed to imprison and detain its own citizens for any unspecified period of time, and with little to no justification. Interestingly enough, this also happened under Nasser in very similar circumstances, and is one of the core characteristics of Al Sisi's rule today. Citing the supposed threat posed by terrorism, Mubarak kept referring to the potential danger represented by Islamist groups such as the Muslim Brotherhood should they have seized power, which led to their brutal repression and persecution. In turn, this also led to the imprisonment of activists without trial, widespread reports of torture and breaches of human rights, all of which went on for almost three decades, therefore fuelling the popular rage behind the outbreak of the 2011 Uprisings. The Human Rights group "The Human Rights Association for the Assistance of Prisoners" (HRAAP) reported in 2007 that under this law, an estimated 15,000 to 20,000 were being held without trial, in some cases for as long as two

²² Human Rights Watch, *World Report 2010: Egypt* <http://www.hrw.org/world-report-2010/egypt>

²³ Kassem, M., *In the Guise of Democracy: Governance in Contemporary Egypt* (London: Garnet & Ithaca Press, 1999), pp. 57-58

²⁴ Egyptian Constitution of 1971

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/34111/67289/F-39389390/EGY34111.pdf>

²⁵ Williams, D., "Egypt expands 25 Years Old Emergency Law", *The Washington Post*, (May 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/30/AR2006043001039.html>

decades.²⁶ Similarly, Amnesty International reported that in 2010 alone between 5,000 to 10,000 people were being held in long-term detention without any charge, while approximately 17,000 more were being detained under law, and the average estimate of political prisoners was as high as 30,000.²⁷ Once again, as it will be shown later, Al Sisi's regime follows a very similar conduct, with the only difference being numbers and statistics being much higher and worrying than those recorded during Mubarak's time.

Moreover, throughout Mubarak's Presidency, the Emergency Status that was allowing all the breaches of human rights mentioned above to take place was routinely renewed every three years. Mubarak had promised to lift Law No. 162/1958 in 2006, following the escalation of popular discontent, and vowed to replace the State of Emergency with more appropriate legislations, such as a specific anti-terrorism law.²⁸ However, the President never kept his promise, and on 30th April 2006 the People's Assembly released the following statement, extending Law 162/1958 once again: "The state of emergency is extended according to decision No. 560 of 1981, as mentioned above, for two years from the first of June 2006 to 31 May 2008 or until the issuance of the new terrorism law. The Prime Minister mentioned the reasons and motives to extend the state of emergency. He indicated that fighting terrorism is not accomplished by normal procedures, but private rules need to be enacted to strike a balance between the nature of terrorist crime and the rights of citizens."

Despite the fact that the above decision was met by widespread popular protests, the country continued to be ruled by a government that had installed a state of exception and operated within this zone of indistinction to maintain its power. Therefore, when looking at the outbreak of the 2011 Uprisings, the fact that the abolition of Emergency Law was one of the revolutionaries' main demand should not come as a surprise.

The SCAF Era

When attempting to identify and understand the drivers behind the outbreaks of the 2011 Uprisings that (at least temporarily) toppled Mubarak's deep state²⁹, it is worth considering Samera Esmair's interpretation of the events. She argues that the 2011 Uprisings should be understood as a "state of exception" themselves, in the sense that they replaced the pre-existing state of exception by bringing about "a suspension of the grounds of legitimacy of both the Egyptian state and the Constitution".³⁰ Esmair traces the succession of several, different states of exception leading up to the events of 2011, the original one being the response of the regime to its worsening legitimacy crisis, which created the normalisation of

²⁶ Human Rights Association for the Assistance of Prisoners, "Detention and Detainees in Egypt 2003" (Cairo, 2003), p. 18

²⁷ Amnesty International Public Statement, "Egypt: Keep Promise to Free Detainees by End of June", (June 2010) <https://www.amnesty.org/en/documents/MDE12/027/2010/en/>

²⁸ Williams, D., *op.cit.*

²⁹ <http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html>

³⁰ Mavelli, L., Petito, F., (eds.), *Towards a PostSecular International Politics: New Forms of Community, Identity, and Power* (New York: Palgrave MacMillan, 2014), p. 171

