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Emergency Powers of the Executive
In the United Arab Republic†

SHERIF OMAR HASSAN*

I. INTRODUCTION

A. THE RULE OF LAW AND EMERGENCY GOVERNMENT

The conflict between freedom and authority is an ancient and everlasting one. The problem of regulating the relations between the rulers and the ruled, or, to put it more technically, the relation between the state and the individual, is as old as the emergence of the earliest political societies.

The development of this relationship led to the establishment of the basic principle of legality or limited government, government of laws and not of men, where men are "ruled by law and not by caprice."¹

The essence of the principle of legality is that acts and decisions of public authorities cannot be valid or binding except to the extent that they conform to the supreme rules of law. If they are violative of these rules, they become illegal and it becomes the right of interested individuals to apply for their annulment and to recover the damage caused by them.

This principle provides protection for individuals against public authorities, and it achieves a reasonable balance between the necessities of the exercise of power and the individual freedoms of citizens.

Even though the rule of law has become an article of political and legal faith in all democracies, this rule is, like all other legal norms and principles, a means to an end. The end is, generally speaking, the preser-

†Adapted from a chapter of Mr. Hassan's LL.M. thesis on file at The Cornell Law School Library, Ithaca, New York.

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¹. A. Dicey, LAW OF CONSTITUTION 189-90 (1964).
vation of society and the fulfillment of its needs. If under certain circumstances the strict adherence to a particular rule of law puts the whole society in danger, it becomes a matter of logic and necessity to relax this particular rule of law or sacrifice it temporarily in order to preserve society at large. This is the basic philosophy underlying the doctrine of emergency powers. "The law is made for the state, not the state for the law. If the circumstances are such that a choice must be made between the two, it is the law which must be sacrificed to the state. *Salus populi suprema lex esto.*"\(^2\)

When the preservation of the Union during the Civil War necessitated measures unwarranted by the laws of the United States,\(^3\) President Lincoln did not hesitate to go ahead, realistically declaring that Every man when driven to the wall by a murderous assailant will override all laws to protect himself, and this is called the great right of self defense. So every government when driven to the wall by a rebellion, will trample down a constitution before it allows itself to be destroyed. This may not be constitutional law, but it is a fact.\(^4\)

It is undoubtedly a fact that there are crises that can threaten the very existence of a nation. It is also a fact that the system of government designed to function under normal circumstances is often inadequate to cope with the exigencies of great national crises, and therefore should be changed to the degree necessary to achieve success in the nation's struggle for survival. This change involves a government of stronger character, that is, a government that does not adhere, literally, to the democratic constitutional framework designed for normal conditions. "Democracy is a child of peace and cannot live apart from its mother."\(^5\)

The theory that "necessity knows no law" might be an overstatement, but undoubtedly it has more than a grain of logic and is a realistic approach to the facts of political life. But the problem is, as Clinton Rossiter eloquently stated it, that "Hitler could shout 'necessity' as easily as Lincoln."\(^6\) Therefore, the surrender of the rule of law to the so called rule of necessity must be balanced by some carefully elaborated guidelines that keep life under necessity from being transformed into a lawless life under a complete state of license.

Consequently, this writer submits that any constructive effort to study

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2. J. Barthélémy, *Problèmes de Politique et Finance de Guerre* 121 (1915). However, I would rather use the terms "societies" and "basic needs" than the term "state" used by Barthélémy, since throughout history this protection of the "interest of the state" has been the preferred technique by which dictators relaxed *en toto* the rule of law and substituted for it their own whims and caprice.


emergency powers should concern itself mainly with a critical analysis of the doctrine of emergency powers in light of the conditions, limitations, and review of such powers.

A study of the emergency powers of the executive in the United Arab Republic is particularly appropriate because of two essential considerations. First, the system of emergency government in the United Arab Republic, modeled on its French counterpart, is based on civil law techniques which are quite different from those with which lawyers in common law jurisdictions are familiar. Its study, therefore, has particular significance for the comparative lawyer. Second, the United Arab Republic has had a unique experience with emergencies. The United Arab Republic has witnessed a series of successive and prolonged emergencies which have been extended over most of recent Egyptian history. The country was indirectly involved in the two World Wars, directly involved in three regional wars, engaged in a struggle for independence, and has gone through a critical stage of transition following the Egyptian Revolution of 1952 and the downfall of the monarchy.

It may not be an overstatement to say that emergencies or exceptional circumstances there have ceased to be exceptional. Whenever they have occurred, these emergencies have led the government to invoke the emergency powers in order to cope with them. The impact of successive and prolonged emergency government on the constitutional order of a democracy is a subject of great significance from the standpoint of constitutionalism.

