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# Military Tribunals and Due Process in Post-Revolutionary Egypt

BIANCA C. ISAIAS\*

This paper seeks to examine the various changes in Egypt's legal framework following the Arab Spring in January 2011 and how, despite strengthened protections, military trials for civilians have surged. The increase in military trials for civilians is worrisome as the procedures currently adopted erode civilians' due process rights. The new Egyptian Constitution, which took effect in 2014, provides a unique opportunity for the Egyptian Supreme Constitutional Court to limit the military courts' continually expanding jurisdiction, as well as scrutinize the level of procedural protection afforded to civilians that end up facing trial before those courts. Although the Constitution now provides for military trials for civilians-in particular circumstances-it also elevates numerous due process guarantees to the status of constitutional rights. This status empowers the Supreme Constitutional Court to review the legal framework that governs jurisdiction and procedure in cases where civilians are tried before military courts. Beyond limiting the military courts' jurisdiction, bringing those courts' procedural standards in line with now constitutionally protected due process rights would acutely reduce the allure of employing military courts to try a broad swath of civilians for a highly expansive set of offenses. In this endeavor, the military justice frameworks of two other countries-the United States and Germany-may provide useful examples for aligning these proceedings with the constitutional protections, while still allowing civilians to be tried in the military justice system when required in carefully delineated circumstances.

The first section of this paper will provide an introduction to the Egyptian legal system. It will include a broad political history of the country from 1952 to the present, an outline of the legal changes after the Arab Spring in 2011, and an overview of the due process violations that occur during military trials for civilians. The second section will focus on the military courts' composition, jurisdiction, and appeals procedure, with a focus on the legal bases for the aforementioned. The third section will cover the Supreme Constitu-

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tional Court's competency for review, its prior case law on due process issues, lower courts' jurisprudence on the same issues, and an analysis of instances where military trials for civilians are in violation of the 2014 Constitution's provisions. Finally, the fourth section will analyze the U.S. military justice system and how it may serve as a model for the Supreme Constitutional Court to re-structure the Egyptian system. The U.S. legal framework can serve as a particularly useful example, as it allows for military trials for civilians, and the Supreme Court of the United States (SCOTUS) has reviewed the issue on numerous occasions. SCOTUS has circumscribed military courts' jurisdiction and procedure to conform to both the U.S. Constitution and due process guarantees, and has done so not only with respect to civilians who fall within the military courts' jurisdiction, but also to protect combatants—both lawful and unlawful—under U.S. control.

"As goes Egypt, so goes the rest of the Arab world." This popular refrain reflects the reality that Egypt, the Arab world's most populous country, responsible for the production of some of the region's most widely disseminated news, literature, and film, holds an enormous amount of influence in other Arabic-speaking countries in the Middle East. The route Egypt takes will strongly influence the future of the rule of law in many Arab countries, from moderate reforms taking place in Jordan to the eventual shape of Libyan rule of law following Muammar al-Ghaddafi's downfall.

### I. Historical Introduction

Egypt has been particularly influential to other Arab countries in the legal field.<sup>3</sup> The most famous Arab jurist of the twentieth century was Abd al-Razzaq al-Sanhury, a professor at the Cairo University law school. He redrafted Egypt's Civil Code in 1949<sup>4</sup> and it served as a template for many countries in the Arab world, which recreated major features of the Egyptian system.<sup>5</sup> Gulf States, for example, obtained Egyptian assistance in drafting their own constitutions and codes, and often employed Egyptians to staff their courts,<sup>6</sup> in addition to nationals who graduated from Egyptian universities or were otherwise trained in Egypt.

The increase in the use of military courts to try civilians—which constitutes an erosion of due process and greatly impacts people's civil and political rights—is a source of great concern as countries in the region attempt to change their systems of government away from powerful executive branches.

<sup>1.</sup> Tbink Tank: The Vital Middle in the Middle East, Pub. Broad. Serv. (Jul. 30, 1998) (Transcript), http://www.pbs.org/thinktank/show\_631.html; The World: Why Egypt Crisis Worries Neighbors, Pub. Radio Int'l (Jul. 8, 2013), available at http://www.pri.org/stories/2013-07-08/why-egypt-crisis-worries-neighbors; Lucette Lagnado, Saying Goodbye to Egypt Again, Wall St. J. (Sept. 17, 2011), http://online.ws/.com/news/articles/SB10001424053111903927204576570921448275448; Russell Raymond, As Goes Egypt, So Goes Tunisia? Not Quite, Huffington Post (Aug. 9, 2013), http://www.huffingtonpost.com/freedom-house/as-goes-egypt-so-goes-tun\_b\_3732252.html.

<sup>2.</sup> Egypt, CIA WORLD FACTBOOK, (last updated Jan. 27, 2016), https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html (follow "Introduction").

<sup>3.</sup> Its efforts in codifying law began in 1875. Chibli Mallat, Introduction to Middle Eastern Law 262 (Oxford Univ. Press, 2007).

<sup>4.</sup> Id. at 331, 350.

<sup>5.</sup> See Nathan J. Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf 17 (Cambridge Univ. Press, 1997).

<sup>6.</sup> Id. at 4, 17.

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### A. EGYPTIAN HISTORY FROM NASSER TO 2011

Although Egyptians gained their independence from the United Kingdom on February 22, 1922, the modern Egyptian nation state's birth can be traced to the Free Officer's Movement Revolution in 1952 and the end of monarchic rule in the country. After Muhammad Naguib's short-lived presidency, Gamal Abdel Nasser took power and ruled as president from 1956 to 1970. Egypt's first Constitution, ratified in 1923, provided for the ability to declare martial law; it was first declared in 1939 and lasted through the end of the Second World War. Martial law was again imposed from 1948 to 1950 as a result of the Arab-Israeli War and from 1952, following Suez Canal protests, until Gamal Abdel Nasser assumed the presidency in 1956. Nasser himself re-imposed martial law on two occasions: in November 1956 as a result of the Suez War and in 1958 during the union with Syria. November 1956 as a result of the Suez War and in 1958 during the union with Syria.

In 1958, Nasser enacted the Law Concerning the State of Emergency, Law 165 of 1958 (Emergency Law), which granted the President extraordinary powers, including the ability to refer certain cases to military courts. From that date until May 31, 2012, the Emergency Law was continuously in effect, with the exception of a brief eighteen-month period preceding President Sadat's death in 1981.<sup>11</sup> Anwar Sadat, Nasser's successor, followed the centralized executive model of governance, which was continued under Hosni Mubarak's rule upon Sadat's death.<sup>12</sup> Mubarak enacted several constitutional amendments in 2007 responding to pressure to repeal the Emergency Law.<sup>13</sup> But the amendments served to constitutionalize many of those emergency powers.<sup>14</sup>

### B. Arab Spring: Changes and Challenges

In February 2011, President Hosni Mubarak was toppled following massive popular protests that brought the nation to a standstill for eighteen days. <sup>15</sup> Following these protests, the Supreme Council of the Armed Forces took power with General Mohammad Tantawi acting as interim president. <sup>16</sup> The military council issued various Constitutional Declarations in 2011, among them, one limiting the duration of a declared state of emergency to only six months pending approval by popular referendum. <sup>17</sup> Mohammad Morsi, the Muslim Brotherhood candidate, won the presidential election and took office on June

<sup>7.</sup> Sadiq Reza, Endless Emergency: The Case of Egypt, 10 New Crim. L. Rev. 532, 540 (2007).

<sup>8.</sup> Id. at 535-36.

<sup>9.</sup> Id. at 536.

<sup>10.</sup> Id

<sup>11.</sup> Ahmed Eldakak, Approaching Rule of Law in Post-Revolution Egypt, 18 U.C. Davis J. Int'l L. & Pol. 261, 285 (2012); Int'l Comm'n of Jurists [ICJ], Egypt: A Flawed Constitutional Reform Process, 42 (Nov. 13, 2012), http://www.refworld.org/docid/530ef8a34.html.

<sup>12.</sup> All three presidents were part of the military.

<sup>13.</sup> Reza, *supra* note 7, at 541.

<sup>14.</sup> Article 179 of the 1971 Constitution was amended to allow exceptions to the Criminal Procedure Code with respect to anti-terrorism efforts, specifically the warrant requirement for searches and seizures, arrest and detention, home entry, and surveillance and seizure of correspondence. It also enshrined the President's power to refer terrorism cases to military and other special courts. *Id.* at 537, 541-42.

<sup>15.</sup> Egypt Profile-Timeline, BBC (May 29, 2014), http://www.bbc.com/news/world-africa-13315719.

<sup>16.</sup> Eldakak, supra note 11, at 276.

<sup>17.</sup> Id. at 303 (citing The Temporary Constitutional Declaration of 2011, Al-Jarida Al-Rasmiyya, 30 Mar. 2011, No. 12bis(B), art 59 (Egypt)).

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30, 2012.<sup>18</sup> A new Constitution was approved by the Constituent Assembly and took effect after a popular referendum on December 22, 2012.<sup>19</sup> But on July 3, 2013, Morsi was ousted and replaced by the president of the Constitutional Court, Adly Mansour, who served as interim president and subsequently by General Abdul al-Sisi, who assumed the presidency on June 8, 2014, following the May 2014 elections.<sup>20</sup> A new draft Constitution was approved and took effect on January 18, 2014, following a popular referendum, and is the current Egyptian Constitution.<sup>21</sup>

The end of Mubarak's thirty-year regime led to a succession of legal changes nominally intended to bring about sweeping changes guaranteeing freedom and democracy. One widely reviled piece of legislation,<sup>22</sup> the Emergency Law,<sup>23</sup> expired on May 31, 2012, and was not renewed.<sup>24</sup> The Emergency Law, further discussed *infra*, granted sweeping powers of detention and referral to military or state security courts for categories of crimes to be defined by the President. Over the years, these categories expanded to include any violation that might relate to military matters, persons or objects, "terrorism", and "thuggery", the last two being very broadly defined crimes. "Terrorism" covers "any threat or intimidation with the aim of disturbing the peace or jeopardizing the safety and security of the society," and the hindrance of "public authorities in the performance of their work." "Thuggery" is formally defined as displaying force or threatening to use force with the intent to intimidate or cause harm; however, it has been broadly interpreted as encompassing breaking curfews, destroying public property, theft, and a variety of other acts. This allowed civilians to be detained and tried before military and state security courts for virtually any crime.

<sup>18.</sup> Matt Bradley, Morsi Takes Office, Praises Egyptian Military, WALL St. J. (June 30, 2012), http://online.wsj.com/news/articles/SB10001424052702304058404577498384052282866.

<sup>19.</sup> Shaimaa Khalil, Egyptian Constitution "Approved" in Referendum, BBC (Dec. 23, 2012), http://www.bbc.com/news/world-middle-east-20829911.

<sup>20.</sup> Patrick Kingsley & Martin Chulov, Mobamed Morsi Ousted in Egypt's Second Revolution in Two Years, The Guardian (July 4, 2013), http://www.theguardian.com/world/2013/jul/03/mohamed-morsi-egypt-second-revolution; David D. Kirkpatrick, Army Ousts Egypt's President; Morsi is Taken Into Military Custody, N.Y. Times (July 3, 2013), http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html?pagewanted=all; Ben Wedeman, Reza Sayah & Matt Smith, Coup Topples Egypt's Morsy; Deposed President Under "House Arrest", CNN (July 4, 2013), http://edition.cnn.com/2013/07/03/world/meast/egypt-protests/.