“an illusory state of emergency that authorised the regular adoption of ‘exceptional’ measures by the state’s security apparatus”.³¹ Throughout the Mubarak era, emergency laws had given the state and the police forces an extraordinary array of powers, resulting in the widespread and systematic use of torture, which had essentially turned the country into a police-state. Therefore, according to Esmair, “the revolution shifted the definition of the exception from the grounds of normalised security-driven legalities, which were the Egyptian State’s technologies of rule, to the self-organised plural groups working collectively on the ground and laying claims to the present and the future of Egypt”.³² Accordingly, the slogan “the people want the fall of the regime” embodied the presence of a newly found unity and call for collective action that challenged Egypt’s historical factionalism, which during the revolutionary “state of exception” was blurring the gap between Islamism-oriented opposition groups and secular ones that had always polarised the country’s politics.³³

This revolutionary “state of exception” was short lived, as the historical difference in experiences between secular and religious opposition groups made dialogue an arduous task and Mubarak’s deep state returned in the form of the Supreme Council of the Armed Forces (SCAF). Upon assuming control of the country after Mubarak’s resignation in February 2011, the SCAF released a statement in which it vowed to oversee the country during its democratic transition, to set up free and fair presidential elections, and promised “to end the state of emergency as soon as the current circumstances are over”.³⁴ Nevertheless, an article allowing the state to call for a state of emergency in an unrestrained way once again was included in the constitutional declaration that the SCAF released on the 30th March 2011, which mirrored the constitutional amendments made by Mubarak in 2007. In both the 2007 constitution and in the 2011 constitutional amendment, it is stated that general law is to be used in determining the way in which a state of emergency is declared, with article 59 of the 2011 document stating that “ The president of the republic, after taking into account the opinion of the cabinet, can announce a state of emergency as stipulated in law.”³⁵

Moreover on 13th June 2012, just two weeks before SCAF’s pledged hand over of power to an elected government, the Council released Decree 4991/2012, detailing a series of amendments to the Penal Code that made human rights activists fear the creeping back of a Mubarak-era state of emergency.³⁶ The release of the Decree so close to the country’s first free Presidential elections also casted doubts over the credibility of the SCAF’s stated intention of transferring power to a democratic government, and fuelled the revolutionaries’

³¹ Ibid.

³² Ibid.

³³ Hirschkind, C., “New Media and Political Dissent in Egypt,” *Revista de Dialectología y Tradiciones Populares*, Vol. LXV, No. 1, (2010), pp. 138–139

³⁴ “Statement from the Supreme Council of the Egyptian Armed Forces”, *The New York Times*, (February 2011) http://www.nytimes.com/2011/02/11/world/middleeast/11egypt-military-statement.html?_r=0

³⁵ Egypt Interim Constitution, 2011

<http://aceproject.org/ero-en/regions/mideast/EG/egypt-interim-constitution-2011/view>

³⁶ Zwitter, A., “The Arab Uprising: State of Emergency and Constitutional Reform”, *ASPJ Africa & Francophonie*, Vol. 2., (2014), p. 51

suspicions that it would not prevent the military establishment from remaining a key player in the country's political administration, which the 2013 *coup* demonstrated. Decree 4991/2012 granted military forces judicial power of arrest and detention of civilians, therefore invoking extraordinary powers not supported by general law, and representing a clear circumvention of the formal termination of the state of emergency. Crimes that were included under the military forces' new power of arrest and detentions were "Misdemeanors and felonies harmful to government security, whether internally or externally," "explosives," "resistance to the authorities, non-compliance with their orders, and addressing them through verbal abuse or other means," and "causing damage to buildings, historical monuments and other public property", and "disrupting traffic and transportation," in addition to "obstructing work in public interest facilities, and violation of the freedom of work," and, finally, "terrorization and intimidation – thuggery".³⁷ Essentially, this gave the SCAF scope to hold on to power even longer, and to prevent the rise of even more protests which would have negatively impacted on their intention to not relinquish power.