B. Historical Background

The first institutionalized emergency system was introduced in Egypt by the British authorities on November 2, 1914, after the outbreak of the First World War. On December 18, 1914, Great Britain declared Egypt a British Protectorate. An emergency system was established to secure the

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7. A survey of the history of the state of siege and the state of emergency in the United Arab Republic in the past thirty years provides illustration of this fact. A state of siege was declared on December 1, 1939, and remained in force until October 4, 1945. Again a state of siege was declared on May 15, 1948, as a result of the war in Palestine; it was extended on May 11, 1949, for a period of one year (date of termination was not available to the writer). The deterioration of the internal situation due to British responses to the national struggle for independence had led the government to declare a state of siege on January 26, 1952. It remained in force until June 20, 1956. On November 1, 1956, and due to the British-French-Israeli attack on Egypt, a state of emergency was declared. It was lifted on March 24, 1964. At the outbreak of the Arab-Israeli War, a state of emergency was declared on June 5, 1967, and is still in force at the time of preparing this paper.

British and allied forces, to guarantee the availability of ports, airports, supplies, and means of transportation required for their operations, to reduce the powers of the existing government to the administration of domestic affairs, and finally to obstruct the growing national struggle for independence. As a result, the civil government's powers were suspended to the extent deemed necessary to serve these goals.

The Egyptians resented the Protectorate, and the military measures created nationwide discontent. Censorship of the press, martial law, and restrictions on Egyptian legislative bodies made the people resentful.

No sooner was the Armistice signed than the Egyptians who refused to take advantage of British difficulties in order to secure national freedom thought they had the right to demand that the Allies' victory should be shared by the "protected" nations. The Egyptian Nationalists soon began their struggle for the abolition of the Protectorate and for independence. The answer given to the delegation asking for independence was the deportation of the head of the delegation, Sa'd Zaghloul, and three of his followers. Public opinion in Egypt was shocked, and the action of Britain brought the explosive situation to its full climax. Strikes and riots broke out and quickly spread throughout the country. The forcefulness of Egypt's reaction compelled the British to envisage for the first time a settlement of the "Egyptian question."

The British government appointed a special Inquiry Commission headed by Lord Milner to study the causes of the disorders and to examine the whole question and to recommend steps which should be taken to regularize the situation in Egypt. Lord Milner advised his government to abandon the Protectorate and suggested replacing it by a "perpetual alliance." The recommendation took years to reach its final implementation.

At the suggestion of Lord Allenby, Lloyd George's government published the Declaration of February 22, 1922, recognizing Egyptian independence and sovereignty, but including four reservations. These reservations concerned the security of communications of the British Empire in Egypt, the defense of Egypt against any aggression or interference, the protection of foreign and minority interests, and the status of the Sudan, which was left to his Britanic Majesty's discretion until the conclusion of a future agreement. On March 1, 1922, Egypt was proclaimed an independent kingdom, and work was started on the country's first constitution, which, modeled on that of Belgium, was promulgated on April 19, 1923. On June 26, 1923, the Act No. 15 of the year 1923 "concerning the State of Siege" was promulgated.

10. Id. at 8.
The Act was closer to military law than to the political state of siege as established in France. Britain had greatly influenced the Act in this respect, motivated by the desire to protect her interests after independence by regulating the state of siege in a manner that would inflict a heavy burden on the unwillingly proclaimed independence.\footnote{For a detailed study of the Act, see S. Hassan, Emergency Powers of the Executive in France, the United Arab Republic and the United States—A Comparative Study 94-101; Thesis presented to the Faculty of the Graduate School of Cornell University for the Degree of Legum Magister (1968).}

The Act of 1923 was substituted by the “State of Siege Act No. 533 of the year 1954,” which was in turn replaced by the “Emergency State Act No. 162 of the year 1958.” Both Acts were substantially derived from the Act of 1923.

The first section of this study will deal with the “Emergency State Act No. 162 of the year 1958.” The second will review the judicial doctrine of necessity as it passed through three phases: 1) before the civil courts; 2) before the Court of Administrative Justice after the establishment of the Council of State; and 3) before the Supreme Court of Administrative Justice which was established within the Council of State in 1955.\footnote{See note 19 infra.}

II. STATUTORY EMERGENCY POWERS

A. THE EMERGENCY STATE ACT NO. 162 OF THE YEAR 1958

The first Constitution of the Egyptian Republic went into effect on June 24, 1956. Article 144 of this Constitution provided that

The President of the Republic may declare a state of emergency according to the law. Such a declaration should be submitted to the National Assembly within fifteen days of its announcement, and the Assembly takes whatever decision it deems necessary thereon. If the National Assembly is dissolved, such a declaration should be placed before the new Assembly when it meets at its first sitting.

