

The Crisis of Transitional Justice Following the “Arab Spring”: Egypt as a Model

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Introduction

Since the ouster of ex-President Hosni Mubarak in Egypt, human rights NGOs have been calling for a process of transitional justice which would ensure a clear break from the state’s repressive practices and government impunity for such acts. These calls have been almost entirely ignored by the Supreme Council of the Armed Forces (SCAF), the interim governments that served them, and now the government formed by elected President Mohamed Morsi. Yet before delving into why this is, let us take a step back and ask a seemingly obvious question: What is meant by the term “transitional justice,” which Egyptian rights NGOs have been calling for since February 12, 2011?¹

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¹ Only hours after President Mubarak stepped down, the Egyptian NGO Forum issued a draft roadmap towards establishing a state based on rule of law and respect for rights. Among the fundamental demands of this document was the following: “4 - An independent judicial body for truth and equity should be formed to investigate and receive complaints of corruption and

By transitional justice, we mean a set of varied tools – both judicial and otherwise – which may include trials of individuals, reparations, fact-finding commissions, legislative and constitutional reforms, the vetting of public officials and security personnel, and other measures considered by the society to be necessary for dealing with the legacy of repression and human rights violations left by the previous regime. For instance, it may be required that changes be made to the penal code and other notorious laws which were used to ensure impunity for the former regime or to justify its criminal acts. Also important are reforms of the security sector, the judiciary, and other general institutional reforms, including changes to educational curricula. The establishment of memorials and museums or the setting aside of a national day of remembrance may serve as important steps towards national reconciliation. These components of transitional justice are laid out in a comprehensive study conducted by Egyptian legal expert Dr. Sharif Bassiouni which was adopted by the UN General Assembly as a set of basic guiding principles for UN member states regarding the steps that may be taken to achieve transitional justice. The study adopts a legal view of transitional justice and focuses on ensuring victims' rights, elaborating their right to remedy in particular. Importantly, the study does not limit the definition of reparations to monetary compensation but also provides for other forms of redress such as the recovery of smuggled funds and assets, rehabilitation, satisfaction, and guarantees of non-recurrence.² Reparations should be proportional to the gravity of crimes and human rights violations committed, including to civil, political, social, and economic rights.³

Instead of adopting such an approach, the successive governments which were appointed following the Egyptian revolution flouted all proposals to address the crisis surrounding the implementation of transitional justice in Egypt. These governments also refused to present a clear roadmap for the transition to democracy, instead continuing to resort to repressive measures including arbitrary arrests, torture, intimidation, confiscation of newspapers, defaming the opposition, and harassing restricting the work of civil society.

human rights abuses committed before and after 25 January. The authorities should guarantee and provide every facility to ensure the independence and impartiality of the body. The latter should give priority to the investigation of crimes committed since 25 January.” See also: Cairo Institute for Human Rights Studies, “The Forum of Independent Human Rights Organizations: Long Live the Egyptian Popular Revolution,” Feb. 12, 2011, <<http://www.cihrs.org/?p=3004&lang=en>>.

² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, United Nations General Assembly, Resolution 60/147, Dec. 16, 2005.

³ Louise Arbour, Economic and Social Justice for Societies in Transition, Second Annual Transitional Justice Lecture, Oct. 25, 2006, New York University School of Law, <http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Arbour_%20Final.pdf>.

A number of the patterns of human rights violations committed under the rule of Mubarak intensified over the two years following the revolution, contributing to a further destabilization of Egyptian politics and the spread of general mistrust regarding how the state conducts its affairs.

In this context, the successive governments have demonstrated their disregard for ensuring genuine accountability for past abuses and establishing the rule of law. This has led to a significant increase in courtroom violence as well as both peaceful and violent protests organized by the families of those killed, tortured and/or illegally imprisoned both before and during the revolution.

The tireless attempts by the current political regime to hijack calls for transitional justice and turn them into a form of revenge against its political opponents or to subjugate the institutions of the state to serve its narrow interests also contributed to the escalation of such protests. It is clear that the authoritarian practices of the former regime have merely been reproduced in the name of vetting state institutions of corrupt elements. Such practices were adopted both by the SCAF and later by President Morsi with the goal of restoring stability within the state's institutions, leading instead to increased social and political discontent with the already difficult period of transition in Egypt.

Mubarak's conviction by an ordinary court on June 2, 2012 was hailed internationally as establishing justice and marking the end of an era of repression and impunity in Egypt's history. Unfortunately, the case of Mubarak has been used to cover up the ongoing reluctance to hold almost any officials or members of the security forces responsible for past abuses, including the acquittal of military and security officials involved in performing the forced virginity tests on female protestors. Indeed, the condemnation of Mubarak continues to be used from time to time to divert public attention from discussions in the media and political circles regarding reform issues.

