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Rethinking Executive Supremacy during Times of Crisis in Egypt

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Rethinking Executive Supremacy during Times of Crisis in Egypt

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Rethinking Executive Supremacy during Times of Crisis in Egypt^{*}**

I. Introduction

Recent political and legal developments within the Arab world have resurrected previously dormant historical debates and endowed them with a new life and vitality. The doctrine of a separation of powers has been prominent within these debates, being repeatedly reasserted, and even celebrated, as a means through which political authority may be appropriately dispersed and distributed. These ongoing developments bring to mind Hannah Arendt's *Between Past and Future: Eight Exercises in Political Thought*, which assigned political crisis in the questioning of the human condition, along with the various obstacles that impede its fuller realization.

The series of political developments that occurred in the aftermath of Mohammad Ben Azizi's self-immolation in 2011 clearly meet the threshold of 'political crises'. In the aftermath of this event, political authority within the region has been challenged to an unprecedented extent. In seeking to contribute to these ongoing developments, legal theorists and academics have sought to develop a constitutional theory that can be directly addressed to the crises that currently afflict the Arab world.

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^{***} This paper has been written as a draft to evaluate the general situation in Egypt in regard to the dynamics between the three branches and the army within the context of the emergency status; it was further developed to the paper "From Manshiya to Alexandria: Examining the process of rationalizing, constitutionalizing, and normalizing the Emergency status in Egypt" forthcoming in Spring 2019.

The persistence of authoritarian regimes in the Arab world presents a clear research puzzle to these academics. How can this persistence, taking unprecedented levels of political mobilisation into account, be explained? A number of explanations have been provided – weaknesses within opposition movements, insufficiently developed civil agencies and established hierarchies and patronage systems have all been proposed and put forward at different points.

In building upon Eva Bellin's contribution, this article instead begins from the proposition that the strange persistence of Arab authoritarianism can be attributed to 'the effective manipulation of political institutions' (Bellin 2012, 128). Conceivably, this manipulation could be theorized with reference to incumbent presidents, along with the huge preponderance of power in their hands. However, we could, with equivalent justification, turn to a number of other reference points. These include the suspension of civil liberties and political rights during political emergencies, the gulf between parliamentary representatives and their constituents and the fictional legitimacy derived from elections that are little more than a façade.

In taking the 'effective manipulation of political institutions' as its starting point, this paper seeks to contribute to wider constitutional debates. It critically appraises the Egyptian application of the separation of powers doctrine, with a view to establishing how this constitutional doctrine has been constructed and re-constructed. It offers an analysis

of Egyptian institutions, which seeks to identify how they responded to the 2011 public uprisings. It asks whether these institutions made a positive (e.g. succeeded in escaping structurally rooted roles) or negative (further accelerated or exacerbated an ongoing constitutional crisis) impact during the course of the uprisings.

The incumbent regime, which was the object of these popular protests, consisted of a centralized presidency and depoliticized institutions (Stacher 2012, 55). It was headed by Hosni Mubarak, who had been at its head for three decades (he came to power in 1981). Power had been concentrated in the presidency for a substantial period of time, with this feature having endured through successive presidencies (Nasser, Sadat (50) and then Mubarak) and ideological shifts (such as the shift from Pan-Arabism to nationalism). Executive centralism can therefore be appropriately described as an enduring feature of the Egyptian state. Throughout this period, there was always the danger that the President would exercise the executive prerogative at times of crisis, thus manipulating insecurity (real or perceived) with a view to increasing its own 'prestige, influence [and] political power' (Jenkin 2011, 556). This paper addresses itself to this problematic of Egyptian executive supremacy over the course of three chapters. The first chapter examines how the doctrine of a separation of powers is legally enshrined within Egypt's 2014 constitution, which also gives the President a range of exception-

nal powers, including the ability to dissolve parliament and veto parliamentary acts. This chapter focuses upon the historical development of each institution and seeks to explain its specific contribution to a wider constitutional process. Texts play a very limited role. The predominant emphasis is instead upon how these institutions function in practice.

The second chapter engages with the question of how powers were separated during the authoritarian and post-revolutionary periods. This is particularly important because it contributes an enhanced understanding of how the different branches interacted at particular points in time. This chapter therefore builds upon Levi's observation that a closer engagement with the historical dynamics between political institutions in the region can help to calculate 'the consequences of proposed realignment of government power and what may be lost in the process' (Levi 1976, 327). A more sustained engagement with the function of the legislature, the executive, the judiciary and the army can contribute considerable insight into the wider function or purpose of the government. It can also highlight how weaknesses within certain branches served to justify, and thereby perpetuate, executive supremacy.

The final chapter then engages with two practical elements that have substantially contributed to the perception that executive and presidential supremacy are increasing. The first element can be traced back to legality and the second originates within legitimacy. Legitimacy

can conceivably derive from a number of sources— the leader can present themselves within the lineage of predecessors, invoke national symbols or appeal to the antecedents of state authority (e.g. cultural or religious reference points). Alternatively, as this chapter demonstrates, it is possible that emergency status may well come to function 'as the new paradigm of government' in the expression of Georgio Agamben (2005).

II. The Separation of Power in the Post-Revolutionary Period

The doctrine which holds that power should be separated first emerged within a western context. Vile suggests that it should be viewed as a response to the question of how the government should be controlled. On this reading, the doctrine limits the exercise of power (Vile 2012, 2) by disaggregating or distributing it. Cooper strikes a more critical note when he suggests that the doctrine contributed to 'a governance structured based on compromise, not theoretical coherence' (1994, 362) – this, he maintains, was the final outcome of a system of checks and balances that 'hoped to restrain the ability of either to dominate' (2005).