Nevertheless, several Human Rights organizations, united under the Cairo Institute for Human Rights Studies, were quick to denounce and protest the dangers to democracy and freedom of expression posed by this Decree, as many of the 'crimes' listed above "fall within the lawful rights of all Egyptians to peacefully express political opinions in opposition to the regime, to demonstrate and strike, or to demand the amendment of laws or even constitutional provisions."³⁸ Moreover, they also noted that many of the legal provisions listed in Decree 4991/2012 were almost impossible to define legally, and that a similar strategy had previously been used by the Mubarak administration as a way to cut citizen's rights to peaceful association and to suppress both political and social actions. Their concern can be summed up in their final statement, reading "This decree is much worse than the restrictions and violations for which the State of Emergency provided a legal basis. If tens of thousands were arrested and tortured and some of them killed under the banner of the Emergency Law, this new decree will provide a legal shield for army intervention in the daily life of Egyptians".³⁹

The Muslim Brotherhood Era

Mohamed Morsi was sworn in on 30th June 2012, as Egypt's first democratically elected president and as a representative of the first Islamist organization ever gaining power in the region through a democratic process. While his election was seen by many as the new beginning the country needed in order to kickstart the transition to democracy, almost half

³⁷ Cairo Institute for Human Rights Studies, "Welcome to the Military State of Egypt: Minister of Justice Decree More Repressive than State of Emergency, Grants Military Police and Military Intelligence Judicial Authority to Arrest Civilians", *Statements and Position Papers*, (June 2012), <http://www.cihrs.org/?p=2846&lang=en>

³⁸ *ibid.*

³⁹ *ibid.*

of the Egyptian population was also concerned about an Islamist organization gaining power, fearing the rise of sectarian tensions and exclusion along religious lines. While these concerns did not seem to manifest themselves, it soon became clear that the newly elected president was facing strong opposition from the military establishment and remnants of Mubarak's deep state, which were refusing to relinquish power. The political struggle between these two entities meant that the first few months of Morsi's presidency were characterised by the enforcement of various decrees that were aimed at limiting the powers of the military, and at annulling the controversial constitutional amendments enforced by SCAF in the lead up to the final round of presidential elections.⁴⁰ Therefore, throughout the summer of 2012 it appeared that Mohammed Morsi was indeed striving to be the "people's president" and to stand his ground as the first Egyptian president with no affiliations to the military establishment. However, the historical struggle for power between the Muslim Brotherhood and Mubarak's deep state was still far from being over.

Throughout the first few months of Morsi's presidency, it seemed like the threat of the return of a Mubarak-era state of emergency that had been the Egyptian revolutionaries' damocles sword since SCAF's assumption of power had been fought off for good. However, the country was still without an operating constitution nearly 18 months after Mubarak's removal, which coupled with the never ending tensions between the presidency and the Army, led to Morsi releasing a constitutional decree on 22nd November 2012. The decree expanded the presidency's legislative and judicial authorities, essentially granting Morsi sweeping powers, and making a return to yet another period of state of exception a very likely possibility. This is because of what was stated by Article VI of the decree, reading "The President may take the necessary actions and measures to protect the country and the goals of the revolution.", which sounded worryingly similar to the infamous Art. 148/1971 discussed in details above.⁴¹ As one might expect, the Muslim Brotherhood and the presidency attempted to justify the decree as the only way to overcome the country's political deadlock, and as a necessary step to achieve "revolutionary demands and rooting out remnants of the old regime", but the spiralling back into yet another state of emergency was far from being over.⁴²

Popular sit-ins and marches in opposition to the new Constitution started soon after the announcement of the Constitutional decree, but it was not until December 1st 2012, when Morsi manifested his intention to go ahead with the drafting of the document and called for a popular referendum to take place on December 15th, that Egypt's internal situation started getting even more tense. On December 5th, thousands of demonstrators gathered in Tahrir Square and outside of the presidential palace, and were soon caught in violent clashes with

⁴⁰ Fahim, K., "In upheaval for Egypt, Morsi forces out military chiefs", *The New York Times*, 12 August 2012, <http://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html?hp>

⁴¹ Ahram Online, "English Text of Morsi's Constitutional Declaration", *Ahram Online*, November 2012 <http://english.ahram.org.eg/News/58947.aspx>

⁴² Revkin, M., "Egypt's Untouchable President", *POMEPS Briefings: The Battle for Egypt's Constitution*, (January 2013), p. 13

the police forces, in what will be remembered as “the battle of Ittihadiya”. Over the course of four days, protesters and military forces clashed repeatedly, leading to thousands being injured and over 50 deaths, which kickstarted a series of riots that resembled those of 2011.⁴³ Despite the Constitution passing through a referendum with 64% of the popular vote on 15th December 2012, the country grew increasingly divided, while protests against Morsi’s government kept gaining more momentum each and every day.⁴⁴ This led to the presidency declaring the official return of a state of emergency on 27th January 2013, with Morsi publicly stating “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”.⁴⁵ In essence, Morsi was following the pattern set up by his predecessors, and resorted to extreme measures when he felt power slipping away from him, while being seemingly unaware of the implications and consequences that such actions would have.