<sup>21.</sup> David D. Kirkpatrick, Overwhelming Vote for Egypt's Constitution Raises Concern, N.Y. Times (Jan. 18, 2014), http://www.nytimes.com/2014/01/19/world/middleeast/vote-validates-egypts-constitution-and-military-takeover.html; Egypt Constitution Approved by 98.1 Percent, AL JAZEERA ENGLISH (Jan. 24, 2014), http://www.aljazeera.com/news/middleeast/2014/01/egypt-constitution-approved-981-percent-2014118163264705 32.html.

<sup>22.</sup> One of the demonstrators' principal demands during the Revolution of 2011 was to repeal the Emergency Law. Eldakak, *supra* note 11, at 302; *The Demands of the Egyptian Revolution*, CodePink (2011), http://www.codepinkarchive.org/article.php?id=5695.

<sup>23.</sup> Eldakak, supra note 11, at 285; Int'l Comm'n of Jurists (ICJ), supra note 11.

<sup>24.</sup> Egypt Lifts Popular Emergency Law, CNN (Jan. 24, 2014), www.edition.cnn.com/2012/05/31/world/africa/egypt-emergency-law/index.html.

<sup>25.</sup> Eldakak, supra note 11, at 287, n.158; Law No. 58 of 1937 (Penal Code), Al-Jarida Al-Rasmiyya, 5 Aug. 1937, art. 46 (Egypt).

<sup>26.</sup> Eric Trager, Egypt's Military Tribunals: Illiberal and Destabilizing, The Wash. Inst. (Aug. 30, 2011), http://www.washingtoninstitute.org/policy-analysis/view/egypts-military-tribunals-illiberal-and-destabilizing; article 375(bis) of the Penal Code.

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### C. Due Process Violations in Military Trials

Military courts are governed by the Code of Military Justice, Law 25 of 1966, discussed *infra*, while state security courts are governed by the now-dormant Emergency Law. Military courts have jurisdiction over crimes by members of the armed forces, as well as over civilians as described in article 204 of the 2014 Constitution and the Code of Military Justice.<sup>30</sup> Section 6 of the Code, which was repealed in 2012, also permitted the President to refer cases to the military courts.<sup>31</sup> State security courts had jurisdiction over violations of Presidential orders issued pursuant to his powers under the Emergency Law, and over criminal offenses the President referred to those courts during a state of emergency.<sup>32</sup>

Military courts—much like state security courts—operate secretively, which makes it difficult to ascertain how criminal procedure law is implemented *de facto.*<sup>33</sup> Both news and human rights reports reveal that defendants do not receive basic due process rights. Unlike civilian trials, which follow constitutionally established criminal procedure that guarantees access to counsel, the right to appeal, and other fair trial guarantees, military tribunals currently operate in a legal vacuum. Detainees are often held in very poor conditions and mistreated.<sup>34</sup> "The trials can take place in as little as five minutes. Defendants

<sup>27.</sup> INT'L COAL. FOR FREEDOMS & RIGHTS, Civilians' Referral to Military Tribunals in Egypt, 12, http://www.icfr.info/en/wp-content/uploads/Civilians-referral-to-military-tribunals-in-Egypt.pdf (last visited Feb. 12, 2016) (stating that "for crimes that constitute a direct assault against military facilities or camps of the Armed Forces, or their equivalents, against military zones or border zones determined as military zones, against the Armed Forces' equipment, vehicles, weapons, ammunition, documents, military secrets, or its public funds, or against military factories; crimes pertaining to military service; or crimes that constitute a direct assault against the officers or personnel of the Armed Forces by reason of performing their duties."); CODEPINIK, subra note 22.

<sup>28.</sup> It appears to narrow jurisdiction through its wording, which implies that civilians will only be prosecuted before military courts if they commit a "direct assault" against the functioning of the military. As will be discussed, *infra*, this is not the case.

<sup>29.</sup> As many civilians were prosecuted before military courts in the three months following Mubarak's ouster alone (11,879 persons) as during Mubarak's entire 30-year rule (nearly 12,000 persons). Egypt: Retry or Free 12,000 After Unfair Military Trials, Human Rights Watch (Sept. 10, 2011), http://www.hrw.org/news/2011/09/10/Egypt-retry-or-free-12000-after-unfair-military-trials; Erin Banco, Egypt's Sisi Extends Reach of Military Courts Reminiscent of Mubarak Era, Int'l Bus. Times (Nov. 17, 2014), http://www.ibtimes.com/egypts-sisi-extends-reach-military-courts-reminiscent-mubarak-era-1724829.

<sup>30.</sup> Sadiq Reza, Egypt: Criminal Law, Handbook of Comparative Criminal Law 5-1, 5-3, available at http://ssrn.com/abstract=1854895.

<sup>31.</sup> *Id*.

<sup>32.</sup> Id.

<sup>33.</sup> Elizabeth Arrott, Egyptian Civilians Caught in Military Tribunals, Voice of America (Aug. 16, 2011), http://www.voanews.com/content/egyptian-civilians-caught-in-military-tribunals-127950738/143936.html.

<sup>34.</sup> Jack Shenker, Egyptian Junta Pledges to Free Hundreds After Damming Prison Letter is Published, The Guardian (Nov. 2, 2011), http://www.theguardian.com/world/2011/nov/02/egypt-military-promises-pardon-civilians; Alaa Abd El Fattah, After Egypt's Revolution, I Never Expected to be Back in Mubarak's Jails, The Guardian (Nov. 2, 2011), http://www.theguardian.com/commentisfree/2011/nov/02/egypt-revolution-back-mubarak-jails; Kristen Chick, Rare Success Story for Egypt's Revolution: Ending Military Trials, Christian

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sometimes cannot choose their lawyers, and are sometimes allowed to say only a single word before the military judge."35 Defendants are sometimes prevented from accessing an attorney of their choosing, and when they are given access, the attorneys are often not granted enough time to review the evidence and other documents properly.<sup>36</sup> Although amendments in 2007 introduced an appeals system that permits defendants to appeal to a higher military court, the defendant may not file the appeal until a certification officer ratifies the court of first instance's judgment.<sup>37</sup> As the certification officer is not compelled to ratify within a specific period of time, this often results in prolonged detention and a total deprivation of the defendant's ability to appeal.<sup>38</sup>

By mid-2012, over twelve thousand civilians had faced trial before military tribunals, with Human Rights Watch reporting that at least forty-three juveniles were submitted to military trials.<sup>39</sup> Although the new Egyptian Constitution explicitly permits military trials for civilians, its provisions are unusual in that they expand the array of due process guarantees enshrined in the Constitution, including access to counsel and the right to appeal, which stand in direct opposition to civilians' current treatment before military tribunals. The new Constitution theoretically ensures that all defendants are granted basic fair trial guarantees, regardless of whether they fall under the jurisdiction of military courts under the new Constitution.

### II. Military Court Jurisdiction and Its Legal Bases

### A. CONSTITUTIONALITY OF MILITARY TRIALS FOR CIVILIANS

Military Courts' mandate is provided for in article 204 of the 2014 Egyptian Constitution. Article 204 states as follows:

The Military Court is an independent judicial body exclusively competent to adjudicate on all crimes pertaining to the Armed Forces, the officers and personnel thereof, and their equivalents, and on the crimes committed by the personnel of the General Intelligence while and by reason of performing their duties.

No civilian shall face trial before the Military Court, except for crimes that constitute a direct assault against military facilities or camps of the Armed Forces, or their equivalents, against military zones or border zones determined as military zones, against the Armed Forces' equipment, vehicles, weapons, ammunition, documents,

SCIENCE MONITOR (Apr. 26, 2012), http://www.csmonitor.com/World/Middle-East/2012/0426/Rare-success-story-for-Egypt-s-revolution-ending-military-trials.

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<sup>35.</sup> Kristen Chick, supra note 34.

<sup>36.</sup> Military Trials of Civilians in Egypt since the January 25 Revolution, CAIRO INST. FOR HUMAN RIGHTS STUDIES & NO MILITARY TRIALS FOR CIVILIANS GRP. 3 (June 2012), www.cihrs.org/wp-content/uploads/2012/06/Military-Trials-of-Civilians-in-Egypt-since-the-January-25-Revolution.pdf. For example, Ahmed Helmy, an attorney currently representing four civilians facing military trial has stated that he was not allowed to visit his clients in custody and first met them at their initial court hearing. Egypt: Unprecedented Expansion of the Military, Human Rights Watch (Nov. 17, 2014), http://www.hrw.org/news/2014/11/17/egypt-unprecedented-expansion-military-courts.

<sup>37.</sup> Cairo Inst. for Human Rights, supra note 36.

<sup>38.</sup> *Id*.

<sup>39.</sup> Egypt: Children on Trial, Human Rights Watch (Mar. 27, 2012), http://www.hrw.org/news/2012/03/27/egypt-children-trial.

military secrets, or its public funds, or against military factories; crimes pertaining to military service; or crimes that constitute a direct assault against the officers or personnel of the Armed Forces by reason of performing their duties.

The law shall define such crimes, and specify the other competences of the Military Court.

Members of the Military Court shall be independent and shall be immune to dismissal. They shall have all the guarantees, rights and duties stipulated for the members of other judicial bodies.<sup>40</sup>

This article appears to give the military tribunals a much narrower jurisdiction over civilians than any previous constitutional iteration on the subject. The 2013 draft Constitution produced by the Committee of Ten, for example, defined the military courts' jurisdiction over civilians more vaguely and thus more broadly. Article 174 of that draft stated: "[c]ivilians shall not be tried before military courts except for crimes that are direct wrongdoings to the Armed Forces, and the law shall define such crimes and other jurisdictions of the Military Judiciary." Ultimately, the final version of the Constitution appears to much more narrowly define those crimes that are direct wrongdoings to the Armed Forces. But the 2014 Constitution still uses many vague terms, which allow for continually expanding military court jurisdiction. The term "direct assault" and "their equivalents" are never defined and have been often construed to mean that a case must be heard before a military, rather than civilian, tribunal.

Furthermore, article 204 of the 2014 Constitution defines military courts' jurisdiction to include crimes that constitute a direct attack against military holdings, properties, funds, and personnel. This is particularly troublesome given the Egyptian military's extensive property ownership and involvement in the Egyptian economy. The Arab Organization for Industrialization and the National Service Projects Organization are directly overseen by the Egyptian military (the Ministry of State for Military Production and the Ministry of Defense, respectively).<sup>42</sup> The military's economic activities include production of household appliances, agrarian projects, hotels, maritime transportation, wastewater treatment plants, gas stations, construction projects, and even the production of basic foodstuffs like pasta.<sup>43</sup> In sum, military projects constitute around five to fifteen percent (5-15%) of the country's gross domestic product.<sup>44</sup> Therefore, even under the

<sup>40.</sup> Constitution of the Arab Republic of Egypt, 18 Jan. 2014 at art. 204, translated in Comparing Three Versions of the Egyptian Constitution, Comparative Constitutions Project, http://comparativeconstitutionsproject.org/comparing-the-egyptian-constitution (an unofficial English translation).; see also Int'l Coalition for Freedoms & Rights, supra note 27.