In drafting this article, we deliberately sought to first engage the provisions that were put in place by the post-revolution constitution. Specific emphasis was placed upon the intended political system and the anticipated

functions of each branch. We then sought to address the question of how these branches functioned in practice during the 2014 uprisings. We arranged this for one main reason, in which we did not want to give rise to the misconception that the 2014 constitution directly derived from the practices of the respective branches during the uprising. On our reading, it was actually the opposite – the constitution provides one of the main justifications for the maintenance of executive supremacy and military supremacy.

On the 25th January 2011 the Egyptian people began to mobilize, 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.

Subsequent to a SCAF declaration, the 1971 Constitution was then suspended. When free 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. From the outset, its ability to represent social groups and interests was drawn into question – the majority of the Assembly were Islamists, and was dominated by their salfaists allies (Meyer-Resnde

2014, 6) and it only included four women. Far from addressing social tensions and unrest, it seemed just as likely that the new constitution would further inflame an already violent and deeply polarized political atmosphere (2014).

These concerns were given further credence when Morsi granted himself unlimited power in the name of 'the revolution' and made limited provision for judicial oversight (Haimerl 2014, 13) - the role of the Supreme Constitutional Court (SCC) was restricted to reviewing electoral laws passed by the parliament.¹ Article 132 of the 2012 Constitution establishes that the President is the guardian of the separation of power doctrine. Article 104 provided the President with the ability to veto parliamentary bills. 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.

In 2013, the SCAF intervened in the domestic political process again. General (now Field Marshal) Abdel-Fatah El-Sisi declared that Morsi was no longer the

¹ Article (177): "*The President of the Republic or the House of Representatives submit the bills that govern political rights as well as presidential, legislative, and local elections to the High Constitutional Court before issuing them, so that the Court may examine their constitutionality ex ante. It issues its decision on this matter within 45 days of receiving it. If the Court does not issue a ruling, the bill becomes law. If the Court rules that parts of the bill are unconstitutional, its ruling must be implemented. The laws referred to it for ex ante review are not eligible for the ex post review covered by Article 175 of the Constitution.*"

President, before issuing a ‘roadmap’ that contained three constitutional amendments that were directly addressed to three key issues: firstly, this Roadmap set out broader conditions for presidential candidates; secondly, it put in place fixed presidential terms; and finally it abolished the emergency status that had been in place since the early 1980s (Meyer-Resnde 2014, 5). El-Sisi’s roadmap, it should be acknowledged, commanded considerable levels of public support.

In the immediate aftermath of Morsi’s removal, the country was led by Adli Mansour, who served as an interim President. Article 30 of the Road Map (Quoted from Vaques 2015) established that he would submit the draft constitution to a public reference within 30 days of receiving it. 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 culture associations, the security forces, and minority groups’ (Meyer-Resnde 2014, 8). 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 (Meyer-Resnde 2014, 8).

The 2014 Constitution generally drew very strongly upon the 1971 constitution (this explains why the tasks assigned to the legislature and the judiciary are broadly consistent across both documents). Article 5 of the 2014 Constitution establishes that Egypt’s political system is based upon the doctrine of a separation of power. It establishes a close relationship between powers and responsibilities² and describes the overall system; separate chapters then assign specific tasks and duties to each branch of the government. It granted broad rights to the President, who was firmly established as the pre-eminent figure in the domestic political system. The President vetoed parliamentary bills (Article 104)³ and upheld the separation

² Article (5): “The political system is based on political and partisan pluralism, peaceful rotation of power, separation and balance of powers, the inevitable correlation between powers and responsibilities, and respect for human rights and freedoms, as stated in the Constitution.”

³ Article (104): “The House of Representatives informs the President of the Republic of every bill that has passed the chambers, so that the President can sign it into law within fifteen days of receipt. If the President of the Republic vetoes the bill, he returns it to the House of Representatives within thirty days of receipt. If he does not return the bill by that deadline, or if the House of Representatives overrides his veto by a two-thirds majority, the bill becomes law and is issued. If the House fails to override the presidential veto, four months must pass from the date of the failed override vote before the bill may be reintroduced within the same legislative session.”

of power (Article 132).⁴ He/she possessed an unlimited ability to call referendums— some observers expressed concern that, in the event of sustained opposition from the House of Representatives, this could result in a ‘plebiscitary presidency’ (Meyer-Resnde 2014, 9).

He/she appointed members of the judiciary and Government, including the Prime Minister (Article 146) and represented the state in foreign affairs (Article 151). The President was head of the executive and armed forces (see Article 152), declared a state of emergency (Article 154) and granted pardons (Article 155). However, he/she did not declare war and full ratification of treaties and the announcement of a state of emergency were both contingent upon majority parliamentary approval. The duration of presidential terms was also limited to four years and the President could only be re-elected once.⁵

The 2014 Constitution most closely resembled the semi-presidential model of government. This was clearly demonstrated by the way in which the constitution drafted and deployed

different institutions. While this model granted the President substantial and even formidable powers, it quite clearly did not approximate to the presidential model, in which the President acquires all executive powers. The 2014 Constitution therefore divides executive power between the President, who is directly elected, and the Government, which it describes as the ‘supreme executive and administrative body of the state’ (Article 167). The Government’s exercise of executive power is contingent upon the continued confidence of the Parliament (House of Representatives) and the prime minister, who is appointed by the President with the approval of the Parliament, is the head of government (Article 163). Public policy decisions are made by both the government and the president (Article 167).