Under this constitutional provision the Emergency State Act No. 162 was promulgated on September 27, 1958. The general features of this Act are similar to those of the Act of 1923, though the circumstances which influenced the framers of the latter Act\footnote{See pp. 48-49 infra.} were not existing in 1958. However, it should be borne in mind that this Act was framed under a transitory stage of constitutional and political evolution which required a government of strong character, a government empowered with all the powers that would make it capable of undertaking the
heavy tasks required to fulfill the aspirations of the Egyptian people on the eve of the revolution.

B. CIRCUMSTANCES INVOKING THE STATE OF EMERGENCY

Article I of the Act authorizes the President of the Republic to declare a state of emergency whenever the public security or order is endangered in the territories of the Republic or in portions thereof, be it a result of war, or a threat of war, of internal disturbances, of public calamities, or the spread of an epidemic. By comparing this provision to Article I of the Act of 1923, we notice that the new Act increased the cases in which the state of emergency could be invoked. While actual war was one of the two cases provided for in the State of Siege Act of 1923, the Act of 1958 added the case of "a threat of war." The term is extremely flexible, a quality of questionable desirability considering the very strong powers vested in the executive under the declaration of the state of emergency. Moreover, the legislature might well have left the circumstances of "public calamities" and "spread of an epidemic" to be dealt with through the ordinary police powers of the administration. Floods, earthquakes, and epidemics undoubtedly need urgent and strict measures to limit or eliminate their ruinous consequences, but the ordinary police powers of the administration provide adequate measures without any need to subject the society to the harsh measures provided in the Emergency State Act.

It should be also borne in mind, when considering Article I, that a long line of judicial decisions in Egypt has established the rule that the declaration of the state of siege or the state of emergency is an act of sovereignty or of government to which judicial review does not extend. Such a judicial rule makes the legislative use of such loosely defined phrases, under which the executive possesses unlimited discretion, most undesirable. It was for this reason that a unique argument was introduced by the late Professor Sayed Sabry in several hearings before the Court of Administrative Justice to the effect that the act of declaring the state of siege itself is not exempt from judicial review. This view was based on the premise that the legislative enumeration of the circumstances under which the state of siege could be invoked means that the President's discretion to declare the state of siege is conditioned by the existence of one of the circumstances enumerated in the provision. It follows that the Presidential declaration of the state of siege should be subjected to the court's review to enforce this limitation, otherwise the

14. Art. I of the Act of 1923 authorized the declaration of a state of siege whenever the public security and order are put in peril resulting from the menace of an invasion by an enemy's armed forces, or from internal disturbances.
provision enumerating these circumstances would be of no practical value. However, this sound view was never accepted by either the Egyptian courts or by Egyptian jurists.\(^\text{15}\)

**C. Declaration and Termination**

Article 144 of the Constitution of 1956 authorized the President of the Republic to declare a state of emergency and provided that such a declaration must be submitted to the National Assembly within fifteen days following its announcement. The Assembly then can make whatever decision it deems necessary. Following Article 45 of the Constitution of 1923,\(^\text{16}\) Article 144 places the power to declare a state of emergency in the hands of the head of the state, with the one difference that here the authority to make the declaration is given to the same authority which the law had vested with the emergency powers. The declaration, however, is to be submitted to the National Assembly within fifteen days following its announcement.

Article 144 did not provide for the case in which the state of emergency is declared when the Assembly is not in session; however, it is understood that it must be invited to assemble. In the event the Assembly is dissolved, the declaration should be placed before the new Assembly when it meets at its first sitting. Article 2 provides that a Presidential decree could terminate the state of emergency.

**D. Effects of the State of Emergency**

Despite the fact that Article 2 of the Act of 1923 was subject to severe criticism for the very vast powers it vested in the state of siege authorities with the resulting menace this constituted to rights and liberties of Egyptian citizens, and despite the very hard experience of Egyptian democracy under the said Article, Article 3 of the Emergency State Act of 1958 vested even greater powers in the President whenever a state of emergency is declared.

Section 1 of Article 3 authorizes the President to restrain the freedoms of assembly, moving, and residing, to arrest persons deemed to be security risks, to authorize search of persons and places regardless of the procedures provided for in the Criminal Procedures Act, and to order the performance of work.