<sup>41.</sup> Nancy Messieh, An Eye on Egypt's Amended Constitution: Military Articles, ATLANTIC COUNCIL (Oct. 2, 2013), http://www.atlanticcouncil.org/blogs/egyptsource/an-eye-on-egypt-s-amended-constitution-military-articles

<sup>42.</sup> Cherine Chams El-Dine, *The Military and Egypt's Transformation Process*, 6 SWP COMMENTS 1, 2 (Feb. 2013), http://www.swp-berlin.org/fileadmin/contents/products/comments/2013C06\_ced.pdf.

<sup>43.</sup> Id. at 2-3; Sherif Tarek, Inside Egypt's Draft Constitution: Debates Over Military Powers Continue, Ahram Online (Dec. 12, 2013), http://english.ahram.org.eg/News/88582.aspx; Zeinab Abul-Magd, Egypt's Military Business: The Need for Change, Middle East Inst. (Nov. 19, 2015), http://www.mei.edu/content/map/egypt's-military-business-need-change.

<sup>44.</sup> El-Dine, supra note 42, at 3; see also Joshua Stacher, Deeper Militarism in Egypt, MIDDLE EAST INST' (Sept. 16, 2013), http://www.mei.edu/content/deeper-militarism-egypt.

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seemingly restrictive provisions of article 204, an Egyptian civilian could be tried before a military tribunal for an altercation at a military-owned gas station or wedding hall.<sup>45</sup> It has also been argued that the phrase "or their equivalents" could be interpreted to include civilian employees at military-owned businesses.<sup>46</sup> A recent presidential decree, promulgated in October 2014 and discussed *infra*, declared public areas and vital installations as "equivalent" to military areas and vastly expanded military courts' jurisdiction.

The 2012 Constitution contained a similar, more vaguely worded provision allowing trials of civilians before military courts. Article 198 of that Constitution stated "[c]ivilians cannot stand trial before military courts except for crimes that harm the armed forces. The law defines such crimes and determines the other competencies of the Military Judiciary." The 2012 Constitution's provision was problematic in that it referred to vague harms against the Armed Forces. Although the 2014 Constitution seems to limit this jurisdiction to offences involving military members and military property, it also allows for military courts' competency to be further defined by law.

Specifically, the 2014 Constitution contains a provision in common with the two previous Constitutions of 2012 and 1971. The three versions all state that "[t]he law defines such crimes and determines the other competencies of the Military Judiciary." This wording was the only provision in the 1971 Constitution, contained in article 183 that referred to the existence of the military judiciary. Nevertheless, thousands of civilians throughout the Mubarak regime<sup>49</sup> and nearly 11,879 civilians in the year following Mubarak's ouster were tried before military tribunals pursuant to this provision.<sup>50</sup> The law referred to in all three Constitutions is the Code of Military Justice, which governs the military judiciary and provides for a wider competency to try civilians than specified in article 204 of the 2014 Constitution.

## B. MILITARY COURTS' COMPOSITION

Per article 204 of the 2014 Constitution, military tribunals' structure and competencies are defined by law, specifically the Code of Military Justice. Section 43 of the Code of Military Justice structures military courts into a Supreme Military Court, a Central Military Court with Supreme Authority and a Central Military Court. Section 44 specifies that the Supreme Military Court is composed of three judge officers, presided over by the senior judge, whose rank cannot be inferior to that of lieutenant colonel. Section 47 also stipulates that in some cases there may be five judges sitting in a case. There will also be

<sup>45.</sup> Sherif Tarek, supra note 43.

<sup>46.</sup> Sonia Farid, Military Trial Back to Haunt Egyptian Civilians, AL ARABIYA NEWS (Dec. 2, 2013), http://english.alarabiya.net/en/perspective/analysis/2013/12/02/Military-trials-back-to-haunt-Egyptian-civilians

<sup>47.</sup> Constitution of the Arab Republic of Egypt, 30 Nov. 2012 at art. 198, translated in Comparing Three Versions of the Egyptian Constitution, Comparative Constitutions Project, http://comparativeconstitutionsproject.org/comparing-the-egyptian-constitution (an unofficial English translation).

<sup>48.</sup> David Risley, Egypt's Judiciary: Obstructing or Assisting Reform?, MIDDLE EAST INST. (Jan. 13, 2016), http://www.mei.edu/content/at/egypt's-judiciary-obstructing-or-assisting-reform.

<sup>49.</sup> One report which states that around 1,033 civilians were tried before military courts in the period between 1992 and 2000, with 644 defendants receiving imprisonment sentences and 92 defendants subjected to the death penalty. Reza, *supra* note 7, at 641.

<sup>50.</sup> Stacher, supra note 44.

 $<sup>51.\ \</sup>mbox{The Constitution}$  of the Arab Republic of Egypt at art. 204.

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one military prosecutor and a clerk. Under section 50, the Supreme Military Court may consider all crimes committed by officers or crimes in which officers take part, and felonies included in the competence of military jurisdiction. Section 51 further restricts these two felonies carrying the punishment of the death penalty or hard labor. The court is entitled to decide which felonies fall within its competence – whether prescribed by military law or under the Penal Code and regardless of the perpetrator's status as military or civilian.<sup>52</sup>

The Central Military Court with Supreme Authority is composed of an individual judge whose rank is at least that of a major, per section 45. There will also be a military prosecutor and a clerk. Section 47 dictates that in some cases, the court may be composed of three judges. Section 51 sets its jurisdiction as comprehending all felonies within the military tribunals' jurisdiction that can be punished through imprisonment or hard labor, regardless of the perpetrator's military or civilian status, except if they are officers, as the Supreme Military Court has exclusive jurisdiction over them.

The Central Military Court is, according to section 46, composed of one judge whose rank is of captain or higher. Under section 47, the court may be comprised of three judges at the request of the presiding judge. A military prosecutor and a clerk must also be present. Per section 52, this court has jurisdiction over misdemeanors and petty offenses, whether stipulated under military or ordinary law and regardless of whether the perpetrator is military or civilian, except if the perpetrator is an officer.

Following an amendment to section two in 2007, military judges must now fulfill the same qualification requirements as civilian judges as defined in article 38 of the 1972 Law on Judicial Authority. In other words, they must possess, at minimum, a law degree.<sup>53</sup> But section 57 of the Code specifies that military judges are subject to all aspects of military law, including discipline and obedience, in contravention to the judicial independence requirement mandated by law.<sup>54</sup> Additionally, the executive branch appoints military judges to renewable two-year terms, which further compromises their independence.<sup>55</sup>

### C. Jurisdiction under the Code of Military Justice, Law 25 of 1966

The Code of Military Justice, law 25/1966 governs military courts, much like the Uniform Code of Military Justice governs Courts Martial in the United States. Unlike the latter, however, Egyptian military courts are granted jurisdiction over civilians. The earlier provisions of this law articulate the breadth of the military justice system's jurisdiction. Section five states that military courts have jurisdiction over:

- (1) Crimes committed against the safety, security or interests of the armed forces,
- (2) Crimes stipulated in the Military and National Service Code, and

<sup>52.</sup> Seif el-Islam, Exceptional Law and Exceptional Courts, in EGYPT AND ITS LAWS 359, 373 (Nathalie Bernard-Maugiron & Baudouin Dupret eds., 2002); see also Mohamed Nour Farhat & Ali Sadek, Promoting the Rule of Law and Integrity in the Arab Countries Project, ACRLI, available at http://www1.umn.edu/humanrts/research/Egypt/Egypt\_FinalReportP2S4\_En.pdf.

<sup>53.</sup> Hafez Abu Seada, Exceptional Courts and the Natural Judge, in Judges and Political Reform in Egypt 171, 171 (Nathalie Bernard-Maugiron, ed., 2008).

<sup>54.</sup> Id

<sup>55.</sup> Freedom in the World 2013: Egypt, FreeDom House (2013), https://freedomhouse.org/report/freedomworld/2013/egypt#.VQK12kYnutw.

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(3) Crimes committed in army bases, barracks, establishments, factories, ships, planes, vehicles, spaces, things or places, wherever they may be, operated by army personnel on behalf of the armed forces.<sup>56</sup>

The military courts possess jurisdiction regardless of whether the crime is committed by uniformed military personnel or civilians. This section is now enshrined in the Constitution itself by reference to the Code of Military Justice in article 204. Section 7 of the Code grants additional jurisdiction over civilians where a member of the armed forces is one of the parties involved in the offence being tried.<sup>57</sup> Under section 8 *bis*, minors may also be tried before military courts if they were accompanied by an adult subject to military jurisdiction at the time of the offence.<sup>58</sup> Perhaps most troublingly, section 48 of the Code grants the military judiciary itself the exclusive competence to determine whether a specific crime falls under its jurisdiction.<sup>59</sup>

The Code of Military Justice was amended in 2012. Section 6, which granted extensive powers to the President, was repealed. Section 6 stated:

The provisions of this law apply to crimes provided for in the first and second chapters of the second book of the Penal Code, as well as crimes that are related to it, which will be referred to the military court following a decision by the President of the Republic.

When a state of emergency is declared, the President of the Republic may refer any cases punishable under the Penal Code or any other law.<sup>60</sup>

Those chapters of the Penal Code deal with "Felonies and Misdemeanors harmful to the Government's Security from a Source Abroad" and "Felonies and Misdemeanors Internally Prejudicial to the Government," articles 77-102F.<sup>61</sup> These articles encompass a wide array of crimes, many of them vaguely defined and harshly penalized. For example, article 77 of the Penal Code states that "[a]ny person who commits premeditatedly a deed that leads to affecting the country's independence, unity and the integrity of its territories shall be punished with a sentence of death."

<sup>56.</sup> Law No. 25 of 1966 (Code of Military Justice, reformed in 2012), Al-Jarida Al-Rasmiyya 6 June 1966 § 5, (Egypt) (unofficial English translation on file with author, courtesy of Farah Al Haddad, NYU School of Law, candidate for J.D. 2017).

<sup>57.</sup> Egypt: New Law Keeps Military Trials of Civilians, Human Rights Watch (May, 7, 2012), http://www.hrw.org/news/2012/05/07/egypt-new-law-keeps-military-trials-civilians; Menna Hegab, Constitution-Backed "Military State": Fact or Fiction?, Egypt Independent (Sept. 13, 2013), http://www.egyptindependent.com/news/constitution-backed-military-state-fact-or-fiction.

<sup>58.</sup> Law No. 25 of 1966, at § 8(bis)(1); Egypt: Children on Trial, supra note 39; Egypt: New Laws Keep Military Trials of Civilians, CHILD RIGHTS INTERNATIONAL NETWORK, (May 9, 2012), http://www.crin.org/en/library/news-archive/egypt-new-laws-keep-military-trials-civilians.

<sup>59.</sup> Justice at a Crossroads: The Legal Profession and the Rule of Law in the New Egypt, IBAHRI 20 (Nov. 2011), available at http://www.ibanet.org/Document/Default.aspx?DocumentUid=981DD862-B07F-4E6F-8A17-EDC9E9D07D64.

<sup>60.</sup> Article 6(2) Law No 25 of 1966 (as amended by Law No. 5 of 1970).

<sup>61.</sup> Law No. 58 of 1937 (Promulgating the Penal Code), Al-Jarida Al-Rasmiyya (Egypt), art. 46.

<sup>62.</sup> Id. art. 77.