The precise distribution of executive power between the President and the Prime Minister is, however, somewhat vague and ambiguous. For instance, in exercising his/her executive power, the President is not constitutionally obliged to obtain countersignature of the Prime Minister or any other minister. The President can also chair the Council of Ministers whenever he chooses. Under certain circumstances, the Parliament could hold the Prime Minister to account for executive actions that had little or even nothing to do with him/her. This becomes even more problematic in instance of cohabitation (e.g. when the President and the majority of the Parliament are not members of the same political party). Setting aside the formal distribution of

⁴ Article (132): “The President of the Republic is the head of state and the leader of the executive power; he pursues the People’s interests, preserves the independence of the homeland and its territorial integrity, and upholds the separation of powers. He carries out his responsibilities in accordance with the Constitution.”

⁵ Article (139): “The President of the Republic shall be elected for a period of four calendar years, commencing from the day following the termination of the term of his predecessor. The President may only be reelected once”

powers and responsibilities, we can therefore infer that the President is the real head of the executive authority, who both governs and rules (Khalil, n.d.).

In the 2014 constitution, the House of Representatives functioned as the legislature. It replaced the Shura Council, whose constitutional role and significance was limited in any case. The House of Representatives is not directly accountable to the president, and its dissolution is subject to the expressed will of a public referendum (the relevant article of the Constitution does not, however, make it clear what will happen if public assent is not forthcoming). (Anthony Mughan et al. 2013) Article 191 of the Constitution establishes an independent and autonomous constitutional court, which possesses powers of judicial review.⁶ However, the de facto independence of this court is drawn into question on three points; firstly, the appointment of the court's judges is a presidential prerogative (Article five of the Constitutional Court Law, No. 48/1979); secondly, there are few genuine guarantees or safeguards that uphold the Constitution's independ-

ence; finally, the existence of military courts (refer to Articles 204 and 205 of the Constitution) undermines the court's independence. During April 2017, the President also passed legislation that provides him the ability to select and appoint the most senior members of the Egyptian judicial system (this includes the individuals who head the Court of Cassation, the State Council and the Administrative Prosecution Authority). This intrusion of executive power potentially undermines judicial independence. It is an open question whether the parliament will ever fully exercise its designated prerogative.

III. The Role of Political institutions In The Uprisings

Now that the outlines of the separation of power doctrine have been set out in more detail, it is now necessary to ask which institutional structures and procedures best promote its concrete realization (Vile 2012, 1). This chapter will closely assess political institutions and identify the values that they help to promote. This will in turn establish the basis for a more sustained engagement with the question of how political institutions are shaped during times of crisis.

As a precursor to this engagement, it is first necessary to clearly distinguish between 'formal' and 'functional' constitutional models. For the purposes of the current discussion, formalism is understood to 'giv[e] priority to rule of law values such as transparency, predictability, and continuity in law';

⁶ Article (192): "The Supreme Constitutional Court shall be solely competent to decide on the constitutionality of laws and regulations, to interpret legislative provisions, and to adjudicate on disputes pertaining to the affairs of its members, on jurisdictional disputes between judicial bodies and entities that have judicial jurisdiction, on disputes pertaining to the implementation of two final contradictory judgments, one of which is rendered by a judicial body or an authority with judicial jurisdiction and the other is rendered by another, and on disputes pertaining to the execution of its judgments and decisions"

(Eskridge 1998, 22) functionalism, meanwhile, is understood to ‘emphasiz[e] pragmatic values like adaptability, efficacy, and justice in law’ (23). Gerangelos provides an important further clarification. Functionalism, he observes, only regards an act of one branch to be unconstitutional if, in attaining a certain level ‘an unspecified level’, it infers with another branch’s ability to perform its function and accrues an excess of power for itself (‘accretion of excessive power to the usurping branch’) (2009, 20). For Functionalism, it is therefore the practice which reveals the usurpation of power to be unconstitutional. This highlights one of the main weaknesses of formalism – namely that it is difficult to define the functions of each branch at a conceptual level (37). This is why Zines (Quoted in Gerangelos 2009, 38) asserts that ‘there is no clear warrant for the view that all functions can be subsumed under the categories “legislative,” “executive” and “judicial”’. This is even more true during times of political upheaval, when these categories are even more prone to collapse in on each other. On these grounds, it is legitimate to question whether formalist models can be applied during times of protracted change and upheaval.

This article will now offer an institutional analysis that directly engages the branches of the Egyptian government tasked with upholding political stability, the integrity of the legal process and the general security of the country. It will focus in particular upon the Parliament, Constitutional Court and Army, with a

view to identifying how they adjusted and responded during the course of the popular uprising.

1. The Egyptian Parliament

The literature on democratic transitions frequently asserts that legislatures are the central institution within a functioning democracy (Beetham 2011, 124). Their contribution to the wider political process is openly celebrated upon the grounds that they enable political elites to be held to account and enable the public will to be expressed. Indeed, the literature emphasises the contribution of legislatures to the extent that it might be assumed that the phenomenon of executive supremacy should be understood in relation to weaknesses within the legislature.

In building upon this insight, this subsection will now consider the role which the Parliament played in the January 2011 uprising. It will place particular emphasis upon the broader significance of the Parliament, and will therefore attempt to ascertain its relation to, and impact upon, a wider protest movement that sought to challenge, and ultimately alter, the basis of political authority within Egyptian society.