In a televised speech, Morsi declared that the state of emergency was to last for 30 days, and was restricted to the three canal cities of Suez, Ismailia and Port Said, marking the return to his predecessor’s most despised weapon of autocracy.⁴⁶ However, this extreme measure did nothing to stop the riots in the street and, if anything, fuelled even more the popular grievances that led to the July 2013 Coup, in an historical series of events that much resembled those leading to Mubarak’s ousting in 2011.

The Al Sisi Era

The first democratically elected Egyptian President, Mohamed Morsi, was deposed by a *coup d’état* led by the armed forces on 3rd July 2013, following popular protests that took the name of the “June 30” revolution. Among the factors that contributed to the popular discontent at the Muslim Brotherhood’s rule were the organization’s tendency to monopolise political power by expelling and ostracizing the opposition, the further deterioration of the economy and living conditions, and the controversial makeover of the constitution.⁴⁷ President Abdel Al Sisi, the man who deposed Morsi and swore to bring Egypt back on the path to secular democracy, took official office in the midst of the worse Human rights crisis that the country has ever known. It needs to be taken in mind that the Egyptian

⁴³ “Egypt Crisis: Fatal Cairo Clashes Amid Constitution Row”, *BBC News*, 6 December 2012, <http://www.bbc.com/news/world-middle-east-20605134>

⁴⁴ “Egyptian Constitution approved in referendum”, *BBC News*, 23 December 2012, <http://www.bbc.co.uk/news/world-middle-east-20829911>

⁴⁵ “Egypt’s Morsi declares ‘state of emergency’”, *Al Jazeera*, 28 January 2013, <http://www.aljazeera.com/news/middleeast/2013/01/2013127195926600436.html>

⁴⁶ Kirkpatrick, D., “Egypt’s leader declares state of emergency in three cities”, *The New York Times*, 27 January 2013, http://www.nytimes.com/2013/01/28/world/middleeast/morsi-declares-emergency-in-3-egypt-cities-as-unrest-spreads.html?_r=0

⁴⁷ Stork, J., “Egypt: painting ‘terrorism’ with a very broad brush”, *Human Rights Watch*, 5 May 2014, <http://www.hrw.org/news/2014/05/05/egypt-painting-terrorism-very-broad-brush>

population is no stranger to human rights abuses, as the lack of freedom of speech, perpetual state of emergency, indiscriminate police abuses and torture, were amongst the main drivers behind the outbreak of the 2011 revolution. However, 3 years on, the state of human rights in Egypt has not bettered but it is consistently deteriorating instead. Al Sisi's rule has witnessed a systematic escalation of violence and authoritarianism rather than the democratic reforms that Egypt's new leader promised upon the removal of Muslim Brotherhood's president Mohamed Morsi. Hassiba Hadj-Sahraoui, deputy director for the Middle East and North Africa at Amnesty International, summarised the country's current situation by declaring "Instead of addressing the urgent need for reform, Egyptian authorities have spent the last year engaging in repression on a scale unprecedented in Egypt's modern history".⁴⁸ Over the course of the past year the newly installed government has imposed heavy restrictions on freedoms expression, associations, and assembly which, coupled with escalation police brutality and repression, completely undermines and erases the gains made after the January 25, 2011 revolution. Three years after Hosni Mubarak's ousting, everything seems to indicate that the Egyptian revolution and its results have been forgotten.

After the *coup d'état*, the Egyptian Constitution issued under Morsi's presidency was suspended, having ruled the country for just over 6 months. The appointed interim president, Adly Mansour, issued a provisional constitutional declaration containing 33 articles, which was meant to remain in place in force until the preparation of a revised constitution on the basis of the 2012 document.⁴⁹ Taking the 2013 Constitutional declaration as the beginning of the transitional period, it meant that the document released by Adly Mansour was meant to rule the country for at least 6 months. According to the declaration, the presidency held legislative authority, as well as being entitled to approve state policy and budget. Moreover, Art. 154 stated that "The President of the Republic declares, after consultation with the Cabinet, a state of emergency in the manner regulated by law.", failing yet again to restrict the presidency's ability to seize powers whenever it was deemed fit.⁵⁰ Therefore it did not come as a surprise when Adly Mansour declared a state of emergency on 14th August 2013, just a month after Morsi's removal, following clashes between Islamist supporters and police forces that led to approximately 149 deaths.⁵¹ In a statement released by the presidency, it was said that the state of emergency was to last at least a month, and that Adly Mansour "has tasked the armed forces, in cooperation with the police, to take all