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Several of these articles are particularly vulnerable to exploitation against journalist defendants.<sup>63</sup> Article 80C, for example, states that imprisonment must be imposed for "whoever deliberately discloses in time of war, false or tendentious news, information or rumors, or willfully propagates provocative publicity, which is all liable to attain harm and damage to the military preparations for the country's defense, . . . military operations, create panic among the people, or weaken the nation's toleration and endurance." Many of the articles in those chapters also deal with crimes of "terrorism." Article 86 of the Penal Code broadly defines terrorism as:

all use of force, violence, threatening or frightening, to which a felon resorts in execution of an individual or collective criminal scheme, with the aim of disturbing public order, or exposing the safety and security of society to danger, if this is liable to harm the persons, or throw horror among them, expose their life, freedom or security to danger, damage the environment, causes detriment to communications, transport, property and funds, buildings, public or private properties, occupying or taking possession of them, preventing or obstructing the work of public authorities, worship houses, or educational institutions, or interrupting the application of the constitution, laws, or statutes.<sup>64</sup>

Depending on the classification of the terrorist acts committed, punishment under the Penal Code can range from imprisonment or temporary hard labor to capital punishment.<sup>65</sup>

In 1993, the Minister of Justice attempted to challenge the constitutionality of the President's power to refer cases to military tribunals under section six before the Supreme Constitutional Court. The Court, however, decided that section six of the code was constitutional.<sup>66</sup> Although section six of the Code of Military Justice—which granted the President the power to refer cases to military tribunals—was repealed in part on May 6, 2012,<sup>67</sup> the Emergency Law has been lifted, and article 179 of the 1971 Constitution, which gave the President the power to refer terrorism cases to military or state security courts, was effectively overturned by the 2012 and 2014 Constitutions which grant no such power;<sup>68</sup> military courts continue to have jurisdiction over civilians. Military judges' power to rule on their jurisdictional competency under section 48 of the Code of Military Justice,<sup>69</sup>

<sup>63.</sup> Agence France-Presse, Egypt to Allow Appeals Against Military Court Verdicts, INTERAKSYON (Feb. 3, 2014), http://www.interaksyon.com/article/79960/egypt-to-allow-appeals-against-military-court-verdicts (discussing in late 2013 and early 2014, three Egyptian journalists have been tried and sentenced in military court for "reporting without authorization in a military zone," "impersonating a military officer over the phone" and "photographing army checkpoints").

<sup>64.</sup> Law No. 58 of 1937 (Promulgating the Penal Code), Al-Jarida Al-Rasmiyya, art. 88.

<sup>65.</sup> Id. arts. 86(bis)-88 (Egypt).

<sup>66.</sup> Id. arts. 374-75; Supreme Constitutional Court, 1/15 (interpretation), 30 Jan. 1993, Official Gazette, Vol. 4 (bis).

<sup>67.</sup> Amendment Stripping President of Right to Refer Civilians to Military Trials Approved, EGYPT INDEP. (Apr. 10, 2012), http://www.egyptindependent.com//news/amendment-stripping-president-right-refer-civilians-military-trials-approved; Egypt: New Law Keeps Military Trials of Civilians, supra note 56; Egypt: President Morsy Should End Military Trials of Civilians, HUMAN RIGHTS WATCH (Jul. 15, 2012), http://www.hrw.org/news/2012/07/15/egypt-president-morsy-should-end-military-trials-civilians.

<sup>68.</sup> Constitution of the Arab Republic of Egypt, art. 179, 11 Sept. 1971, as amended, May 22, 1980, May 25, 2005, March 26, 2007 (Egypt).

<sup>69.</sup> El-Islam, *supra* note 52, at 374.

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coupled with Law 136 of 2014, discussed *infra*, effectively allows for military courts to try civilians for these wide array of offenses: generally, if the offense involves a member of the armed forces, takes place on military-owned property, or takes place within public property or vital installations.<sup>70</sup> Military courts hand down harsher sentences than civilian courts, and given its convoluted appeals procedure, are effectively unable to be appealed.<sup>71</sup>

Finally, a significant change is contained in article 237 concerning terrorism. Unlike article 179 of the 1971 Constitution, the 2012 Constitution makes no reference to terrorism and the 2014 Constitution does not grant the President the power to refer terrorism cases to "any judiciary body stipulated in the Constitution or the law." This is particularly important because "terrorism" is a broad and malleable term that can be abused. Terrorism is listed as a crime in the Penal Code and can thus be tried in civilian courts. But given the broad military judiciary jurisdiction, terrorist acts could still fall within the stipulations in article 204 of the new Constitution or in the provisions of the Code of Military Justice.

D. Law for the Securing and Protection of Public and Vital Facilities, Law 136 of 2014

Following the death of at least thirty-one Egyptian soldiers in the Sinai Peninsula, President Sisi issued Law 136 of 2014. The presidential decree, titled Law for the Securing and Protection of Public and Vital Facilities, renders "all public and vital facilities" as "equivalent to military facilities" and are thus under military jurisdiction for the next two years. Vital institutions include power plants, oil fields, railroads, roads, and bridges; while "public facilities" include universities and roads. Therefore, military tribunals can try crimes such as destroying public property and blocking roads. General Medhat Ghozy, the head of the Military Judiciary Authority was interviewed on the Canadian Broadcasting Corporation on November 1, 2014, where he stated that the decree expanded military courts' jurisdiction to cover "any building or property that provides a general service or is state-owned." Article 2 of the decree requires state prosecutors to refer any crimes committed in those areas to military courts. Some prosecutors and judges have applied this article retroactively—to crimes committed before October 27, 2014, when the law was issued.

<sup>70.</sup> Civilians Referral to Military Tribunals in Egypt, INT'L COALITION FOR FREEDOMS & RIGHTS, (Apr. 2015) http://www.icfr.info/en/wp-content/uploads/Civilians-referral-to-military-tribunals-in-Egypt.pdf.

<sup>71.</sup> Tarek, supra note 43.

<sup>72.</sup> Egypt: Surge of Military Trials, Human Rights Watch (Dec. 18, 2014), http://www.hrw.org/news/2014/12/18/Egypt-surge-military-trials; Patrick Kingsley, Egypt Places Civilian Infrastructure Under Army Jurisdiction, The Guardian (Oct. 28, 2014), http://www.theguardian.com/world/2014/oct/28/egypt-civilian-infrastructure-army-jurisdiction-miltary-court.

<sup>73.</sup> Kingsley, supra note 72.

<sup>74.</sup> Erin Cunningham, Egypt's Leader Grants Military Broad Powers to Put Civilians on Trial, Wash. Post (Oct. 27, 2014), http://www.washingtonpost.com/world/egypts-leader-grants-military-broad-powers-to-put-civilians-on-trial/2014/10/27/1a041db2-aa97-4f69-a619-0ec50994f167\_story.html; Kingsley, supra note 70.

<sup>75.</sup> Egypt: Unprecedented Expansion of Military Courts, supra note 37.

<sup>76.</sup> Id.

<sup>77.</sup> Egypt: Surge of Military Trials, supra note 72.

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Reports state that in the six weeks following the presidential decree, at least 820 civilians were referred to military tribunals.<sup>78</sup> In November 2014, five University students accused of burning down Al-Azhar University's control room were referred to a military court by a civilian criminal court judge.<sup>79</sup> The civilian criminal judge originally presiding over the case stated that he understood the presidential decree removed his court's jurisdiction to try the matter.<sup>80</sup> On 4 December 2014, one prosecutor referred twenty-six men to military court for rioting and belonging to the banned organization, the Muslim Brotherhood.<sup>81</sup> On December 13, 2014, 438 supporters of former President Morsi were also referred to military tribunals for participation in deadly violence following Morsi's ouster,82 even though 139 of them were already facing charges in civilian criminal courts before being transferred.83 On December 15, 2014, top leaders of the Muslim Brotherhood were among 310 other defendants transferred to military courts for trial over rioting and inciting violence in Ismailia.84 Finally, prosecutors also referred forty others to military courts for participating in protests, inciting violence and blocking roads-among them were several underage girls.85

### E. Appeals of Military Court Verdicts

The Code of Military Justice also presents an obstacle to defendants who attempt to appeal their verdicts. Although appeals to the Supreme Court of Military Appeals were allowed under limited circumstances after an amendment to the law in April 2007,86 other sections of the Code make those appeals practically impossible. As previously stated, section 99 states that a certification officer-a person who does not witness the trial-has the "absolute authority to amend or cancel the punishment, and cancel judgments of acquittal and retrial, or suspend or annul a judgment".87 Without such certification, the defendant cannot make a motion for an appeal, often leading to lengthy incarceration.<sup>88</sup> Finally, the President may also amend, abolish or postpone a sentence pursuant to sections 105, 112 and 116, but only after the certification officer has ratified the verdict.

<sup>78.</sup> Id.

<sup>79.</sup> Egypt: Unprecedented Expansion of Military Courts, supra note 37; see also Five Azbar Students Referred to Military Tribunal for Arson, Aswat Masriya (Nov. 16, 2014 4:59 PM), http://en.aswatmasriya.com/news/ view.aspx?id=b2b0b939-ac3b-44b6-98ea-75efbcf63442.

<sup>80.</sup> Id.

<sup>81.</sup> Egypt: Surge of Military Trials, supra note 72.

<sup>82.</sup> Egypt Refers Hundreds to Military Tribunals, DEUTSCHE WELLE (Dec. 14, 2014), http://www.dw.de/ egypt-refers-hundreds-to-military-tribunals/a-18127744.

<sup>83.</sup> Egypt: Surge of Military Trials, supra note 72.

<sup>84.</sup> Id.

<sup>85.</sup> Id.

<sup>86.</sup> Reza, supra note 7, at 541 (citing Law No. 16 of 2007 (Code of Military Justice, amended in 2012), Al-Jarida Al-Rasmiyya (Egypt)); Military Trials of Civilians, supra note 36, at 2-3; Broken Promises: Egypt's Military Rulers Erode Human Rights, Amnesty International, 34 (Nov. 2011) (Defendants who manage to appeal will have their cases brought before the Supreme Court for Military Appeals. This court will only review the law, its interpretation and procedural issues. It does not review the merits or evidentiary sufficiency of the case.).

<sup>87.</sup> CAIRO INST. FOR HUMAN RIGHTS STUDIES AND NO MILITARY TRIALS FOR CIVILIANS, supra note 36, at 2, n. 4.

<sup>88.</sup> Id. at 3.

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Appeals function very differently in the civilian criminal justice system. The ordinary criminal justice system differentiates between lesser offences and greater offences. The former-misdemeanors and violations-are tried in single-judge summary courts and they are appealable before three-judge panels from the court of first instance (called misdemeanor courts of appeal when convened for this purpose). Verdicts are further appealable at a second level to the Court of Cassation.89 Felonies, on the other hand, are tried by three-judge courts and the verdicts are appealable solely to the Court of Cassation, where a panel of five judges hears the appeal.<sup>90</sup> The Court of Cassation only reviews errors of law committed by the trial court—whether there was a failure to apply the law, misapplications or misinterpretations of the law, or legal insufficiency of the evidence to support a conviction.91 Nothing in the Code of Criminal Procedure, Law 150 of 1950, which governs all procedural matters in the civilian criminal justice system, requires ratification by an officer in order to file an appeal.<sup>92</sup> Section 209 of the Code of Criminal Procedure grants standing to appeal to convicted persons, parties liable in damages, and the State representative (typically the Public Prosecutor). The party that wishes to appeal must do so within ten days of the date when the judgment is issued; however, the Public Prosecutor is granted a period of thirty days to file an appeal.<sup>93</sup> To file an appeal, the party is simply required to enter a declaration at the office of the court94 that issued the judgment.95

### F. Law Concerning the State of Emergency, Law 165 of 1958

In addition to the problematic Article 204, the 2014 Constitution provides for the declaration of a state of emergency in Article 154.96 This provision is similar to Article 148 of the 1971 Constitution.97 The new constitution, however, does provide for several new safeguards. A state of emergency must now be approved by a majority of members of the

The President of the Republic shall proclaim a state of emergency in the manner prescribed by

Such proclamation must be submitted to the People's Assembly within the following fifteen days so that the Assembly may take a decision thereon. In case of the dissolution of the People's Assembly, the matter shall be submitted to the new Assembly at its first meeting.