Parliaments can make a variety of contributions and exert a range of impacts during political transitions. We can accordingly have no expectation that they will act in a certain way; rather, our emphasis should be upon identifying the multiplicity of ways in which they can contribute to wider social and political processes.

In the first instance, it is essential to acknowledge that parliaments are active participants, albeit in different roles and to different extents, in the process of making (or remaking) a constitution. The reason for this is clear – the participation of a representative institution endows the wider process with a greater degree of democratic legitimacy. Secondly, parliaments have an important contribution to make when legal reform is conceived more generally – that is, as the basis of economic, political or social reform. Again, the engagement of parliaments endows this process with a greater degree of legitimacy than it would otherwise possess. Finally, parliamentary engagement can legitimize the process of state-building. It can enhance efficiency, accountability and actively contribute to institutional reforms that seek to limit or regulate executive authority (Khalil, n.d.).

In Egypt, the Shura Council (*Majlis Al-shura*) and House of Representatives (*Majles al Nuwab*) were previously the parliamentary institutions – in 2014, however, the Constitution suspended the Council. Over the next three years, the Government repeatedly postponed parliamentary elections. Vokel (2017) suggests that these delays were part of a deliberate government strategy, being conceived with reference to the development of an electoral law that substantially reduced the likelihood of an adversarial or oppositional legislature.

Historically, the Parliament has played a very limited role in Egypt's governance. Until the 1970s, the country was a

single-party state. Even after other political parties were allowed to register, the parliament remained, at best, a secondary consideration. The Parliament under Mubarak has been appropriately described as a 'democratic façade,' that 'never expressed any significant criticism of the government' (Vokel 2017).

The Parliament's essential fragility was further emphasised after Mubarak's overthrow, when SCAF, with the support of the SCC, suspended the 1971 Constitution and dissolved the parliament which had been elected in 2010. The dissolution of the Parliament inaugurated a year of military rule.

Parliamentary elections, which were held in 2012, returned the Muslim Brotherhood as the majority party. This was significant as successive governments (in particular Nasser's) had suppressed the Brotherhood. However, the significance of the elections was drawn into the question by the fact that, during the year of military rule, the SCAF had left 'the main characteristics of Egypt's electoral system broadly unchanged' (Vokel 2017). Clearly changes in political composition would have little importance if the existing constitutional arrangements remained in place. In June 2012, the SCC, a number of whose members were originally appointed by Mubarak, suspended the Parliament. This was then followed, a year later, by Morsi's removal from power (Vokel 2017).

Various factors (its limited role under the Mubarak regime, SCAF's interference in the political process and the perception that it was little more than a

façade) acted to the Parliament's detriment and undermined its ability to hold the other branches of the government to account. Even the limited powers that it retained (such as parliamentary review) were never fully exercised (Cook 2008, 74). The Parliament was also weakened by the fact that it was isolated from the public's general public will – to this extent, it appeared to confirm Schmitt's accusation that modern parliaments 'are no longer capable of taking genuinely political decisions in the name of a people as whole' (Vinx 2015, 9). In the same way as its German predecessor, the Parliament was transparently unable to provide 'strong and coherent political leadership' (13).

2. The Supreme Constitutional Court of Egypt (SCC)

At times of constitutional uncertainty, constitutional courts are generally viewed as weak and incapable of contributing to wider processes of political and social change. Hamilton, in citing Montesquieu, therefore maintained that courts are 'the least dangerous branch' (Mollers 2013, 18). This is even more true during times of emergency, when courts generally 'assume a highly deferential attitude when called upon to review governmental actions and decisions' (Gross and Fionnuala 2006, 153).

However, it is nonetheless possible to envisage circumstances, even if only at a hypothetical level, where courts could emerge as 'paradoxically powerful

political actors' (Brown and Waller 2016, 818). Judicial review, in which constitutional courts are granted the right to review legislation adopted by political is one such example. Indeed, Schmitt, in arguing that 'a constitutional court would be forced to take political decisions', (Vinx 2015, 9) rejected the right of review on precisely these grounds. This contrasted with other observers, such as Montesquieu, who maintained that, by virtue of their strong adherence to the principle of political independence, constitutional courts could not threaten freedom (Mollers 2013, 18).

Arab observers appear to lean much more strongly towards Montesquieu's interpretation. This is shown by fact that constitutional courts, across the region, are being built (Tunisia and Jordan), reconstructed (Morocco) and assigned new roles (Egypt). Historically, the SCC has been a significant legal and even political actor. This article will now situate it in historical context, with a view to ascertaining its current role and relationship with other branches of the Government.

The 1971 Constitution established the SCC as an independent judicial branch and SCC Law No. 48/1979 granted it the power of judicial review. Brown (1997, 5) has previously suggested that the adoption of a modern legal system (the establishment of a constitutional court was a key part of this project) derived from a number of hidden motives. In advancing the centralization of authority and the domination of specific groups or classes as key motivations, he observes

that ‘legal reform in Egypt was understood as an attempt to restrict - or at least regularize - the unlimited authority that Egyptian rulers possessed at the beginning of the reform period’ (8). He claims that, in its early years, the court was strongly guided by this imperative of restricting authority.

For the Egyptian public, the Court retains a powerful symbolic significance. The historical verdicts that it issued during its ‘golden era’ of the 1990s and the early 2000s are a source of fond recollection for many observers. The Court’s horizon was expansive, touching upon issues as diverse as ‘electoral candidacy, party registration, freedom of expression, and human rights advocacy’ (Abu-Odeh 2011, 989). The Egyptian leadership’s heavy reliance upon state security courts and military tribunals during this period was actually testament to the Court’s success in achieving a high level of independence (Cook 2007, 75).