⁴⁸ "Egypt: New Leader Faces Rights Crisis", *Human Rights Watch*, 9 June 2014, <http://www.hrw.org/news/2014/06/09/egypt-new-leader-faces-rights-crisis>

⁴⁹ "Egypt's Constitutional Declaration Issued, Defines Transitional Period", *Ahram Online*, July 2013 http://english.ahram.org.eg/NewsContent/1/64/76065/Egypt/Politics-/Egypys-constitutionaldeclaration-issued_-defines-.aspx

⁵⁰ Full Text of the July 2013 Egyptian Constitutional Declaration," in *Carnegie Endowment for International Peace*, <http://egyptelections.carnegieendowment.org/2013/07/15/full-text-of-the-july-2013-egyptian-constitutional-declaration>

⁵¹ "Egypt Declares State of Emergency", *Al Jazeera*, 14 August 2013, <http://www.aljazeera.com/news/middleeast/2013/08/201381413509551214.html>

necessary measures to maintain security and order and to protect public and private property and the lives of citizens".⁵² Once again, it appeared that the people of Egypt were permanently existing under emergency law.

The new Egyptian constitution was approved through a referendum in January 2014, but since then amendments keep being made to the original document. What the foreign minister Nabil Fahmy defined "a very significant transformation, especially on issues of civil liberties", is quickly becoming a document that allows for authoritarian measures to be the norm once again.⁵³ Under the banner of the "war against terrorism", the constitution produced by the July 3rd authorities marks a clear growth in authoritarian measures and paves the way for yet another military dictatorship to envelop the country. The definition of "terrorism" under the new Egyptian anti-terrorism law is in fact extremely broad, and includes any "act" that might obstruct the work of public officials, institutions, embassies and so on. This catch-all language and new counter-terrorism measures could target anyone who joins peaceful protests or takes part in a strike, and authorises a prison sentence up to ten years for anyone who is part of a group that "harms national unity or social peace".⁵⁴ To put things into perspectives, this includes all of those who participated to the 2011 revolution and even supported the June 30 events that led to Al Sisi's triumph, which could all face convictions under this catch-all language. Approved articles allows for the trial of civilians in military courts, while another amendment to the penal code allows for the detention of a prisoner without seeing an prosecutor or judge for 72 hours that can even be extended to one week.⁵⁵ Moreover, anti-terrorist amendments also makes it an offence to possess or disseminate any media that appears to support anything falling under this disturbingly vague definition, which could include internet pages and viewed on a computer and smartphone.⁵⁶

As previously articulated, many of these articles and measures were not new to Egyptians nor original to the Al Sisi's government, as they much resemble actions taken by both Mubarak and Nasser before him. This goes back to the idea of a clear pattern being present throughout Egypt's modern history when it comes to the enforcement of a state of emergency, with presidents and autocrats relying on the same techniques and core texts/laws when it comes to seizing and maintaining power. This also further strengthens the link between the scope of this article and Agamben's theory, as it is a very clear example of how the existence of a State of Emergency has come to be normalised in an Egyptian context, as is embedded in both bureaucratic and (at least apparently) democratic practices, and has at the same time come to be almost expected by the population itself.

⁵² *ibid.*

⁵³ Stork, J., *op.cit.*

⁵⁴ <http://www.hrw.org/news/2014/05/05/egypt-painting-terrorism-very-broad-brush>

⁵⁵ *ibid.*

⁵⁶ *ibid.*

This table exemplifies just how much the juridical and bureaucratic practices behind the imposition of Martial law share throughout Egyptian recent history:

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

Table ⁵⁷

Similarly, anti-terrorism measures are recurrent factors, as the state of emergency Law No. 162/1958 issued after the assassination of President Anwar Sadat in 1981 ruled the country for more than 3 decades and was one of the main sources of discontent that provoked the outbreak of the 2011 Revolution. In 1992 during an Islamist insurgency, the government enforced a law against terrorism that allowed for detention without right to refer to prosecutor for anyone who was suspected of being affiliated to a group that fell under the broad definition of terrorism, which sounds scarily similar to that proposed by the current