With a deeply rooted system of police brutality and a long record of torture, Egypt has been considered a police state from the second half of the twentieth century onwards. The Egyptian government under President Mubarak left thousands of victims as the result of its commission of systematic and gross human rights violations, including enforced disappearances, torture and other cruel and degrading treatment, sexual assault against political and criminal inmates, extrajudicial killings, and arbitrary arrests and detentions of thousands of political opponents.

All such crimes went unpunished, as throughout the past 30 years public prosecutors were reluctant to open serious investigations into any of these

crimes. Most alarming, however, is the fact that the existing frameworks of repression were not dismantled after the fall of former President Mubarak. On the contrary, the political forces in power are resorting to methods of repression and committing patterns of violations similar to those seen before the January 25 Revolution, thus resulting in the creation of additional victims following the revolution.

The failure of the current president, Dr. Mohamed Morsi, to prioritize establishing mechanisms to ensure a successful transition to democracy has directly exacerbated the crisis of governance and justice in Egypt and threatens to push the country towards even greater instability. This was clearly visible through President Morsi's constitutional declaration of November 21, 2012 which aimed to undermine the law on the judiciary and allowed the president to dismiss the public prosecutor. This decree resulted in a situation of political and legal instability whose repercussions may be felt for years to come. Even though removing the former public prosecutor had been and continues to be an essential demand of the public and of rights experts for achieving justice, this step should have been based on the adoption of a democratic law to govern the judiciary which would have separated the position of the public prosecutor from the Ministry of Justice, making it subordinate instead to the Supreme Council of Judges. This would prevent the public prosecutor from being influenced by the interests of the executive at the expense of the principles of rule of law and respect for citizens' rights. However, this demand has been rejected by the Muslim Brotherhood since they won a plurality in the parliament in 2012. The constitutional declaration issued by Dr. Morsi reaffirms that the political group currently in power did, indeed, adopt the same authoritarian tools and tactics used by the Mubarak regime.

Moreover, during the trials which have been held following the revolution, only Mubarak, his Minister of Interior, and ten low-ranking police officers were convicted of complicity in the murder of peaceful protestors. Meanwhile, six assistant ministers of interior and hundreds of police officers were acquitted on the grounds of insufficient evidence in the same case. Lengthy adjournments, the presentation by the public prosecutor of weak evidence that excluded important and obvious elements, intimidation by police of key witnesses, and the absence of a witness protection system have dramatically decreased public confidence in such trials and in the process of transitional justice in general. Often the state, including state-run media, has attributed the killing of protestors to "foreign hands." Further, the public prosecutor abstained from opening investigations into serious allegations of torture committed before, during, and after the revolution.

The rule of Mubarak, like that of other Arab rulers, was one of psychological domination just as much as it was imposed by force. Not only was the Mubarak era characterized by acts of torture, extrajudicial killings, enforced disappearances and other gross and severe violations of human rights; Mubarak and other Arab rulers undermined the institutions of the modern state that were set up all over the region in the wake of independence from foreign occupation and turned them into state machinery of propaganda and oppression. For example, the different Arab governments have extensively used the executive, legislative and judicial branches in their countries to dominate the minds of their citizens and to cause them to lose the value of rule of law. Constitutions and state institutions established to serve the interest of the people and entrench the rule of law became the main instruments used to exploit and dominate the people.

This institutional fragmentation, cultural oppression, culture of impunity, and reign of fear are the main challenges facing the Arab post-revolutionary countries. The challenge was never to merely remove the individuals of Mubarak, Ben Ali, or Gaddafi; rather, the real challenge has deep socio-economic and cultural roots which were cultivated through police domination and using the bureaucratic machinery of post-independence institutions in an attempt to protect the regime from the very popular uprisings seen today.

During the trials of Mubarak and 150 of his aids (including high- and low-ranking police officers) the Egyptian government has resorted to the same judicial structure that existed under Mubarak. Throughout the past 60 years, the judiciary in Egypt was heavily criticized for its bias and for lacking independence from the executive branch and national security apparatus. As such, the Egyptian judicial system has consistently proven unwilling or unable to prosecute state agents involved in crimes that would qualify as gross human rights violations. Calls for reforming the judicial system to ensure the independence of judges and ensure due process, including proposals submitted by judges themselves, have been summarily dismissed by the SCAF, the party which controls the parliament (namely, the Muslim Brotherhood), and the new president. The various calls to establish truth committees and other non-judicial transitional justice mechanisms have also been ignored or emptied of their meaning.