SCC judgements also played an important role in expanding political rights and promoting broader participation. The court engaged Article Four from *Hemayat Al-Jabha al Dakhlya* Law and found that its political prohibition was unconstitutional (Decisions 1986/2 and 1989/2). In 1987 and 1996, the Court, citing the invalidity of the Election Law as a justification, dissolved the lower parliament. In 2000, the Court required ‘judicial supervision’ of elections (*Majlis Al-Sha’b*). However, it is important not to overstate the significance of these activities. Haimerl therefore strikes an appropriately cautious note in observing

that ‘[w]hile the SCC certainly curtailed executive power to some extent, it always showed reluctance to challenge the “core interests” of the regime’ (Haimerl 2014, 13).

This closely aligns with Brown’s (2006, 12) observation that legal orders do not simply mark the domination of specific groups or classes; rather, they perpetuate this domination by ‘making concessions or at least offering opportunities to subaltern groups’. Clearly, it would be a profound conceptual error to grant the Court the status of an independent court upon the grounds that it did not function as a ‘mechanical tool’ of the regime.

This fact notwithstanding, the Government came to feel increasingly threatened by the rate at the court’s jurisprudence was expanded. This ultimately resulted in the Court’s chief justice being replaced by a regime insider (Abu-Odeh 2011, 986). This open subversion of the judicial appointment process, in addition to subsequent rulings (most notably the declaration that Mubarak’s state security courts were constitutional) furthered the impression that the Court was little more than a tool of the executive.

However, this was not the case during the Egyptian uprisings, when the Court’s stance could more accurately be described as cautious and ambiguous. It therefore apparently fluctuated between being positively and negatively predisposed towards unfolding events, while also evidencing a reluctance to engage with important or contentious

issues. However, there were two important exceptions in this respect.

This essential ambiguity was also evidenced during the Egyptian uprisings. The Court did not settle upon a clear stance, but instead shifted from being positively to negatively predisposed. It also evidenced a pronounced reluctance to engage with important issues. However, there were two important exceptions. Firstly, the Court invalidated the law that prevented members of the Mubarak regime from contesting the presidency; secondly, it dissolved the Muslim Brotherhood's majority parliament (upon the grounds that a third of the seats should have been reserved for independent candidates).

In seeking to explain these two decisions, it is useful to bear in mind a previous contribution from Brown and Waller. They (2016, 822) observe that constitutional courts, during times of transition, are invariably 'concerned with their own survival' and predisposed to 'ensure their privileges and prerogatives are maintained and respected' (839). Was status (or the return to a 'golden age' in which parliaments had been dissolved and the scope of its jurisprudence had rapidly expanded) therefore a concern for the Court?

Two observations suggest that this was not the case. Firstly, the Court operated within a contradictory constitutional context – this meant that it remained unsure of its aspirations and virtues; secondly, the court, by virtue of the 'judicial-executive collaboration module', had little reason to challenge the

existing arrangements. Faruq Sultan, the Chief of Justice appointed by Mubarak, in addition to 17 members with ties to the old regime, remained in place (Haimerl 2014, 13). In July 2012, *Sultan* was replaced by *Maher El-Beheiry*. After one year, *Adli Mansour* was appointed to the role. He became Egypt's Acting President only minutes after being appointed as the Court's President.

The dissolution of the parliament was not the first occasion on which the Court had intervened in the political process. However, it should be noted that its reasoning clearly differed from preceding decades. In this instance, the Parliament took an intervening political step into the complex political realm by consciously limiting growing Islamist influence. Brown makes the important observation that whereas the other rulings took several years to reach the Court, in this instance the ruling was issued 'hours after hearing the arguments' (Brown and Waller 2016, 846). In addition, it should also be recognized that the timing of the decision to resolve the parliament on the second round of the election was clearly intended to empower *Ahmad Shafiq* who, as an associate of the former regime, was the only candidate that was openly opposed to Morsi. It was clear that the Court lacked the tools that would enable it to fully extradite itself from the grasp of the executive (Brown 2013, 39).

IV. The Rise of the Executive supremacy

1. Rethinking Prerogative Power

The contrast between liberal democracy and prerogative power has led legal theorists and academics to ask how the two are related. The proposition that 'special powers' should be invested in particular hands clearly raises the question of how this can be reconciled with the practice and theory of contemporary liberal democracy, in addition to the expectations of modern democratic societies. The interrelation of the two elements has also contributed to debates about the precise role of law in 'emergency' situations, along with the grounds upon which any suspension of civil and political rights can be legitimised. These debates have a clear relevance to the contemporary context of the Arab world, where there is a clear and pressing need for a better understanding of the performative context in which powers are generated and applied. In addition, this interrelation has a clear relevance to the question of how authoritarian patterns of rule and authority are sustained.

The executive branch is normally handed the task of executing the laws when a crisis occurs. In crisis situation, a prerogative power, which permits actions that would otherwise exist 'outside the limits of the law', is vested in its hands. Arguments in support of this course of action may well derive from the proposition that those who are

tasked with executing the laws knows full well when to suspend them. In slightly different terms, it might be legitimately argued that the suspension of laws is, in many respects, an extension of them. Historical experience also lends considerable credence to the proposition that the executive possesses 'special resources and characteristics that [enables it] to formulate responses more rapidly, flexibly and decisively than [legislatures], courts, and bureaucracies' (Fatoyic 2009, 2).