\(^{16}\) Art. 45 of the Constitution of 1923 vested the power to declare a state of siege in the King. The emergency powers, however, were vested in a military commander to be appointed by the King. The consistent Egyptian practice has been to appoint the Prime Minister as a general military commander.
Section 2 authorizes the President to order the censorship of all types of correspondence, the censorship of the press, of all printed matters and scripts, and of all means of expression, advertisement and propaganda before their circulation. Section 3 gives the President the authority to fix the opening and closing hours of all public establishments and to order the closing of such establishments. The President is further authorized by Sections 4, 5, and 6 to order the seizure of property and sequestration of companies and enterprises, to direct the surrender of arms and munitions, to evacuate certain localities, and to regulate all means of transportation.

Such are the unprecedented powers Article 3 vests in the President during a state of emergency. Moreover, the last section of the same Article authorizes the President to enlarge the scope of these powers, but his decision in this respect must be submitted to the National Assembly at its first meeting.

Another effect of the state of emergency is the devolution upon the military authorities of the police powers exercised by civil authorities under normal circumstances. Article 4 provides that the enforcement of the orders of the President passes from the exclusive hands of civil authorities to the armed forces as well as the police.

The Emergency State Act of 1958 established a body of exceptional courts similar in structure, powers, and procedures to the military courts established in the Act of 1923, but given the name "Courts of the Security of the State." Under Article 9 the President is authorized to refer to these Courts all cases involving crimes committed in violation of ordinary law statutes.

Violations of the orders of the President of the Republic are punishable by penalties provided in these orders. Such penalties, however, are not to exceed fifteen years of hard labor or four thousand pounds. In the event the orders are silent as to the penalties, violations of them may be punished by imprisonment for not more than six months, or a fine not to exceed fifty pounds, or both penalties.

It should be noted in this respect that the power of the executive to prescribe penalties was more limited under the Act of 1923. While the penalties prescribed by the executive were not to exceed eight years of imprisonment under the 1923 Act, the maximum limit under the 1958 Act was raised to fifteen years. The breadth of the limits established by this latter Act should be viewed and appraised in light of two essential facts. First, no adequate standards exist to govern the President's authority in prescribing penalties, save the very general and vague standard of "public interest," which is no standard at all. Realistically one should agree with Professor Davis that "sometimes telling the Agency to do what is in the public interest is the practical equivalent of instructing it, 'Here is the problem. Deal with it.'" 17 The problem here,

however, is not one that should be left to the executive to "deal with" as he deems fit; we are dealing with the establishment of crimes and the prescription of penalties, with the liberties and rights of citizens, the regulation of which should be purely in the hands of the legislature. If necessities and extraordinary circumstances call for the delegation of this legislative power to the executive, precise and adequate standards should be attached to the delegation.

Second, the violators of the orders and declarations of the President are to be tried before the "Courts of the Security of the State" established by Article 7 of the Act and consequently subjected to the summary procedures of these courts. This fact should have persuaded the legislature not to grant to the President such wide discretion in establishing crimes and prescribing penalties.

In addition, it should be noted, with regard to the problem of delegation under exceptional circumstances, that Article 136 of the Constitution of 1956 provides:

In exceptional cases, and in virtue of an express delegation by the Assembly, the President of the Republic may issue ordinances which will have the force of law. This delegation should be for a fixed period, and the objects and basis of such ordinances should be precisely determined.

This provision was introduced for the first time by the Constitution of 1956 which also reiterated the provision of Article 41 of the Constitution of 1923 concerning the ordinances of necessity. Article 135 of the Constitution of 1956 provides that

If during the Assembly's recess or during its dissolution, urgent measures have to be promptly adopted, the President could enact the appropriate ordinance which will have the force of law.

Such ordinances should, however, be submitted to the Assembly within fifteen days of their promulgation if the Assembly is in session. If the Assembly has been dissolved, the ordinance should be submitted at its first session.

If such ordinances are not submitted to the Assembly they become retroactively null and void.

If such ordinances are submitted and are not ratified by the Assembly, they again become retroactively null and void unless the Assembly decides to settle whatever consequences that may have resulted through the application of such ordinances during a preceding period.

Admittedly, the above cited two articles have provided sufficient and adequate safeguards in the parliamentary control of the President's exercise of the delegated legislative power. However, in examining the legislative power granted to the President by Article 5 of the Emergency State Act, together with his legislative power under these constitutional provisions, one may be justified in concluding that emergencies under the
Egyptian system do more than "modify" the principle of separation of powers.

E. LIMITATIONS ON THE STATE OF EMERGENCY

The first limitation on the state of emergency is provided in Article 144 of the Constitution, which requires the submission of the declaration of the state of emergency to the National Assembly within fifteen days of its announcement and authorizes the Assembly to take whatever action it deems necessary. Therefore, the Assembly is authorized to suspend the state of emergency if the executive declares it without sufficient reason.