In all cases, the proclamation of the state of emergency shall be for a limited period, which may not be extended unless by approval of the Assembly.

Under the 1971 Constitution, there was no supermajority vote requirement, and the state of emergency could remain in effect even if the Assembly was dissolved and could not vote on the validity of the declaration of a state of emergency. The maximum length of a state of emergency without requiring re-approval was also

<sup>89.</sup> Reza, *Handbook of Comparative Criminal Law*, supra note 30, at 5-7 (indicating the misdemeanor courts of appeal hear criminal appeals).

<sup>90.</sup> Id.

<sup>91.</sup> Id. at 5-5, 5-6.

<sup>92.</sup> See Law 150 of 1950 (Code of Criminal Procedure), Al-Jarida Al-Rasmiyya § 177 (Egypt), available at https://archive.org/stream/codecriminalpro00egypgoog\_djvu.txt.

<sup>93.</sup> Id. § 177.

<sup>94.</sup> Id. § 178

<sup>95.</sup> Id. § 210 (indicates that the procedure for filing appeals in criminal cases must be done in accordance with §§ 177-78).

<sup>96.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 154.

<sup>97.</sup> Article 148 of the 1971 Constitution states:

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House of Representatives, and the state of emergency cannot exceed three months unless it is further extended by a vote of two-thirds of the House of Representatives. Despite the more stringent requirement of the House of Representative's approval, a new state of emergency can be continually extended as was possible for decades prior to May 31, 2012. As discussed *infra*, such a re-instatement would grant even greater flexibility to abuse civilians' civil and political rights.

The declaration of a state of emergency would revive the Emergency Law, which granted the president very broad powers. A state of emergency can be imposed "whenever public security or order are threatened," whether due to war, a state threatening the eruption of war, internal disturbances, natural disasters, or an epidemic. <sup>100</sup> Prior to the 2014 Constitution, the only procedural requirements were that the president declare a state of emergency and specify its reason(s), the region(s) covered, the date of application, and refer the declaration to the People's Assembly for ratification within fifteen days or at the first meeting of the next Assembly if declared during the Assembly's recess. <sup>101</sup>

Under Article 3 of the Emergency Law, the state of emergency would grant the president the power to:

(1) Restrict people's freedom of assembly, movement, residence, or passage in specific times and places; arrest suspects or [persons who are] dangerous to public security and order [and] detain them; allow searches of persons and places without being restricted by the provisions of the Criminal Procedure Code; and assign anyone to perform any of these tasks. $^{102}$ 

This can be carried out by a simple oral or written order, among other expansive powers to abrogate civil and political rights.<sup>103</sup> Articles 7 and 9 of the Emergency Law also permit the creation of State Security Courts empowered to try violations of emergency orders and criminal offenses referred by the president.<sup>104</sup> The president is also allowed to order that military judges rather than ordinary judges preside in those courts.<sup>105</sup> Additionally, the president can order that the State Security Courts follow different procedural rules than the rules in the Code of Criminal Procedure.<sup>106</sup> Verdicts from state security courts are not appealable.<sup>107</sup>

The continuation of the state of emergency was justified as necessary to combat terrorism threats.<sup>108</sup> In fact, in 2010, then-Prime Minister Ahmed Nazif rationalized that the

unspecified. Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, March 26, 2007, art. 148.

<sup>98.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014 art. 154.

<sup>99.</sup> *Id*.

<sup>100.</sup> Law No. 162 of 1958, art. 1 (Law on State of Emergency), Al-Jarida Al-Rasmiyya, 27 Sept. 1958 (Egypt); Sadiq Reza, Endless Emergency, supra note 7, at 537-38.

<sup>101.</sup> *Id.* art. 2.

<sup>102.</sup> Reza, Endless Emergency, supra note 7, at 538.

<sup>103.</sup> Id.

<sup>104.</sup> Id. at 539.

<sup>105.</sup> Id.

<sup>106.</sup> Id.

<sup>100.</sup> Id.

<sup>108.</sup> Reza, Endless Emergency, supra note 7, at 544 (quoting Maye Kassem, Egyptian Politics: The Dynamics of Authoritarian Rule 56 (2004); Eldakak, supra note 11, at 287.

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extension of the state of emergency was consistent with national security measures taken in the United States, such as the Patriot Act and the indefinite detention of suspects in Guantanamo Bay.<sup>109</sup> But following the expiration of the Emergency Law on May 31, 2012, terrorism prosecutions have moved to military courts.

### III. Potential Limitations on Military Trials for Civilians

The Egyptian Supreme Constitutional Court has the competency to review military courts' jurisdiction over civilians and the procedures they employ, by scrutinizing their compatibility with the constitution. Jurisdiction may be limited by clearly defining the terms and limits in Article 204 of the Constitution. Furthermore, practices that violate individuals' due process rights—both in law and in practice—guaranteed under the constitution, rights such as the Article 98 right to (an adequate) defense and the Article 96 right to the presumption of innocence, may be prohibited.

### A. Competency of the Supreme Constitutional Court

Article 192 of the 2014 Constitution states that "[t]he 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."<sup>110</sup> Previous constitutions granted the Supreme Constitutional Court the same power of review.<sup>111</sup> Furthermore, Article 25 of the law on the Supreme Constitutional Court, Law No. 48 of 1979, also grants the Supreme Constitutional Court the jurisdiction to rule on conflicts of jurisdiction between judicial entities.<sup>112</sup> Articles 48 and 49 of that law state that the Supreme Constitutional Court's judgments in constitutional disputes are final, non-reviewable, and bind all persons and public bodies.<sup>113</sup>

The 2014 Constitution strengthened judicial independence of the Supreme Constitutional Court. Article 191 specifies that the Court's budget is independent and must be paid out in a single lump sum.<sup>114</sup> It also indicates that the Court's own General Assembly is responsible for governing the Court's affairs, including appointing its own chief justice.<sup>115</sup>

<sup>109.</sup> Michael Slackman, Egyptian Emergency Law is Extended for 2 Years, N.Y. Times (May 12, 2010), at A10, available at http://www.nytimes.com/2010/05/12/world/middleeast/12egypt.html?\_r=0.

<sup>110.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 192.

<sup>111.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, art. 175; art. 175, 30 Nov. 2012.

<sup>112.</sup> El-Sawi, supra note 51, at 187; Reza, supra note 30, at 5-1.

<sup>113.</sup> Adel Omar Sherif, *The Rule of Law in Egypt from a Judicial Perspective, in* The Rule of Law in the Middle East and the Islamic World 2 (Eugene Cotran & Mai Yamani eds., 2000).

<sup>114.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 191.

<sup>115.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014 art. 193-94; Nathan Brown, Why do Egyptian Courts Say the Darndest Things?, wash. Post. (Mar. 25, 2014), http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/25/why-do-egyptian-courts-say-the-darndest-things/ (The 2014 Constitution does not include a provision con-

### B. Jurisprudence of the Supreme Constitutional Court

The Supreme Constitutional Court has exercised its competency to review military tribunals' jurisdiction on various occasions in the past, overturning legislation and practices contrary to the constitution. These cases were decided under the 1971 constitutional framework. Were the Supreme Constitutional Court to review legislation and practices vis-à-vis military trials now, it would rely on a much more due process-robust constitution. Under the 1971 Constitution, the military courts' jurisdiction did not expressly provide for civilian trials, but left the regulation of military courts to the Code of Military Justice and the Emergency Law. This permitted civilians subject to military trials to appeal their verdicts before the Supreme Constitutional Court. Although the 2014 Constitution expressly provides for military trials of civilians in limited circumstances and allows for further prescription by law, this is not a blank check to violate other constitutional provisions—to allow it would infringe on the Court's constitutionally mandated obligations in Article 192.

One case challenging military tribunals' jurisdiction over civilians reached the Supreme Constitutional Court in 2011, before the enactment of the new post-Arab Spring Constitutions. The appellant in that case sought to challenge the constitutionality of section 48 of the Code of Military Justice, which reads, "[t]he military judicial authorities alone decide whether crimes fall under their jurisdiction." The case was not decided<sup>119</sup> and has now been foreclosed by Article 204 of the 2014 Constitution, which specifically defines military courts' jurisdiction over civilians. But the Court's granting of certiorari confirms its competency to review military courts' jurisdiction and operation.

In other cases, the Supreme Constitutional Court has carved out protections for important individual rights in its case law. It has repeatedly asserted in its rulings that judicial review is based on the provisions of the constitution in force, as it is the paramount law of the land.<sup>120</sup> In Case No. 47 of the 3rd Judicial Year<sup>121</sup> it stated that "[a]ll statutes which are not constitutional provisions are subordinate to the Constitution, and are subject to judicial review."<sup>122</sup> In 1984, the Court ruled that the restrictions for appeal and other procedures in the State Security Courts did not violate the constitution;<sup>123</sup> however, that

tained in Article 176 of the 2012 Constitution, which stated that appointments to the Supreme Constitutional Court "take place by a decree from the President of the Republic").

- 121. Case No. 47 / 1983 / Supreme Constitutional Court, (Eg).
- 122. Sherif, supra note 113, at 6.
- 123. Reza, Endless Emergency, supra note 7, at 548.

<sup>116.</sup> Rana Muhammad Taha, Constitutional Articles on Armed Forces Stir Controversy, Daily News Egypt (Nov. 21, 2013), http://www.dailynewsegypt.com/2013/11/21/constitutional-articles-on-armed-forces-stir-controversy/.

<sup>117.</sup> Id.

<sup>118.</sup> Law No. 25 of 1966 (Code of Military Justice, as amended in 2012), Al-Jarida Al-Rasmiyya § 48 (Egypt) (unofficial English translation on file with author, courtesy of Farah Al Haddad).

<sup>119.</sup> Hatem Elliesie, Rule of Law in Egypt, in Understandings of the Rule of Law in Various Legal Orders of the World 1, 11 (Matthias Koetter & Gunnar Folke Schuppert eds., 2010) ("At odds with its strong record of rights activism, the Supreme Constitutional Court ruled Egypt's emergency courts constitutional, and it has conspicuously delayed issuing a ruling on the constitutionality of civilian transfers to military courts")

<sup>120.</sup> Awad Mohammed El-Morr, Recent Landmark Decisions of the Supreme Constitutional Court of Egypt, in Democracy, in The Rule of Law and Islam 239, 242-43 (Eugene Cotran & Adel Omar Sherif eds., 1999); Sherif, supra note 51, at 327.

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case was decided under a much weaker constitutional framework. Moreover, as detailed *infra*, the 1971 Constitution did not have an explicit provision recognizing the right to criminal appeals, which the 2014 Constitution does contain. Cases upholding the right to defense, to a fair trial and to the presumption of innocence all arose when the 1971 Constitution, with less defined and protective due process rights, was in place.

