

## **Mubarak's First Trial: Another Lost Opportunity to Achieve Justice**

A legal and political analysis of the trial of Mubarak and others on charges of killing protesters and corruption

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### **Executive summary and recommendations**

When former President Mohamed Hosni Mubarak, his interior minister Habib al-Adli and Adli's aides appeared in court, we all believed we were witnessing an exceptional moment in Egyptian judicial history. Yet the deficiencies of the justice system exposed by the trial, its enervation and the incompetence of its personnel, showed us the harsh truth: reform of the criminal justice system has been delayed for far too long. If we want to bring those who oppressed and wronged the people to justice, there must be a genuine revolution in the criminal justice system.

Unlike Zine El Abidine Ben Ali in Tunisia, when Mubarak stepped down in February 2011 just 18 days after the revolution erupted, he and his family did not flee, apparently believing he was safe from being held accountable for his actions and that he would not be referred to court for any of his crimes.

The ousted president spent two full months in Sharm al-Sheikh despite rising popular anger and demands for his swift trial. The anger reached its peak following the broadcast of a taped speech on al-Arabiya in April 2011, in which Mubarak reiterated his innocence, as he had done in the last speech before his ouster, prompting crowds to take to the streets to demand his speedy prosecution. Faced with this, the Public Prosecution announced it was opening an investigation and referred him to criminal trial on 24 May 2011. It was not until 3 August that he could be seen behind bars in the courtroom, set up in the Police Academy.

Close observation of the trial file showed the severe deficiencies in the Public Prosecution's work, how that office was unaccountably slow to open the investigation or refer the defendants to trial while unduly rushing to complete the necessary investigations of those it referred to trial. It also failed to charge many persons revealed to have been involved in the crimes by the investigation.

The politicization of the Public Prosecution discredited many of its procedures and

perverted the course of justice. The scope of the charges was narrowed to avoid accusations against the security establishment and prevent proof coming to light of the depth of its involvement in the crimes against revolutionaries. The truth about the network of officials involved in systematic oppression was circumvented to condemn only a few of their now fallen members, in order to calm the public and appease its anger.

The court pursued the same protective stance. The trial revealed how deeply it sought to prevent the case from becoming a means to achieve justice in the name of the people against a regime whose head had fallen. The court made sure the trial remained of limited scope—the prosecution of individual bad apples, whether president, minister or ministerial aide. It accepted the charges submitted to it by the Public Prosecution, tailored to suit this frame, and accepted a referral order that did not name the original perpetrators of crimes of murder, thus denying the reality of the crime against the victims and martyrs of the revolution.

The people hoped for a comprehensive, fair trial, to bring justice for the oppression and wrongs of three decades of Mubarak's rule and to achieve retribution from those of whom the court itself said, “[Mubarak] tightened his grip on them, and they perpetrated the gravest crimes, the greatest tyranny and the utmost corruption without account or oversight.”

Unfortunately, the court itself did not assume this role, although it had both the license and authority to do so. It was also unfortunate to see how the court disregarded valuable evidence and testimony on the grounds that the court has the right to form its belief about the case as it deems fit. With all these deficiencies, it was natural for ready-made judgments to be issued.

On the morning of 2 June 2012, the court convicted Hosni Mubarak and Habib al-Adli on charges of murder and attempted murder and sentenced them to life in prison. It acquitted al-Adli's aides and also acquitted the former interior minister and his underlings of the charge of squandering public funds. It also dismissed the criminal suit against Mubarak, his sons and Hussein Salem on felony charges of influence peddling and bribery, on the grounds that the statute of limitations applied. It further

acquitted Mubarak of the charge of influence peddling in the gas export case.

The court explained in its judgment, “Mubarak and al-Adli, with unknown parties, aided and abetted the commission of the crimes of the murder of demonstrators.”

Oddly however, the conviction relied on a legal argument that had nothing to do with the contents of the case files, the testimony and the legal evidence. Mubarak and al-Adli were convicted because they intentionally refrained from performing a positive act required by the terms of their office and the Constitution, though they were able to perform these actions to prevent the outcome they sought with the murder and injury of demonstrators. They thus bear criminal liability, the court said, for the murder and injuries in question in the case. In fact, this argument is less legal than political, especially since the case documents contained material more than sufficient for a conviction and also sufficient to pursue the thread of justice straight to the institutions and the gatekeepers of injustice hiding inside them.

In acquitting al-Adli’s aides, the court noted that “the case documentation and seized items contain no evidence to persuade the court that the original perpetrators were police officers and personnel.” Nor was the court persuaded by the more than 1,300 witness testimonies that were cited in the referral order, not deeming them evidence that the police had killed and attempted to kill demonstrators. The court believed that all these statements and testimonies had been given in abnormal circumstances, tainted by “hostility and aggression” against the police.

The court also clearly ignored the overwhelming evidence in the case file, including witness statements, as well as an enormous number of medical reports, material exhibits of weapons and live ammunition and the weapons logs for the Central Security Forces divisions that took part in the crackdown. It disregarded the video footage submitted to the Public Prosecution by victims, their families and citizens, and the conclusions of the first fact-finding commission headed by Judge Adel Qura looking into the events of the 25 January revolution, all of which clearly indicates the involvement of police personnel in the deaths of demonstrators.