The second limitation is established by Article 2 of the Act, which requires that the declaratory decree should designate the specific areas to which the state of emergency applies. This provision prevents further abusive or careless extension of the state of emergency to areas not actually in a state of emergency.

A third and most significant limitation was established, for the first time, by Article 2 which provides that the declaratory decree should state the circumstances for which the state of emergency had been declared. It would appear that the mere enumeration of the kinds of circumstances that would warrant a declaration of emergency implies that any such declaration aimed at circumstances other than those expressly specified is not authorized under the law. This limitation means, moreover, that the declaration of the state of emergency to face one specific circumstance warrants only those measures necessary to deal with this very circumstance.

Finally, there is the limitation laid down by the courts in reviewing the acts issued under the state of emergency. Both civil and administrative courts have always held that the declaration of the state of siege is an act of state or of government exempt from all judicial review.\(^{18}\) As for the acts issued under the state of siege, it has been established by both administrative and civil courts that they are subject to judicial review and have been set aside on different grounds. Judicial policy in this respect has passed through different stages that will be dealt with in the following section.

III. THE JUDICIAL DOCTRINE OF NECESSITY AND REVIEWABILITY

The judicial doctrine of necessity has passed through three phases:

\(^{18}\) Council of State, Court of Administrative Justice, March 7, 1956, Case No. 4079 (Year 7); also Court of Administrative Justice, April 26, 1957, Case No. 3715 (Year 7).
19) before the civil courts, 2) before the Court of Administrative Justice after the establishment of the Council of State, and 3) before the Supreme Court of Administrative Justice, which was established within the Council of State in 1955 as the court of last resort in administrative cases.\(^1\)

\[\text{A. THE DOCTRINE OF THE CIVIL COURTS}\]

The Egyptian civil courts have established the rule that both the State and the individuals should abide by the rule of law.\(^2\) Should the government infringe upon the rule of law, its enactments are null and void, and victims of such violations are entitled to indemnity. However, in several decisions the courts admit that the administration should exercise broader powers and greater discretion under abnormal circumstances constituting menace and threat to public order and security. Under such circumstances, the administration can take any necessary measure to cope with the situation without being required to adhere literally to the laws and regulations if such adherence would impair the administration's ability to maintain public order and protect the society. The measures taken under such circumstances are not to be considered violative of the laws, since such laws are formulated to be applied in normal circumstances and do not provide for measures to be taken under abnormal and exceptional circumstances, provided the extraordinary measures are aimed at the protection and maintenance of public interests.\(^3\) Applying this theory, the Court of Cassation\(^4\) decided that officials clothed with police powers can, to prevent crime, take all necessary measures restraining the freedom of individuals as long as such measures are justified by the circumstances of the case.\(^5\)

This theory, however, represented a compromise between two opposing views with regard to the measures of necessity taken by the authorities holding the police powers. Adversely affected individuals claimed that

\[^{19}\text{The Council of State was established by the law No. 112 on "The Council of State" issued in 1946; while the Supreme Court of Administrative Justice was established by law No. 165 on "The Council of State" issued in 1955.}\]

\[^{20}\text{Indigenous Court of Appeals, Nov. 4, 1924, B. Ass'N REV. (Year 4), No. 627, 829.}\]

\[^{21}\text{Cairo Indigenous Court, February 6, 1934, B. Ass'N REV. (Year 15), No. 236, at 505, and May 11, 1935, B. Ass'N REV. (Year 15), No. 299, at 610; Mixed Court of Appeals, June 9, 1898, Review of Legislation and Mixed Courts (Year 10), 316.}\]

\[^{22}\text{Egypt adopts the French system of cassation. The Court of Cassation is the court of last resort in civil, commercial, and criminal cases. Appeals to the Court has only the power to "casser," i.e. to break, the judgment below and upon doing so must remand the case to an intermediate appellate court. On the French system of appeals see R. Schlesinger, COMPARATIVE LAW 229-84 (1959).}\]

\[^{23}\text{Court of Cassation, March 22, 1935, B. Ass'N REV. (Year 14), No. 155, at 870.}\]
their rights and liberties could not be restrained except by the authority of laws and regulations and that any measure, regardless of its justification, restraining their liberties in violation of the law, should be held an administrative trespass, *voie de fait,* not covered by the administrative immunity. And, as such, the courts are empowered to declare it null and void. The Egyptian civil courts unanimously rejected this view on the ground that it contradicts the essence and spirit of law and public order, obstructs the due exercise of police power, and leads to outright anarchy. The courts held that as long as these measures are taken under a state of necessity, and as long as they are the only means available to maintain public order and safety, they should be held valid.