In Case No. 13 of the 12th Judicial Year, 124 the Supreme Constitutional Court ruled that an anti-smuggling statute that established a presumption of guilt if someone was found in possession of a stolen artifact was unconstitutional.<sup>125</sup> The Court stated that such a law violated the constitutional guarantees of the presumption of innocence and right to a fair trial. In addition to reiterating the Constitution's status as the supreme law of Egypt, it said that given the seriousness of the penalties attached to a criminal conviction and the potential threat to the defendant's right to life, everything must be clearly defined in a criminal case from the charges to meeting each of the required elements with concrete evidence.<sup>126</sup> The Court also recognized a minimum standard of due process rights owed to the accused in order to protect persons' inalienable values that cannot be dispensed with.<sup>127</sup> Case No. 3 of the 10th Judicial Year<sup>128</sup> established that a law allowing a person's criminal record to be introduced against them in proceedings involving current crimes was unconstitutional. Such use of character evidence violated numerous articles of the 1971 Constitution.<sup>129</sup> Finally, the Supreme Constitutional Court also upheld the constitutional right to freedom of speech when it ruled in Case No. 44 of the 7th Judicial Year, 130 In that case, the Court found that a statute prohibiting political parties from being created if their founders or leaders advocated or encouraged principles inconsistent with the Egypt-Israel Peace Treaty violated the petitioners' right to freedom of speech.<sup>131</sup>

The Supreme Constitutional Court has ruled against statutes that blatantly violated constitutional rights even when the standing Constitution provided for much more limited civil and political rights. Thus, under the 2014 Constitution's broader and more detailed protections, the Court should be able to find that the military judiciary's procedures in trying civilians are inconsistent with those civilians' constitutional rights. Since the 1990s, the Court has also adopted the practice of referring to international human rights and foreign national legal materials as a source in its rulings; therefore, an examination into other military justice systems, *infra*, may prove valuable.<sup>132</sup>

### C. Jurisprudence of the First Circuit Administrative Court

The Supreme Constitutional Court has not been the only Egyptian court to overturn legislation contrary to superior laws. The Minister of Justice issued Decree No. 4991/

<sup>124.</sup> Case No. 13 / 1992 / Supreme Constitutional Court, (Eg).

<sup>125.</sup> El-Morr, supra note 120, at 242-43.

<sup>126.</sup> Id. at 243-44.

<sup>127.</sup> Id. at 244.

<sup>128.</sup> Sherif, supra note 113, at 18-19.

<sup>129.</sup> *Id*.

<sup>130.</sup> Id. at 7.

<sup>131.</sup> Id.

<sup>132.</sup> Id. at 4.

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2012, which was published in the Official Gazette on June 13, 2012.<sup>133</sup> The decree stated that, without prejudice to the Code of Military Justice, military prosecutors had arresting authority over non-military personnel for crimes in chapters 1, 2, 2(bis), 7, 12 and 13 of the Penal Code.<sup>134</sup> This expanded jurisdiction included competence over persons who committed the crime of offending an official.<sup>135</sup> Under Article 133, a person may be detained for up to six months for "affront[ing] by signal, talk, or threat, a public official/civil servant, a law officer, or any person charged with a public service, while performing his duty, or due to its performance." But if the affront is directed against a judicial or administrative court, a council or one of its members, the person may be punished for up to a year in prison. Likewise, Article 184 punishes "[w]hoever affronts or insults in any of the foregoing methods, the People's Assembly, the Shura Council, or other regular organizations, the Army, the tribunals, the Authorities, or Public Departments" with an undefined period of detention and a fine.

This law could have enabled acts of dissent to be construed as crimes under the Penal Code. And military prosecutions, because of their greater expediency and harsher sentences, could have been employed to effectively chill opposition.<sup>136</sup> Less than a month later, on June 26, 2012, the Egyptian First Circuit Administrative Court—Individual Disputes revoked the Minister of Justice's decree.<sup>137</sup> The Court reasoned that Article 23 of the Code of Criminal Procedure grants the Minister of Justice the right to confer judicial capacity. However, because the powers of arrest are defined by law, the minister cannot expand these powers by administrative decree.<sup>138</sup>

### D. VIOLATION OF CIVIL AND POLITICAL RIGHTS UNDER THE 2014 CONSTITUTION

The 2014 Constitution has introduced numerous detailed provisions guaranteeing due process rights that did not exist under the 1971 Constitution. <sup>139</sup> Military trials for civilians, though provided for in the new constitution, violate several of these constitutional due process rights. Barring yet another Constitutional reform, the Supreme Constitutional Court can best narrow the military courts' jurisdiction over civilians by narrowing the scope of ambiguous terms in Article 204, and by declaring certain provisions in the Code of Military Justice and the procedures in military trials unconstitutional. <sup>140</sup>

<sup>133.</sup> Welcome to the Military State of Egypt: Minister of Justice Decree more Repressive than State of Emergency, Grants Military Police and Military Intelligence Judicial Authority to Arrest Civilians, CAIRO INST. FOR HUMAN RIGHTS STUDIES, Jun. 13, 2012, http://www.cihrs.org/?p=2846&lang=en.

<sup>134.</sup> Id

<sup>135.</sup> Egypt: Military Power grab Creates Conditions for Abuse, HUMAN RIGHTS WATCH, Jun. 21, 2012, http://www.hrw.org/print/news/2012/06/21/egypt-military-power-grab-creates-conditions-abuse.

<sup>136.</sup> Trager, supra note 26.

<sup>137.</sup> Administrative Court Rules in Favor of Appeal Presented by Human Rights NGOs, Revokes Decree Enabling Military Intelligence and Military Police to Arrest Civilians, CAIRO INST. FOR HUMAN RIGHTS STUDIES (Jun. 26, 2012) http://www.cihrs.org/?p=3073&lang=en.

<sup>138.</sup> Id.

<sup>139.</sup> See Constitution of the Arab Republic of Egypt, 18 Jan. 2014, Part III, art. 54.

<sup>140.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 204.

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As they stand, military trials violate several of civilians' constitutional rights. Article 54 sets out basic procedural due process guarantees.<sup>141</sup> According to this provision, the procedure authorities must take to ensure due process and personal freedom is as follows:

Every person whose freedom is restricted shall be immediately notified of the reasons therefore; shall be informed of his/her rights in writing; shall be immediately enabled to contact his/her relatives and lawyer; and shall be brought before the investigation authority within twenty-four (24) hours as of the time of restricting his/her freedom.

Investigation may not start with the person unless his/her lawyer is present. A lawyer shall be seconded for persons who do not have one.

. . .

In all events, it is not permissible to present for trial in crimes that may be punishable by imprisonment unless a lawyer is present.<sup>142</sup>

This Article specifically lays out a person's rights when in custody. Perhaps most importantly, it recognizes the detainee's right to contact their attorney, their right not to be questioned until the attorney is present, and the right to be represented by their attorney at trial.<sup>143</sup> It stands in direct opposition to military tribunals' practice of restricting defendants' access to their lawyers or to lawyers of their choosing.

Article 54 is also starkly different from Article 71 of the 1971 Constitution. Although Article 71 recognizes the detainee's right to be informed of the reasons for detention, it states the detainee "shall have the right to communicate with whoever he sees fit and inform them of what has taken place and to ask for help in way organized by law." The older provision does not recognize the detainee's right to contact their own attorney, nor their right to be represented by her attorney of choice. The 1971 Constitution only stated in Article 67 "[e]very person accused of a crime must be provided with counsel for his defense." There is no guarantee not to be questioned outside the presence of an attorney. Tellingly, the 1971 Constitution had no provision equivalent to Article 55 in the new constitution. This new article establishes the accused's right to remain silent and outlaws the use of torture or other degrading or inhuman treatment against detainees; it also declares information obtained through torture, terror or coercion inadmissible.

Article 98 of the 2014 Constitution also defines the right of defense as not only defending oneself in person or by proxy, and the right to a court-appointed attorney for the indigent, but also "[t]he independence of the legal profession and the protection of its rights is a guarantee for the right of defense." The 1971 Constitution's equivalent, Article 69, did not define the right of defense and merely reiterated the right to defend

<sup>141.</sup> Id., pt. III, art. 54.

<sup>142.</sup> Id. pt. III, art. 54.

<sup>143.</sup> Id.

<sup>144.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, art.71.

<sup>145.</sup> See id.

<sup>146.</sup> Id. ch. 4, art. 67.

<sup>147.</sup> See generally id.; Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 55.

<sup>148.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 98.

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oneself in person or by proxy and the right to a court-appointed attorney.<sup>149</sup> Article 96 of the 2014 Constitution further stipulates the right to the presumption of innocence<sup>150</sup> "until proven guilty in a fair legal trial in which the right to defend himself is guaranteed." Although the 1971 Constitution mentions the right to the presumption of innocence in Article 67, it makes no reference to a fair trial.<sup>151</sup> A fair trial necessarily implies the need to contact one's attorney, so as to give that attorney enough time to familiarize him or herself with the record and build a proper defense. A fair trial also necessarily excludes thirty minute long mass trials, often in the absence of adequate legal counsel, which are reported to have occurred repeatedly before military tribunals following Mubarak's ouster. <sup>152</sup>

Military courts' implementation of the appeals procedure detailed in section 99 of the Code of Military Justice renders Article 240 of the 2014 Constitution – which formally grants the right to criminal appeals and states that a criminal appeals system must be established by 2024 – essentially meaningless.<sup>153</sup> Additionally, section 8(bis) of the Code also stands in contravention to Article 80 of the Constitution, which establishes special protections for juveniles facing trial.

With respect to military courts' jurisdiction, section 7 of the Code of Military Justice could be said to expand the scope of military courts' power beyond what Article 204 of the Constitution prescribes. <sup>154</sup> Law 136 of 2014 also contradicts Article 204. <sup>155</sup> Although it allows for the competencies and crimes within military court jurisdiction to be defined by law, the Supreme Constitutional Court could rule that the article clearly intended to allow a very narrow exception to the prohibition on military trials for civilians. Such a massive expansion of military court jurisdiction would be incompatible and thus unconstitutional. The law also runs afoul of the prohibition on the retroactive application of laws contained in Article 95 of the Constitution. <sup>156</sup> This is because crimes that were committed prior to its promulgation in October 2014 are being transferred and tried before military courts even though they were not crimes within those courts' jurisdiction at the time they were committed

In sum, the 2014 Egyptian Constitution, although formally authorizing military trials for civilians, also grants all citizens much more robust constitutional rights. These constitutionally protected rights to due process can be employed to limit the secretive and loose procedures the military operates under. Bringing military trials to procedural standard with those carried out in civilian tribunals alone would sharply decrease the attractiveness

<sup>149.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, art. 69.

<sup>150.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 96; see also Reza, supra note 30, at 5–8.

<sup>151.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, art.67.

<sup>152.</sup> Trager, supra note 26; see also Chick, supra note 34 (detailing an actual incident of such a military tribunal lasting five minutes).

<sup>153.</sup> Constitution of the Arab Republic of Egypt, 11 Sept. 1971, as amended May 22, 1980, May 25, 2005, Mar. 26, 2007, Jan. 18, 2014, art. 240.

<sup>154.</sup> See id. ch. 3, art. 204.

<sup>155.</sup> See id.

<sup>156.</sup> See id. pt. IV, art. 94.