The court dismissed all this evidence and the testimony of those who had been injured and harmed, while solely relying on the statements of official witnesses who had been

summoned, including Omar Suleiman, the former intelligence chief and Mubarak's vice-president before his ouster; Mansour Eissawi and Mahmoud Wagdi, former interior ministers who assumed control over the ministry after Mubarak stepped down; and Field Marshall Hussein Tantawi, Mubarak's minister of defense and later head of the Supreme Council of the Armed Forces and thus the de facto president. The court adopted the view of some of these witnesses that an unknown "third party" was responsible for demonstrator deaths. Omar Suleiman, for example, stated that he had informed Mubarak of foreign, criminal elements who had smuggled in weapons before the demonstrations erupted and who were present among the demonstrators. Tantawi supported Omar Suleiman's testimony, stating that he told Mubarak that it was likely foreign elements were responsible.

The court acquitted al-Adli's aides saying there was no evidence against them in the case documents that reached it. This raises a question: if this is indeed the reason, why did the court deny the numerous motions before it from counsel for the victims to return the files to the prosecution<sup>1</sup> to question specific, named parties who could help identify the original perpetrators? The court did not ask the prosecution to supplement the case documents to enable it to realize justice and prevent the criminals from eluding punishment. The court failed to note that the problem was deficiencies in the prosecution's work, not the impossibility of identifying the perpetrators.

The reason for this farcical judgment was that the trial proceeded through the regular security channels—the same channels designed to protect the Mubarak regime—whose staff, structure, organization and legislative framework remained unchanged after Mubarak's ouster. The Public Prosecution's office was also politicized, run without genuine independence. Prosecutors act merely as the charging authority, and when investigating, they are subordinate to their superiors' control, despite the autonomy given to the prosecutor by law. Moreover, prosecutors have little experience in collecting evidence, leaving the matter to the police.

The convicted defendants appealed their conviction while the Public Prosecution appealed the acquittals and the dismissal of the criminal case. The Court of Cassation began to consider the appeals on 23 December 2012, and ruled on 13 January 2013 to accept all the appeals and ordered a retrial in a different circuit.

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1 Pursuant to Article 11 of the Code of Criminal Procedure.

## **About this report**

This report is based on a detailed analysis of the case file. In addition, Hoda Nasrallah, a lawyer with EIPR, attended all the trial sessions in her capacity as a member of the victims' defense counsel.

This report contains a legal analysis of the Mubarak trial. Part one focuses on the performance of the Public Prosecution during the investigations, looking at the delays in pursuing them and the failure to question the ousted president in a timely manner.

It examines the Public Prosecution's failure to identify the original perpetrators, charging only the ex-president, his interior minister and six interior minister aides, and the lack of comprehensive, exhaustive investigations. It discusses how the Public Prosecution limited the charge to the killing and injury of demonstrators during the period of 25-31 January in streets and squares that witnessed demonstrations, excluding those who were killed in other places, such as police stations.

The report then moves on to the evidence, noting how the court disregarded more than 1,300 witness statements collected by the prosecution, basing its ruling only on the statements of four witnesses it summoned. This section examines the treatment of the evidence exhibits, which reflected the Public Prosecution's lack of professionalism in dealing with evidence, as well as the court's disregard of the reports of the fact-finding commission.

The third section focuses on the trial itself, examining how the court ignored motions from attorneys for the victims to separate the charge of killing demonstrators from the corruption charges, rejected motions to refer the case documents back to the Public Prosecution to name the actual perpetrators as new defendants in the case and prohibited the victims' defense counsel from questioning Field Marshall Tantawi. The report devotes a special section to due process guarantees, including defendants' and victims' rights, the principle of witness protection and the public nature of the trial.

The report concludes with a discussion of the verdict and the grounds for appeal.

## **Recommendations**

The EIPR recommends that the circuit to which the case will be referred grant the motions of attorneys for the victims to return the case documents to the Public Prosecution pursuant to Article 11 of the Code of Criminal Procedure, to allow the addition of further evidence and the inclusion of new defendants as the original perpetrators.

The EIPR recommends treating the evidence exhibits with prudence and precision and taking into consideration the conclusions of the various fact-finding commissions that investigated the January revolution events, particularly the committee formed by President Mohamed Morsy after he assumed office in July 2012. Moreover, the EIPR reiterates the need for internationally accepted due process guarantees, including the provision of a public trial, the right to defense, the protection of witnesses and compensation for victims.

The EIPR recommends that if the conclusions of the fact-finding commission formed by President Morsy do not provide this information, another independent commission be tasked with identifying the number and names of those killed or injured in the revolution and identifying the circumstances of their death and injury.

The EIPR recommends that the Council of Representatives, immediately upon its election, consider the amendments necessary to guarantee genuine independence for the judiciary and Public Prosecution. There are important measures in this regard, some related to amendments to the judiciary law and others to the appointment of prosecutors. The assembly should also consider amending the Code of Criminal Procedure to separate the charging authority from the investigating authority.

The EIPR recommends the adoption of new instruments to investigate cases in which the security body is the defendant to include special guarantees, among them that the body being accused is not responsible for investigating or collecting evidence against itself, given the conflict of interest for the accused party. For this purpose, an instrument may be created independent of the executive apparatus to investigate all cases of death or injury caused by police personnel, to determine the legality of the

use of force. The instrument would cooperate with the Public Prosecution in cases entailing a criminal investigation.