Locke's theory of prerogative power was developed in the shadow of a crisis, having arisen during, and in response to, the abuses of power that were perpetrated during the reign of the Stuarts (Gross and Fionnuala 2006, 119). Locke places prerogative power in the hands of the executive and equates it with the concept of the 'public good'. Corbett, in drawing attention to the fact that Locke expounds multiple definitions of 'prerogative' in *Two Treatises of Government*, initially proposes that prerogative is '[t]his Power to act according to discretion, for the publick [sic] good, without the prescription of Law, and sometimes even against it, *is* that which is called *Prerogative*.' Alternatively, '[p]rерогатива can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick [sic] good, and their acquiescing in it when so done.' Corbett then invokes a third proposition which maintains that 'prerogative is nothing but the power of doing publick [sic]

good without a rule.' (Quoted in Ross 2006, 436-437).

In engaging with each of these three assertions, Corbett (2006) clearly extracts two elements that are essential to all definitions and articulations of prerogative. Firstly, prerogative can be said to be a power that seeks to further the public good (it is, however, a limited power because it is defined in relation to this public good). Secondly, it is not bound by the provisions of 'positive law' because it exists above and beyond law.

In presenting itself as a 'natural power' (Corbett 2006, 1) that does not require disclosure in the law, Locke's theory of prerogative appears to be extra-constitutional. Gross and Fionnuala (2006, 121) initially argued otherwise. While they acknowledged that Locke's prerogative is an extra-constitutional power, they maintained that it is 'an integral part of the broader constitutional scheme' – by virtue of this feature, they suggested, it functioned *within* clear constitutional limits. However, they later revoked this position to instead argue that Locke's prerogative should be viewed as extra-constitutional and extra-legal (122). This, it should be noted, is not an abstract or self-referential debate. Quite the contrary – the precise definition of prerogative (whether it is political, legal or extra-constitutional) has crucial implications for the level of flexibility that the government is able to deploy in the face of crisis and exigency (123).

Locke's theory creates a tension between legislative supremacy and

executive prerogative. This, Ward suggests, should be viewed as 'the theoretical core of Locke's constitutional problematic'. Ward suggests that Locke's justification of the prerogative permits of two separate interpretations. The first ('broad') interpretation views prerogative as a 'requirement of effective or enlightened political leadership'. The second ('narrow') interpretation instead maintains that 'the executive [is] purely ministerial in relation to the supreme legislature, and thus even prerogative must be seen in terms of a merely temporary measure which is subject to validation or reversal by the legislature once it is convened.' (2017, 720). Locke justifies the (temporary) limitation of the legislature's authority by observing that 'the legislature cannot anticipate in advance and regulate by statute all that may be, at any point in the future, beneficial to society'. He adds that, under certain circumstances, the 'law-making power may be too slow to adapt adequately to [the] exigencies and necessities of the times' (Gross and Fionnuala 2006, 120).

Thomas Jefferson, in opposing the broad granting of power to the executive, suggested a model for 'exceptional crises'. This entailed the application of '[e]xtra-legal powers that go beyond the strict lines of law while not forming part of the constitutional framework' (124). For Jefferson, these extra-legal powers were not (in contrast to Locke's 'public good') limited by the actors themselves. He instead maintained that an '[e]xplicit, particular ex-post legislation ratification of the same must be rewarded' (127) –

trust is obtained through the checks and balances that are part of the process of legislative ratification; it does not, to this extent, extend from self-discipline and regulation.

Schmitt, one of the most well-known critics of the proposition that the rule of law can be reconciled with emergency executive power, has previously gone as far as to suggest that it is an impossibility (Casson 2008, 1). Schmitt maintains that the power handed to a 'sovereign dictator' is not restricted to an ability to suspend – rather it instead extends to 'the power to amend, revoke, and replace' Gross and Fionnuala 2006, 165). In engaging with the apparent imposition of binary categories, Casson argues that this is a profound misreading. For him, the reader is not confronted by a choice between 'naive constitutional rationalism' and 'Schmittian decisions'; in endeavoring to demonstrate this point, he highlights a version of liberalism which endeavors to reconcile the 'necessity' of extralegal political action with the struggle against discretionary power (2008, 947).

2. The Fictional President

The allegation that the protestors were unaware of their aims and intentions is comprehensively refuted by a closer examination of their discourse and rhetoric. The very entry of the protestors into the public sphere derived from a desire for heightened participation and accountability. The terms in which they sought to justify these political acts are significant because they have the

potential to impact and influence institutional arrangements. This insight closely aligns with Schlumberger's (2007, 10) previous account of Arab Authoritarianism, in which he described how the interaction between regimes and society at large has a determinative impact upon state-society relations and the wider political system.

During the uprisings that took place over 2011, the Arab public reacted strongly against the personification of political power – that is, against the proposition that the president represented the current embodiment and future potential of the nation's political life. However, it was not merely the case that Arab publics were reacting against the limitations of established political arrangements – to the same extent, there was a clear sense of how the principle of political division could contribute to a better future. This was exemplified in Tunisia, where the slogan '*la re'asa Mada Al-Haya*' ('no presidency for life') was aimed in the direction of Ben Ali, the incumbent Tunisian president. In Egypt, protestors shouting '*Yasqout Yasqout Hokom Al Askar*' called for the removal of military rule. Other slogans instead required more interpretative effort on the part of observers. Devina, in duly obliging, understood 'Erhal' ('Go Away') to be a 'refusal of the concentration of powers as well as an appeal for the separation of them' (Touzeil-Divina 2012).