The government based its defense in such cases on the grounds that the measures of administrative police restraining public liberties, though administrative in nature and treated as such under normal circumstances, when taken under exceptional circumstances in defense of the existence of the state, become acts of sovereignty or political questions immune from all control, no matter how violative of the laws they might be. This confusion between acts of sovereignty and acts of necessity appears in some court decisions adopting the classical theory which based the theory of acts of sovereignty on the concept of *force majeure.* According to this theory, all governmental actions aiming at the security of the citizens inside and outside the country are acts of sovereignty. This trend, however, was not accepted by the majority of the civil courts which consider the urgent measures of administrative police under exceptional circumstances ordinary acts of administration and not acts of sovereignty.

B. THE DOCTRINE OF THE COUNCIL OF STATE

A significant point with respect to the judicial trends in controlling legislative acts in Egypt is that almost all judicial activity in this field deals with a single problem. The central issue in all cases of judicial review of legislation has been the constitutionality of laws prohibiting any legal action attacking certain governmental enactments. The frequency of such "jurisdiction-limiting" legislation is perhaps due to the adoption of a general principle of governmental liability under political and social conditions that frequently call for more active and even summary treatment of exceptional emergency conditions.

Such laws are almost systematically adopted in Egypt at the end of a period of emergency or state of siege as a means of covering all govern-

25. Cairo Indigenous Court, August, 1936, cited by El-Garf, supra note 15, at 188.
mental liability for acts performed during the emergency period. In the first five or six years of its activity in judicial review, the Egyptian Council of State took the position that such laws are unconstitutional. Within the last ten years, however, there has been a marked departure from that sound position.

The arguments advanced by the Council in support of its two different theses will be discussed against a background of the United States Supreme Court's decisions dealing with similar problems.

1. Unconstitutionality of Laws Preventing Every Legal Action

In two famous decisions rendered on June 21 and 30, 1952, the Court of Administrative Justice declared laws preventing every legal action to be repugnant to the Constitution and to the basic notion of limited government. In the second of these cases where the decision was rendered by the whole Court (all the chambers united), the Court had before it decree-law No. 64 for the year 1952, which undertook to prevent any legal action which would bring into question any act, order, or decision of the Military Governor appointed under the authority of the State of Siege Act. The particular act at issue was a decision of that governor ordering the plaintiff to remain in forced residence in his country estate. In declaring the decree-law unconstitutional, the Court established the following two principles:

1. The absolute denial of access to the courts in such a general and complete way is, in effect, an absolute exemption from responsibility accorded to the particular governmental agency at issue. Such general exemption covers all enactments, even those in violation of the authorizing statute itself. Such an exemption with its corollary result of depriving individuals of their rights to judicial remedies is violative of the people's rights to liberty, equality, and the access to the remedial process of the judiciary, the very rights guaranteed to them by the Constitution.

2. Judicial review is the only effective means of control over the administration. Every system or institution provided for in the Constitution, and determined by law (the Court here is referring to the institution of the state of siege) is subject to the principle of legality, no matter how exceptional it may be.

The constitutionality of laws limiting the jurisdiction of courts raises a very delicate and complicated problem. This delicacy was very aptly
described by the United States Supreme Court in the case of Cary v. Curtis.29 There the Court found itself in the following dilemma: "The Supremacy of the Constitution over all officers and authorities ... and the sanctity of the rights guaranteed by it, none will question." But on the other hand, the judicial power ... although it has its origin in the Constitution is dependent for distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.30

To the Egyptian Council of State, however, the decree-law at issue did more than regulate jurisdiction. It was directed towards the impairment and confiscation of personal rights by denying them every practical significance, and it reached this aim through the absolute denial of judicial remedy.

2. Validation of Absolute Denial of Judicial Remedies in Particular Cases31

In three leading decisions rendered on June 8, June 29, 1957, and July 12, 1958, the Egyptian Supreme Court of Administrative Justice practically overruled the Council's previous decisions, approaching the problem from a totally different viewpoint.