⁵⁷ Zwitter, A., "Egypt's State of Emergency Revisited", *Constitution Making and Constitutional Change*, <http://constitutional-change.com/egypts-state-of-emergency-revisited/>

Egyptian government.⁵⁸ Under this law an estimated 15,000 to 20,000 were held without trial, in some cases for as long as two decades.⁵⁹ Similarly, an estimated 41,163 Egyptians were arrested in the period between July 3, 2013 and May 15, 2014, including 36,478 detained during political events and a further 3,048 arrested as members of the Muslim Brotherhood. According to lawyers at ECESR (Egyptian Centre for Economic and Social Rights), only a quarter of these prisoners have been released.⁶⁰ These numbers are unmatched in Egyptian history. Moreover, the state of emergency law was enforced once again by then temporary president Adly Mansour in November 2013, together with the controversial and restrictive assembly law (Law 107 of 2013 on the Right to Public Meetings, Processions and Peaceful Demonstrations based) that effectively replicate the lack of freedom of speech under Mubarak's dictatorial rule.⁶¹ This law goes against international standards, as it gives authorities the power to disperse any meeting of "public nature" of more than 10 people in a public space, allows police to forcibly disperse any public meeting or protest, and sets heavy prison sentences for vague offences such as "attempting to influence the course of justice".⁶² Once again, this law evokes the Illegal Assembly law of 1914, (Law 10 of 1914, and Public Assembly Act No. 14 of 1923), which police under Mubarak used to ban public protests.⁶³

Conclusion

At the beginning of this article we set out to explore structural factors within Egypt that remained in place across the 5 years of transition in Egypt, through the use of the state of exception. The Egyptian case appears to be a paradigmatic example of the use of the state of exception within the non-Western world. While the application of Agamben's state of exception within a non-Western context remains underexplored, the Egyptian case, across a number of different regimes, offers an example of how within the context of a political system, albeit authoritarian in character and non-Western, the state of exception can be mobilised for similar reasons. In this article we have shown how events in modern and recent Egyptian history lend themselves to be analysed and explained through the lens of Agamben's concept of the "state of exception", particularly so because of the structural factors that have resulted the practice across Egyptian history. Moreover, we have shown how the normalisation of the State of Exception can be understood as one of the main characteristics of modern Egyptian regimes, with its imposition being embedded in both

⁵⁸ The official name of Law 97/1992 is the Law Amending Some Provisions of the Penal Code, the Criminal Procedure Code, the Law Establishing the State Security Courts, the Law on Secrecy of Bank Accounts, and the Law on Weapons and Ammunition. For some of the provisions, see the Egypt chapter in Human Rights Watch, *World Report 1996*, p. 271

⁵⁹ Human Rights Association for the Assistance of Prisoners, "Detention and Detainees in Egypt 2003", Cairo 2003, p.18

⁶⁰ Aiena, C., "The Never-ending Story of Egypt: Al Sisi and the Military Legacy", *Islamic Human Rights Commission*, 18 July 2014,

<http://www.ihr.org.uk/publications/briefings/11123-the-never-ending-story-of-egypt-al-sisi-and-the-military-legacy>

⁶¹ Stork, J., *op.cit.*

⁶² "Egypt: Deeply Restrictive New Assembly Law", *Human Rights Watch*, 26 November 2013,

<http://www.hrw.org/news/2013/11/26/egypt-deeply-restrictive-new-assembly-law>

⁶³ *ibid.*

democratic and legal traditions, while being characterised by a constant blurring of legal and illegal practices. It is the blurring of concepts that has resulted in a seemingly continuous state of exception that finds traction amongst the Egyptian public.

Of course, questions must be raised as to the extent to which Agamben's work, written with a particular reliance upon Western ideas, can be applied to the non-Western world. We have attempted to show that the metaphysics of a state - and characteristics within this - mean that the concept can be applied beyond the Western world. Undeniably, this is an important area that requires a great deal of further exploration, which is beyond the scope of our inquiry. What we do hope to have done, however, is to demonstrate that the concept of the state of exception possesses a strong explanatory power in the non-Western world. In the Egyptian case, what becomes apparent is that the law has increasingly been used as a tool of the powerful, as a disused object, picked up to serve the purpose of regime survival, whatever the price.

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