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in employing military courts to try civilians.<sup>157</sup> Should cases challenging the violations of these constitutional rights be brought before the Supreme Constitutional Court, it would be acting under its clear mandate if it limits the military judiciary's jurisdiction and practices vis-à-vis civilians.

### IV. Comparative Models: The United States Military Justice System

Military justice systems serve a crucial role in their respective nations' legal systems. As a parallel system of courts, they allow a country's military to swiftly deal with offences that may be considered minor in civilian life, but that are crucial to the functioning of the armed forces. Specifically, it ensures good order and discipline, so that the military may function properly. As a result, trials before military courts are often stricter and quicker than that provided in civilian courts. Several different military justice models have evolved around the world; these can be divided into the purely civilian model, the structurally hybrid model, the jurisdictionally hybrid model, and the purely military model.

According to the purely civilian model, civilian courts have jurisdiction over military judicial matters.<sup>161</sup> In the structurally hybrid model, there are specialized chambers within civilian courts that deal specifically with military judicial matters.<sup>162</sup> The jurisdictionally hybrid model is the most complex. Military and civilian courts have overlapping jurisdiction, and the referral of cases may depend on various factors including the seriousness of the offence, the identity of the victim, where the offence was committed, and whether the offence was committed in wartime or peacetime.<sup>163</sup> In France, for example, civilian courts try offences committed in France, while military courts try offences committed abroad.<sup>164</sup> In the United Kingdom, on the other hand, military courts deal with criminal offences that occur between members of the armed forces, while civilian courts deal with offences that occur between members of the armed forces and civilians.<sup>165</sup> In the purely military model, military courts have exclusive jurisdiction over military offences committed by military personnel.<sup>166</sup>

<sup>157.</sup> Trager, supra note 26.

<sup>158.</sup> Mindia Vashakmadze, Guidebook: Understanding Military Justice 10 (Geneva Centre for the Democratic Control of Armed Forces, 2010), http://www.dcaf.ch/Publications/Guidebook-Understanding-Military-Justice; Joseph W. Bishop Jr., *The Case for Military Justice*, 62 Mil. L. Rev. 215, 216 – 19 (1973); Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 1975 Mil. L. Rev. 579, 584 (1975); *Parker v. Levy*, 417 U.S. 733, 743 (1974), *see also Burns v. Wilson*, 346 U.S. 137, 140 (1953); James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. Rev. 185, 186 (2002) ("The maintenance of good order and discipline is an absolutely essential *function of command.*").

<sup>159.</sup> See Hodson, supra note 158, at 584; see also O'Callahan v. Parker, 395 U.S. 258 (1957); see also In re Grimley, 137 U.S. 147, 153 (1890) ("An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.").

<sup>160.</sup> See Vashakmadze, supra note 158, at 10; see also Bishop, supra note 158, at 216-17.

<sup>161.</sup> Vashakmadze, supra note 158, at 10.

<sup>162.</sup> Id.

<sup>163.</sup> Vashakmadze, supra note 158, at 12.

<sup>164.</sup> *Id.* 

<sup>165.</sup> Id.

<sup>166.</sup> Id. at 22.

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Most military justice systems' jurisdictions are defined by a combination of different factors. With status-based jurisdiction, only members of the armed forced may be tried in military courts. Status-connected jurisdiction only covers crimes related to military service, and jurisdiction based on purely military crimes only extends jurisdiction over crimes of military character. All of these factors have vague or malleable definitions. For example, status-based jurisdiction is ambiguous concerning reservists or civilians accompanying the armed forces abroad. Constitutional courts have played crucial roles in shaping and limiting their respective military courts' jurisdiction, while preserving the integrity of the military justice model they operate in. 170

It is therefore instructive to examine the United States' military justice system, which has a jurisdictionally-hybrid model with status-based jurisdiction.<sup>171</sup> Although other systems, such as the German model, which follows the purely civilian model during peacetime, reflect a global trend toward the civilianization of military justice, it is of limited use for the Egyptian legal system as the Egyptian Constitution expressly provides for military trials for civilians.<sup>172</sup>

### A. THE UNIFORM CODE OF MILITARY JUSTICE

The United States' military justice system is best separated into three broad categories: military justice, the law of war and martial law. Military justice may be described as the judicial system that governs members of the armed forces and others closely associated with them.<sup>173</sup> The law of war concerns matters related to armed conflict, such as the detention of enemy combatants and the prosecution of war crimes.<sup>174</sup> Finally, martial law refers to a state of emergency when civilian laws and courts have been up-ended and criminal law for both service members and civilians must be administered by the military judicial system.<sup>175</sup> The U.S. Supreme Court has confirmed these broad divisions in past case law.<sup>176</sup> All three are governed by the United States Constitution and the Uniform Code of Military Justice.

Article I § 8 of the United States Constitution expressly provides for the establishment of military courts: "[t]he Congress shall have power . . . [t]o make rules for the government and regulation of the land and naval forces . . . [t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States." Furthermore, the Necessary and Proper clause, contained within that same section of the Constitution, also implicitly authorizes the existence of military courts, by granting Congress the power "[t]o make all laws which shall be

<sup>167.</sup> Id.

<sup>168.</sup> Vashakmadze, supra note 158, at 22.

<sup>169.</sup> Id.

<sup>170.</sup> Id. at 18.

<sup>171.</sup> Id. at 12.

<sup>172.</sup> Id. at 11.

<sup>173.</sup> Robinson O. Everett, Persons Who Can Be Tried By Court-Martial, 5 J. of Pub. L. 148, 150 (1956).

<sup>174.</sup> Id.

<sup>175.</sup> Id

<sup>176.</sup> Ex Parte Milligan, 71 U.S. 2, 141-42 (1866) (distinguishing between "military law", "military government", and "martial law proper").

<sup>177.</sup> U.S. Const. art. I, § 8, cl. 16.

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necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department thereof."<sup>178</sup> Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950, which is the basis of modern U.S. military justice.<sup>179</sup> It details the composition and procedure of military courts, punishable offences before those courts, and the procedural rights granted to all accused before those courts.<sup>180</sup> Although the rules and offences prescribed in the UCMJ differ from their civilian counterparts, the Code adheres to civilian standards as much as possible and ensures that defendants in military trials enjoy the same constitutional protections as defendants in civilian trials.<sup>181</sup>

### 1. Military Justice: Military Trials of Service Members and Certain Civilians

There are different levels of trial in military court, all called court-martial. <sup>182</sup> The Manual for Courts-Martial elaborates the procedures in the UCMJ for conducting these trials. <sup>183</sup> All courts-martial must comply with the following due process guarantees: The government must prove guilt beyond reasonable doubt, the accused has the right to present evidence and cross-examine witnesses, the accused is protected from being compelled to incriminate themselves, and the accused is provided with defense counsel. <sup>184</sup> Furthermore, the military rules of evidence closely resemble the civilian Federal Rules of Evidence. <sup>185</sup>

The right to appeal is also enshrined in Article 66 of the UCMJ, which states that all trials resulting in a sentence that includes punitive discharge or confinement of a year or longer may be appealed to the Service Courts of Criminal Appeals, the first level of military appellate courts. These courts have the authority to conduct *de novo* review 187 and are further empowered to overturn a court-martial verdict of their own volition. The case may be further appealed to the Court of Appeals for the Armed Forces (CAAF), which is composed of five civilian judges appointed by the President with advice and consent of the Congress and provides civilian oversight to the military justice system. Under Article 67 of the UCMJ, defendants may further appeal to the United States Supreme Court. However, if the Court of Appeals for the Armed Forces declines to review, the defendant is unable to request a writ of certiorari. In such a case, the defendant may

<sup>178.</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>179.</sup> James B. Roan & Cynthia Buxton, The American Military Justice System in the New Millennium, 52 A.F. L. Rev. 185, 186-87 (2002).

<sup>180.</sup> Dan E. Stigall, An Unnecessary Convenience: The Assertion of the Uniform Code of Military Justice (UCMJ) Over Civilians and the Implications of International Human Rights Law, 17 Cardozo J. Int'l & Comp. L. 59, 63 (Winter 2009).

<sup>181.</sup> *Id*.

<sup>182.</sup> Roan & Buxton, supra note 179, at 199.

<sup>183.</sup> Stigall, supra note 180, at 62-65; Roan & Buxton, supra note 179, at 196.

<sup>184.</sup> Roan & Buxton, supra note 179, at 199-200, 204-05.

<sup>185.</sup> Fredric I. Lederer, The Military Rules of Evidence: Origins and Judicial Implementation, 6 (1990). Faculty Publications. Paper 638. http://scholarship.law.wm.edu/facpubs/638.

<sup>186.</sup> Roan & Buxton, supra note 179, at 210; 10 U.S.C. § 866, art. 66 (1996).

<sup>187.</sup> BLACK'S LAW DICTIONARY 117 (10th ed. 2014) (Appeal de novo: An appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings.)

<sup>188.</sup> Roan & Buxton, supra note 179, at 210.

<sup>189.</sup> Id.; 10 U.S.C.A. § 942 (West 2015).

still obtain collateral civilian review—a non-appeal proceeding whereby a defendant can challenge their conviction on procedural grounds, such as violations of their due process guarantees during trial—which may result in the order for a new trial, new sentencing or new appeal procedure.

In *Burns v. Wilson*, the Supreme Court permitted collateral review of military verdicts on constitutional grounds, in other words, through the writ of *babeas corpus*, which examines violations of the Constitution or the laws or treaties of the United States.<sup>190</sup>

The U.S. Supreme Court has reviewed a number of courts-martial verdicts, some challenging jurisdiction over civilians in the UCMJ. Article 2 of the UCMJ defines which persons fall under military courts' jurisdiction.<sup>191</sup> These include regular service members, certain retirees, persons serving court-martial imposed sentences, prisoners of war, certain reservists, as well as persons accompanying the armed forces.<sup>192</sup> The categories of persons listed in this article are extremely detailed. The last category mentioned, however, includes civilians and has been the subject of constitutional review before the Supreme Court. Article 2 states:

(a) [t]he following persons are subject to this chapter [UCMJ]:

. . .

- (10) In a time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.
- (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.<sup>193</sup>

Article 2 is intended to cover a jurisdictional gap. In *United States v. Burney*, the Court of Military Affairs—the precursor to CAAF—defined these civilians as persons who "ha[ve] moved with a military operation and . . . [whose] presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel . . . [including one who] instead, works for a contractor engaged on a military project." Further, in *United States v. Ali*, the CAAF explained that article 2(a)(10) further requires either declared war or being "in an area of actual fighting." Congress amended the UCMJ with the purpose of having persons "employed by" the armed forces outside of the United States—specifically civilian employees of the Department of Defense and military contractors—as well as persons "accompany-

<sup>190.</sup> Burns v. Wilson, 346 U.S. 137, 139 (1953) ("In this case, we are dealing with habeas corpus applicants who assert – rightly or wrongly – that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution."); Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique & Proposal for Hamdan v. Rumsfeld*, 186 Mill. L. Rev. 1, 16-20 (Winter 2005).

<sup>191. 10</sup> U.S.C. § 802, art. 2 (2014).

<sup>192.</sup> Id.

<sup>193.</sup> Id.

<sup>194.</sup> United States v. Burney, 6 C.M.A. 776, 788 (1956).

<sup>195.</sup> United States v. Ali, 71 M.J. 256, 264 (C.A.A.F. 2012), cert. denied, 133 S. Ct. 2338 (2013).