In the first case, the Court upheld Article 291 of the law No. 345 of 1956 which regulated the Egyptian universities and declared inadmissible any action at law aiming at the annulment or suspension of any order or decision of university authorities concerning their students.32

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29. 44 U.S. (3How.) 236, 245 (1845).
31. For an elaborate and most accurate analysis of the decision cited below, see A. ABOULMAGED, JUDICIAL REVIEW OF LEGISLATION IN THE UNITED STATES AND EGYPT 607-23 (1960).
32. Case No. 1789 (Year II), June 8, 1957. In upholding this provision, the court said: a) "The mere denial of judicial relief is not denial of the substantive right involved ... so, Art. 291 is not violative of students' rights ... as regulated by statutes and regulations."
b) "It is the province of the legislation to declare personal rights, and provide for remedies, judicial or non-judicial, aiming at their protection."
In the second decision, rendered on June 29, 1957, the Court sustained the constitutionality of Art. 2 of the law No. 600 of the year 1953 denying any and every judicial remedy to public employees summarily dismissed under its provisions.\(^{33}\)

c) "Such legislation does not deprive applicants (the students) of their right to equality under the law. Equality means the right to receive the same legal treatment under the same legal circumstances. It cannot be measured by comparison between them (the students) and other categories of individuals unrelated to university education." The Court here gives a definition of the right to equal treatment under the law, that seems incomplete and inadequate to meet the requirements of a true notion of equality. According to the Court, the mere fact that legislative classification is on a general and not an individual basis exempts it from being discriminatory. If classification on individual basis is justly condemned, still, however, legislative distinction between groups or categories may not necessarily be justified. A more reasonable approach has been taken by the United States Supreme Court: "The ultimate test of validity is not whether (there are differences between the different groups classified) . . . but whether the differences between them are pertinent to the subject with respect to which the classification is made." Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580 (1935). See Truax v. Corrigan, 257 U.S. 312 (1921).

33. Case No. 161 (Year III), June 29, 1957. In its decision the Court declared the following principles: a) A distinction should be made between absolute confiscation of the right to have access to the courts, and the mere limitation of courts' jurisdiction. b) The contention that Art. 2 is unconstitutional cannot be sustained because an employee has no constitutional right to the public employment. To ask for the court's protection on constitutional grounds one must show that his particular right is guaranteed by the Constitution, and that its judicial protection is provided for in the Constitution itself . . . "Public servants have no vested right to their job comparable to the right of ownership. Their privilege of remaining in office is contingent upon the government's will; which will is determined by considerations of public interest." The issue here is the impact of preventing all judicial action attacking particular enactments on the principle that all governmental activity should be within and in accordance to law and the Constitution. The court here tried to avoid the problem by claiming that the Constitution guarantees only "rights" and not privileges. And as it is recognized in Egyptian legal theory that an employee has no "right" to the public employment, then it follows that he cannot validly invoke any constitutional protection. This argument has been advanced by the United States Supreme Court to uphold summary discharge of public employees on the ground that the due process clause with its ingredients applies only to rights and not to bounties and privileges. Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), aff'd by equally divided Court, 341 U.S. 918 (1951). See Dotson, The Emerging Doctrine of Privilege in Public Employment, 15 PUB. AD. REV. 77 (1955); cited by W. Gellhorn & C. Byse, ADMINISTRATIVE LAW 795-96 (1960).

It seems, however, that the whole problem cannot be so easily solved by the application of an oversimplified doctrine. (For a somewhat similar approach, see Justice Frankfurter's opinion in Garner v. Board of Public Works, 341 U.S. 716 (1951) where he says, "It does not at all follow that because the Constitution does not guarantee right to public employment, a city or a state may resort to any scheme for keeping people out of such employment. To describe public employment as a privilege does not meet the problem"). The problem, properly viewed, has two different phases, one related to the individual and the other related to the administration. While the nature of the employee's legal status meets the first part or side of the problem, it does not, however, meet the other. It can never be maintained and it actually has never been, that the power of government to dismiss public employees summarily is an absolute and boundless one. A minimum requirement for such dismissal to be valid, is "to be related to some public interest and to be based on considerations related to the dismissed employee." Court of Administrative Justice, Case No. 508, Year 7, November
In the third and probably the most important of these cases, decided on July 12, 1958, the Supreme Court of Administrative Justice upheld the constitutionality of Art. 3 of the law No. 70 of the year 1956 declaring inadmissible any suit or action attacking any measure taken by the authorities in the exercise of their power under the state of siege. The inferior court decision had invalidated this provision on the same grounds elaborated by the two leading decisions of 1952, adding that "The principle of legality is a right of all citizens . . . the denial of all remedies is, in effect, authorizing the government to act in a lawless manner. It is in nobody's interest to protect unlawful acts of the government." In reversing this decision, the Supreme Court held that a distinction should be made between absolute confiscation of the right to have access to the courts and the mere limitation of courts' jurisdiction. The legislature has an undisputed power to withhold jurisdiction because it is the "Constitutional organ or agency" that creates courts and invests them with jurisdiction. The Court also held that "the mere denial of judicial relief is not denial of the substantive right involved."