The equation of an Arab president with the nation or with power is not accidental; rather, it instead a politics of symbols or 'symbol politics'

(Schlumberger 2007, 10), which is a clearly discernible feature of the contemporary Arab world. In engaging with it, we could perhaps speak of a peculiar ‘style’ of politics, in which the president comes to exist as an abstraction, in serene isolation from the nation he/she commands. This process of detachment and reinvention clearly brings to mind Habermas’s previous observation that presidents, just like any product, need to be packaged and marketed.

Prior to the uprising, the deposed presidents had quite clearly understood the need to ‘market’ themselves. There were a number of potential explanations for this. Firstly, as leaders of societies that had experienced multi-level transitions and transformations, it made sense of these leaders to situate themselves within the lineage of past ‘glories’. Secondly, a close attention to the embellishment of personal attributes helped to distinguish them from political competitors. In an age of ideological convergence, this need asserts itself with a renewed intensity. Thirdly, personal appeal proved to be conducive to trust, which is an invaluable political commodity.

The condition of successful marketing is the inculcation of the belief that the product is unique, that there is an aspect or feature (its utility, its appearance, its desirability) that sets it apart from other products. Max Weber (1986, 19) had similarly observed that ‘natural leaders are ‘holders of specific (emphasis from authors) gifts of the

body and spirit’. Most do not possess any of these gifts; charismatic leaders, however, possess them in abundance. Charisma is an invaluable resource because it releases the individual from the obligation of being judged upon the basis of individual action.” (28) One observer, in noting the adulation with which el-Sisi is now received, similarly notes that he has been *released* from rules and laws (Mihtasch 2014)

Jamal Abdel Nasser, the Egyptian leader, could perhaps be described as a prototype in this respect, a model of imitation for leaders to come. Tunisia’s Beji Caid Essebsi followed in this lineage (Byne 2014) while Bourguiba, a former Tunisian president (1957-1987) took the model to its outermost extremes when he loudly proclaimed: “What system? I am the system,” (Willis 2014, 51). During times of peace and prosperity, this level of self-possession may be regarded more charitably, perhaps even to the point of being viewed as an asset. However, in times of crisis, when the ‘charismatic leader is exposed to the force of changing events, it takes on the appearance of myopia and narcissism (20).

This sub-section, which has discussed the charismatic profile of presidents during times of instability with reference to the separation of power doctrine, has been strongly influenced by Max Weber’s (1986, 20) account of the relationship between charisma and institutional building during times of social change. This has originated an approach that can be applied to various instances in which presidents, openly

disdaining codes or statutes and citing the public will as their sole justification, have usurped power. This approach has two potential applications. Firstly, to instances where the prerogative power of the executive is so deeply ingrained that the will of the leader is effectively unopposed; secondly, as a means through which concentrations of power can be engaged and understood.

3. The Emergency status

Over the course of the 20th century, the state of exception has shifted away from being a protective measure and has instead been reconfigured as a new form of governance. Agamben (2015) does not exaggerate when he describes it as a new paradigmatic form of government. In further elaborating this proposition, he explains how the state of exception assumed a permanent status during World War One and also observes how the executive's power in the legislative sphere continued to expand after the end of the war. What was originally envisaged and justified as a temporary measure had, by the war's end, quite transparently taken on a different form.

In this article, we have highlighted a continuity of Egyptian political governance that extends from a state of exception that was originally put in place by the Mubarak regime. Contemporary political developments in Egypt suggest that Al-Sisi is rapidly accelerating towards a status of 'exceptionality'. This troubling development has a deeply unfortunate historical

antecedent – the deliberate expansion of presidential prerogatives through the activation of constitutional provisions and the 'legal' suspension of civil liberties have historically accompanied the rise of dictatorships.

Article [48] of the Weimar constitution has a clear echo in contemporary developments in Egypt. This article stated that in instances where public safety was seriously threatened or disturbed, the Reich president' was permitted to 'take the measures necessary to re-establish law and order, if necessary by force.' Closer inspection reveals that the article was accompanied by a weak, and even non-existent, system of checks and balances. In seeking to obtain these emergency power, the president was not even required to obtain the *Reichstag's* approval.

In Egypt, state of exception articles have been exploited since Anwar Al-Sadat was assassinated in 1981. This abuse was frequently evidenced under Mubarak's rule, which extended for 30 years. The antecedents of this exploitation could however be traced back to the 1971 Egyptian constitution, which granted exceptional powers to the President at times of emergency. The president was permitted to create security courts (in which *habeas corpus* was suspended) and restrict a range of civil and political rights.

Having personally experienced its many consequences and ill-effects, Egyptian protestors collectively demanded that the emergency status be abolished. In 2012, the state of emergency lapsed,

and amendments were made to the presidential powers. Article 154 limits the durability of the state of emergency by reducing it from three years to three months. It can only be extended for an additional three months, and any extension is conditional upon the majority approval of the House of Representatives.

However, this article has a legal gap. After the passage of several days at the conclusion of the six-month period, the president is permitted to renew the state of emergency. In any case, the main issue here is not the time period but rather the exceptional powers that Emergency Law no. 165/ 1958 grants to the President. He/she has, for example, the power to establish state-security courts, which operate without the right of appeal (Article 12); in addition, Article Four grants the President the right to deploy state security personnel into public spaces, with the purpose of executing presidential orders. This article also provides the president with exceptional powers that restrict freedom of movement and expression and prohibit peaceful assemblies.

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 since the *Raba' Al-Adwyia* events. In a televised broadcast, the President sought to justify his decision

by invoking the ‘tremendous danger’ that now threatened Egypt. His speech was noticeably personalized and he frequently sought to securitize the situation.