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ing" the armed forces—specifically dependents of service members and other employees—fall under the jurisdiction granted by the UCMJ outside of times of declared war. <sup>196</sup>

There were several cases brought before the Supreme Court prior to the amendment of Article 2. In Reid v. Covert, the Court held that permitting the application of the UCMJ to civilian dependents would run afoul of the Constitution.<sup>197</sup> Specifically, it stated that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections."198 In United States ex. rel. Toth v. Quarles, an ex-service member was charged with a murder he allegedly committed while serving as an airman in Korea.<sup>199</sup> The Supreme Court invalidated the conviction as unconstitutional.<sup>200</sup> It stated that the justification for abrogating a persons' rights by submitting them to courtmartial was to maintain the discipline, morale and order of the armed forces, but that giving an ex-serviceman the benefit of a civilian trial would not disrupt any of these purposes.<sup>201</sup> Furthermore, it stated that the power to court-martial should be limited to "the least possible power adequate to the end proposed."202 But these cases left a jurisdictional gap whereby military courts could not try civilian employees or dependents of employees, but the local judicial system where the armed forces were deployed also could not try these persons as a result of Status of Force Agreements signed between the United States and those countries.<sup>203</sup> Congress amended Article 2 of the UCMI, to require civilians to not only be employed by or accompany the armed forces abroad, but also do so at a time of declared war or during a contingency operation in order to be court-martialed.<sup>204</sup>

Additionally, Congress enacted the Military Extraterritorial Jurisdiction Act of 2000, which granted civilian federal courts jurisdiction over civilians "employed by" or "accompanying" the armed forces outside the United States.<sup>205</sup> In a memorandum issued on March 10, 2008, Secretary of Defense Robert Gates specified that if an offence is committed by a civilian, the Department of Justice will be notified and given priority to prosecute the case instead of the military justice system. If the Department of Justice were to decline prosecution, the military courts would exercise jurisdiction under amended Article 2 of the UCMJ.<sup>206</sup>

### 2. Armed Conflict: The Military Justice System and the Laws of War

If Egypt attempts to deal with an issue relating to terrorism that required resorting to extraordinary measures, the U.S. system offers an instructive model. A person who falls

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196. Stigall, supra note 180, at 70.
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<sup>197.</sup> Reid v. Covert, 354 U.S. 1, 16 (1957).

<sup>198.</sup> Id. at 21.

<sup>199.</sup> United States ex. rel. Toth v. Quarles, 350 U.S. 11, 13 (1955).

<sup>200.</sup> Id. at 23.

<sup>201.</sup> United States ex. rel. Toth v. Quarles, 350 U.S. 11, 22 (1955).

<sup>202.</sup> Id. at 23.

<sup>203.</sup> Stigall, supra note 180, at 69-70.

<sup>204.</sup> John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 552, 120 Stat. 2217; Secretary of Defense Robert Gates Memorandum of March 10, 2008, available at http://fas.org/sgp/othergov/dod/gates-ucmj.prf); Stigall, supra note 180, at 71-73.

<sup>205.</sup> Stigall, *supra* note 180, at 70; Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106-523, 114 Stat. 2488

<sup>206.</sup> Gates Memorandum, supra note 204; Stigall, supra note 180, at 72-73.

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outside the categories described in the section *supra*, can only be subject to military justice if their combatant status is first established. Once combatant status is established, the person may be subject to military trial to punish violations of the laws of war.<sup>207</sup> Article 18 of the UCMJ grants general courts-martial the jurisdiction "to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."<sup>208</sup>

Status determination hearings must comply with due process guarantees, and the Supreme Court has stepped in to ensure it does.<sup>209</sup> In *Hamdi v. Rumsfeld*, the Court reviewed the constitutionality of the defendant's enemy combatant status hearing.<sup>210</sup> It stressed the importance of due process guarantees in these proceedings, although it allowed certain evidentiary practices that would otherwise be impermissible.<sup>211</sup> As the defendant was captured in Afghanistan, the Court recognized the difficulty in complying with normal evidentiary rules in an active theatre of war.<sup>212</sup> For example, it stated hearsay evidence may need to be accepted and that the burden of proof might presume the government's evidence is credible, so long as that presumption is rebuttable. The Court stressed Hamdi's right to challenge his enemy combatant status before a neutral tribunal, and reaffirmed the Supreme Court's role in reviewing the constitutionality of military actions.<sup>213</sup>

In a later case, *Hamdan v. Rumsfeld*, the Court declared that military commissions formed under Executive Order in 2001 were unconstitutional.<sup>214</sup> These commissions were established to try persons suspected of terrorist activity, had weakened procedural and evidentiary rules, and did not have a Grand Jury or equivalent investigation requirement.<sup>215</sup> The defendant and defense counsel were excluded from parts of the proceedings, coerced statements were admissible as evidence, and defendants were prohibited from appealing to any court.<sup>216</sup> The Court ruled that these military commissions violated both the Geneva Conventions and the UCMJ.<sup>217</sup> Article 21 of the UCMJ prescribes military commissions, while Article 36 restricts "the President's power to promulgate rules of procedure for courts-martial and military commissions."<sup>218</sup> Specifically, the rules cannot be contrary to or inconsistent with the UCMJ and must conform to courts-martial standards as far as possible.<sup>219</sup> The Supreme Court conclusively held that any military adjudication, even if conducted against a foreign citizen who is suspected of terrorism, cannot run afoul of the due process guarantees enshrined in law.<sup>220</sup>

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207. See Jurisdiction of General Courts-Marital, 10 U.S.C. § 818(a).
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<sup>208. 10</sup> U.S.C.A. § 818 (article 18(a) of the Uniform Code of Military Justice).

<sup>209.</sup> See Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004).

<sup>210.</sup> Id.

<sup>211.</sup> Id.

<sup>212.</sup> Id. at 533-34.

<sup>213.</sup> Id. at 537-38.

<sup>214.</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 588, 609, 647 (2006).

<sup>215.</sup> Id.

<sup>216.</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 614-15 (2006).

<sup>217.</sup> Id. at 625.

<sup>218.</sup> Id. at 612-13, 620.

<sup>219.</sup> Id. at 615-16.

<sup>220.</sup> Id. at 620-21, 625.

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In Ex parte Quirin, the Supreme Court stated that citizenship is not dispositive of enemy combatant status.<sup>221</sup> It upheld the military convictions and death sentences of eight German spies even though one of the defendants was an American citizen.<sup>222</sup> It further stated that, although both lawful and unlawful combatants are subject to detention (the former as prisoners of war), only the latter are subject to military trial because unlawful combatants are belligerents in violation of the laws of war who lose the privileges of the prisoner of war status.<sup>223</sup>

Detainees are also entitled to petition for collateral constitutional review to challenge the constitutionality of their status determination proceedings by filing a *habeas corpus* petition.<sup>224</sup> In *Boumediene v. Bush*, the Court set out a three-part balancing test to determine whether the detainee may petition for constitutional review.<sup>225</sup> First, the relevant court must consider the detainee's citizenship, status, and the adequacy of process he received in his status determination proceeding. Second, it must consider the nature of the sites where capture and detention took place, whether he was captured on the battlefield, and whether he is held somewhere under *de jure* or *de facto* American sovereignty.<sup>226</sup> Finally, it must consider the practical obstacles inherent in resolving the prisoner's *habeas corpus* entitlement.<sup>227</sup> So even in cases dealing with exceptionally delicate national security matters, the Supreme Court retains competence to review and restrict proceedings that do not comply with the U.S. Constitution.

### 3. Martial Law in the United States

Finally, the U.S. system does not impose martial law unless it is dealing with the most extreme of circumstances: invasion or insurrection. Martial law describes a state where military courts exercise jurisdiction over both civilians and non-civilians in order to maintain law and order in the country during a time of emergency.<sup>228</sup> Although there is no mention of martial law in the UCMJ, there is illustrative case law from the American Civil War period that sheds light on its operation. In *Ex parte Vallandigham*, 68 U.S. 243 (1863), a defendant was tried and convicted before a military tribunal under the charge of being a Confederate sympathizer. He attempted to appeal to the Supreme Court, but it determined that his case was not reviewable in civilian courts.<sup>229</sup> In *Ex parte Milligan*, a resident of Indiana—a State that was not engaged in rebellion during the Civil War—was convicted and sentenced to death before a military tribunal on the same charges as Vallandigham.<sup>230</sup> But the Supreme Court held his sentence invalid.<sup>231</sup> The Court explained

<sup>221.</sup> Ex parte Quirin, 317 U.S. 1, 37-38 (1942).

<sup>222.</sup> Id. at 44-45.

<sup>223.</sup> Id. at 30-31.

<sup>224.</sup> See, e.g., Rumsfeld v. Padilla, 542 U.S. 426, 427-28 (2004); Rasul v. Bush, 542 U.S. 466, 481 (2004).

<sup>225.</sup> Boumediene, 553 U.S. 723, 766 (2008).

<sup>226.</sup> Id. at 768; Maqaleh v. Gates, 605 F.3d 84, 94 (D.C. Cir. 2010).

<sup>227.</sup> Boumediene, 553 U.S. at 769.

<sup>228.</sup> Everett, supra note 173, at 151; Brian C. Baldrate, The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique & Proposal for Hamdan v. Rumsfeld, 186 Mil. L. Rev. 1, 8-9 (Winter 2005).

<sup>229.</sup> Ex parte Vallandigham, 68 U.S. 243, 248 (1863).

<sup>230.</sup> Compare Vallandigham, 68 U.S. at 248, with Ex parte Milligan, 71 U.S. 2, 127 (1866).

<sup>231.</sup> Milligan, 71 U.S. at 4.

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that martial law does not apply to areas outside of military operations.<sup>232</sup> Declaration of martial law is considered such an extreme measure that the Supreme Court rendered its decision in very stark terms.<sup>233</sup>

### B. Summary

The U.S. example is instructive not only in the manner that justice dispensed through military courts is categorized, but also in the limits it draws when civilians are court-martialed under Article 2 of the UCMJ. In order for military justice to serve its purpose of maintaining order and discipline so that the armed forces may accomplish their mission, military courts only need jurisdiction over civilians employed by the military or accompanying the military in a time of declared war or in an area of actual fighting. Beyond this, the military only needs to prosecute civilians when they fall outside civilian courts' jurisdiction, as they cannot let crimes go unpunished for that reason alone—a rationale similar to that articulated in *Milligan*.

### V. Conclusion

Egyptian civilians facing trial before military courts in Egypt are in a precarious situation. The procedural practices in those courts are extreme and becoming even more so. They do not conform to basic standards for fair trial. The Supreme Constitutional Court is in a unique position to exercise its constitutional powers of review and mandate that military courts' practices fall in line with the due process rights guaranteed to all persons who stand trial in Egyptian courts—be they civilian or military. In its case law, the United States Supreme Court has restricted military court's jurisdiction over civilians and ensure military justice does not violate defendants' procedural rights. Like peer courts, the Egyptian Supreme Constitutional Court has the competency to review the military justice system, and may limit military courts' practices to conform to the Constitution without gutting the purpose of military trials: ensuring discipline and order within the armed forces.

<sup>232.</sup> Milligan, 71 U.S. at 127 ("there are occasions when martial rule can be properly applied. If, in foreign invasions or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.").

<sup>233.</sup> Everett, supra note 173, at 151.