As to the decisions of 1952, the Court distinguished the two cases on the ground that there the court was dealing with a decree-law, technically administrative in nature, by which the government was trying to exempt itself from every liability under the emergency proclamation. Such exemption could only be achieved by a "law" not by a decree-law. In other words, to the court of 1958, a law may validly exempt the government from every liability for actions performed under the state of siege. In its decision the Supreme Court compares such laws to the English practice of "Indemnity Acts." Finally, the Court took refuge in Art. 190 of the Constitution of 1956 which provided that

All rules prescribed by laws, decrees, ordinances, regulations and decisions prior to the issuing of the present Constitution shall remain valid. They may, however, be abrogated or amended according to the principles and procedure established in the present Constitution.24

3. Appraisal of the New Position of the Court

From a purely procedural or formal standpoint, the Egyptian Supreme Court is correct in holding that the legislature has a right to regulate the jurisdiction of all courts. One form of regulation is, of course, withholding certain subjects from the courts' jurisdiction. This point was

23. 1954. The mere existence of legislation regulating such dismissal is, in itself, a limitation on the government's discretion. And the very law challenged in the case is certainly a limitation on the government's power. The promulgation of these laws would be worse than a mockery if the government can violate them, and the violation be sanctioned in the indirect way of denial of judicial review.

clearly elaborated by the United States Supreme Court in 1850.35 "Courts created by statute can have no jurisdiction but such as the statute confers." In the famous *McCardle* case decided in 1868,36 Chief Justice Chase took the position recently taken by the Egyptian Supreme Court. In that case, he declared that "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

In the *McCardle* case, and under the American system, however, the issue is rendered even less clear by the existence of the federal system and two bodies of courts. Moreover, the reference made in the Constitution to the "one Supreme Court" may give it a more solid basis than that given to the Egyptian Council of State, a mere creature of the legislature. These concessions, however, do not meet the real problem. It remains to examine the very essence of the attacked legislation herein referred to. When considering the impact of denying all judicial remedies on the substantive rights involved, the court distinguishes between the "right" and its "remedy," pretending that the denial of remedies does not touch or affect the substance of the right involved. This sophisticated distinction cannot overshadow the fact that from the standpoint of the individuals affected the practical result of denying every judicial remedy is to indirectly impair the substantive right involved. "The bald truth is . . . that the power to regulate jurisdiction is actually a power to regulate rights, rights to judicial process, whatever those are, and substantive rights generally."37 The question then arises as to whether the Constitution gives an individual right of access to courts. This writer would answer with an unqualified "yes." To declare otherwise would be to deny all significance to enforceable constitutional rights. The denial of all remedies is in effect a "deconstitutionalization" of the particular substantive rights. This writer would go even further and contend that the right of access to courts to protect one's rights has a preferred position among other rights because it is a *sine qua non* of the doctrine of constitutionalism and government under law.

In conclusion, in the first five years under the doctrine of judicial review the Egyptian Council of State had shown an admirably liberal attitude towards the protection of personal rights against governmental encroachments. In 1951 an eminent American judge of the former Egyptian "mixed courts," Justice Brinton, thought that

35. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). See also *Lockerty v. Phillips*, 319 U.S 182 (1943), upholding a denial of jurisdiction to federal district courts and state courts to enjoin the enforcement of OPA regulations, a statutory procedure having been provided for administrative protest and appeal to a specially constituted court of appeals.


If, as there is good reason to hope, the institution continues its labors in the same spirit of judicial independence and with the same energy and effectiveness as in the past few years, its contribution to the problem of constitutional government in Egypt and to the capital issue of the protection of individual rights . . . will be of the highest order.

In the light of the recent cases discussed here, however, may it not be concluded that the Council is retreating to a more docile and conservative position? To give a fair answer, we have to recall that under a transition stage of constitutional and political evolution or even revolution, and where the principle of constitutional government is still in the course of development, it is extremely imprudent to urge the judiciary to practice activism motivated by a hasty desire to have a second "American Supreme Court" transplanted in completely different soil. It is useful, however, to remind the highest court that its adherence to the self-restraint rules elaborated, though not systematically observed by the United States Supreme Court, is sufficient and adequate to meet the delicacy of its relations to the other branches of the government. The court has certain duties that should never be sacrificed or relaxed except under the strictest necessity. It is under difficult and delicate circumstances that the protection of the Supreme Court is most needed, otherwise it would be a fair-weather institution deserting the people it is to serve in moments of their greatest need.