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, in this manner, 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 (Brown 2017).

The legalization of the state of exception makes it into an entity that is rigid and predictable, Agamben has, however, challenging this by questioning the proposition that the state of exception serves a necessity (2015). His argument is diametrically opposed to the speech-acts of political leaders, which are intended to perpetuate precisely the opposite impression – namely that there is no alternative to the course of action that they counsel. The very word ‘emergency’ in itself imposes a set of mental enclosures which instinctively militate against alternative courses of action. El-Sisi is far from the first leader to recognise the utility of emergency status (having been preceded in this respect by Mubarak) and it is scarcely credible to argue that he will be the last.

V. Conclusion

This article has discussed the separation of powers doctrine with reference to states of exception, engaging with the latter in the belief that it has substantially altered ‘the structure and meaning of the traditional distinction between constitutional forms’ (Agamben 2015, 2). Crisis, to this extent, anticipates and sustains new constitutional innovations. The 2011 uprisings provided an appropriate point of engagement because they presented an unprecedented challenge to the Egyptian state’s political and legal foundations. This article engaged at and across four key institutions, with a view to understanding how they responded and adapted during the uprising. This article argued that these institutions either closely aligned with established patterns of conduct or failed – by virtue of deeply embedded functional limitations – to engage with the challenges that derived from a rapidly altering political reality: the Parliament was removed from political developments

and failed to interpret, much less engage with, the general will of the people; the Constitutional Court fluctuated between a positive and negative role before eventually assuming an active role which compromised its independence. The Army, meanwhile, led the transitional period before presiding over presidential elections, and the ruling presidents of that period continued to expand their executive authorities. In concluding, it would be naïve to suggest that executive supremacy was only made possible by the absence of other strong institutions. In the case of Egypt, executive summary was strengthened by the interaction of two important developments. The fictional legitimacy of the President, which resulted in legal status and codes being disregarded, overlapped with the announcement of emergency status. This provided the President with substantial reserves of power, and ultimately made him the strongest institutional actor, thus enabling him to simultaneously govern and rule the country.

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سلسلة أوراق عمل بيرزيت للدراسات القانونية

سلسلة إلكترونية، تصدرها وحدة القانون الدستوري بجامعة بيرزيت، ويشرف عليها كرسي الشيخ حمد بن خليفة آل ثاني للقانون الدستوري والدولي (الكرسي)، تعنى بنشر الأوراق البحثية المتخصصة في القانون، خصوصاً في حقول القانون العام التي من شأنها إفاده الطلبة والأساتذة والباحثين والمهنيين في هذه المجالات، في فلسطين والدول العربية. وذلك ضمن سعي الكرسي لتعزيز البحث العلمي القانوني في جامعة بيرزيت.

تضم السلسلة خمس فئات: المقالات المترجمة، مشروع موسوعة القانون الدستوري العربي المقارن، أوراق أيحاث طلبة الماجستير، أوراق المؤتمرات، وأوراق الموقف. وقد يجري استحداث فروع أخرى جديدة.



H.H. Shaikh Hamad Bin Khalifa Al-Thani Chair in Constitutional and International Law

وحدة القانون الدستوري في كلية الحقوق والإدارة العامة بجامعة بيرزيت، هي أول وحدة بحثية أكاديمية من نوعها في فلسطين. أنشأتها الكلية مطلع العام 2014، إيماناً منها بأهمية مواكبة فلسفة التعليم الحديث القائم على البحث العلمي، وبأهمية القانون الدستوري كأهم حقل من حقول القانون الذي ترتكز على أساسه أركان الدولة، وعلاقة السلطات الثلاث ببعضها، وكونه ينظم حقوق الإنسان كأحد أهم الموضوعات السامية على الصعيدين الداخلي والدولي.

تضم الوحدة الباحثين والمهتمين في القانون الدستوري من أساتذة الكلية وطلبتها وخربيجيها، وتهدف بشكل خاص إلى: تطوير البحث العلمي، تطوير تعليم القانون الدستوري، تقديم فرص تدريب للطلبة وإكسابهم الخبرات البحثية، ومواكبة التطورات على صعيد النظام الدستوري الفلسطيني.

كرسي الشيخ حمد بن خليفة آل ثاني للقانون الدستوري والدولي في كلية الحقوق والإدارة العامة بجامعة بيرزيت، هو أول كرسي متخصص في القانون الدستوري والدولي في فلسطين، أنشأته الجامعة عام 1996، وأعادت تفعيله عام 2015. تجاء تسمية الكرسي تكريماً من الجامعة لدولة قطر على وقفيتها الكريمة للجامعة منذ العام 1996. ويعمل الكرسي بالتشبيك مع وحدة القانون الدستوري في كلية الحقوق والإدارة العامة بالجامعة.

الرسالة:

"الارتقاء بالمواضيع القانونية الدستورية والدولية وبالتحديد الحالة الفلسطينية لاستغلالها بما يخدم مصالح الشعب الفلسطيني، وخدمة المجتمع وتطوير مؤسسات المجتمع المختلفة".

الرؤية:

رفع مستوى الوعي القانوني وتتدريب المختصين على استخدام القانون الدولي وفقاً لغايته الأساسية، بالوسائل القانونية المشروعة لاسترجاع حقوق الفلسطينيين ومنحهم الحق في تقرير المصير، ومحاسبة كل من يرتكب الجرائم الدولية بحقهم. فضلاً عن صون وحماية الحقوق والحريات المختلفة لأفراد الشعب الفلسطيني على الصعيد الوطني والدولي.