The reality is that the SCAF, which managed the transitional period from February 2011 until the beginning of July 2012, adopted positions reminiscent of the Mubarak government – to whom the SCAF was once loyal – by banning protests and sit-ins, restricting the work of NGOs and media, inciting xenophobic campaigns, using excessive force against peaceful protests, killing tens of unarmed civilians, arbitrarily arresting

citizens, exploiting state-owned media outlets to defame liberals, leftists, and revolutionary youth, and using some extremist Islamic groups as a tool to frighten both Egyptian society and the West. At the same time, Mubarak and other convicted members of the former regime are enjoying rights and privileges, even as prisoners, that other Egyptians are not afforded.

To understand the position of the SCAF, it is important to note that during the past two decades the military played a crucial role in securing the regime's interests and maintaining its position. For example, the military institution was pivotal in resolving the economic and food crisis, as it has served as a venue to diminish the unemployment crisis and contributed to several major economic projects (building and managing highways, hospitals, factories, etc.). Mubarak and other leaders of the ruling National Democratic Party (NDP) have always enforced a vision of the positive role that the military could play as an engine for economic growth and development. As such, the military institutions and its affiliated civilian industries manufacture a wide variety of products, including washing machines, televisions, heaters, clothing, doors, office supplies, pharmaceuticals, and even microscopes.

In addition, Mubarak seemed to increasingly rely on the military judicial system to defer and try his opponents. In the years immediately before the revolution, Mubarak ordered cosmetic amendments to the military judicial system to make it more acceptable to the West and to increase its responsibilities to become, according to his plan, one of the pillars of the Egyptian judicial system. However, even as the military establishment was an active social, political, and economic actor under Mubarak, its role was less visible than that of the NDP and the emerging class of businessmen who were actively visible to the public. This deal, or at least this *de facto* check-and-balance, seemed to be acceptable to the NDP as well as to the military, as it allowed each of them to exert their influence on the system.

Even after the Muslim Brotherhood came to power, the use of the same state machinery of repression utilized by Mubarak to silence his opponents continued. During the first 100 days of Morsi's presidency, human rights groups documented the recurrence of the same trends and patterns of violations, and calls for transitional justice continued to be dismissed. The majority of Islamists in the now dissolved parliament refused to revoke laws that were passed by Mubarak and his predecessors to restrict public freedoms and prevent accountability for crimes committed by the regime. According to human rights groups in Egypt, this is an indication that the Muslim Brotherhood has chosen to adopt the same hostile approach to human rights developed by the Mubarak regime.

There was a general perception that the trial of Mubarak and his closest aides would be one of the pillars of Egypt's transition to democracy, putting an end to the culture of impunity that had prevailed in Egypt for over 150 years. For decades, Mubarak and his predecessors had sought to weaken all forms of institutional accountability and to undermine the rule of law. Nevertheless, opinion polls – even those conducted before January 25, 2011 – showed that the general public viewed the judiciary as the state institution that was able to retain the greatest autonomy.⁴ This general sentiment led the revolutionaries to trust in the ability of the existing system to prosecute the Mubarak regime for its crimes and even encouraged the liberal elite to advocate for the adoption of an exceptional treason law⁵ by which to prosecute the old regime, without considering that such exceptional laws can do more harm than good in the future.

Egyptians believed in the so-called “wisdom of the judges,” a view which was maintained until the day when Egyptians woke up to courthouses surrounded by the families of the revolution's victims, attacks on courtrooms, and attempts to assault defendants in the South Cairo Criminal Court. These developments took place in protest of the postponement of a trial of police officers accused of killing demonstrators. In March 2012, the political crisis again deteriorated beyond the abilities of the courts to offer a resolution when residents of Alexandria assembled at a city courthouse to protest the court's decision to release defendants accused of killing dozens of demonstrators.⁶

The Victims of Violations

Among the challenges to implementing transitional justice in any country is defining the time period for which transitional justice mechanisms will be applied. This is necessary in order to determine who should be considered a victim of the regime for the purpose of reparations. The concept of transitional justice combines the two general concepts of transition and

⁴ Nathan J. Brown, “Reining in the Executive: What Can the Judiciary Do?” Paper presented at a conference hosted by CIHRS in Cairo in 2006. Available at: www.cihrs.org/Images/ArticleFiles/Original/121.pdf.

⁵ For more information about the draft treason act leaked by the ministerial council, see CIHRS position paper: “Toward Democratizing the System of Legal Accountability for Members of the Former Regime to Guarantee Victims' Rights”, available at: <http://www.cihrs.org/English/NewsSystem/Articles/2941.aspx>.

⁶ For more information see CIHRS' statement, “In Defense of Judicial Independence... Transparent Investigations and Trials and Avoiding Double Standards Protect the Courts and Guarantee Accountability,” available at: <http://www.cihrs.org/English/NewsSystem/Articles/2903.aspx>.

justice. According to the United Nations, justice is defined as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs”.⁷ The meaning of the term “transition” in the context of transitional justice is understood to be confined to a period of political changes characterized by legal and rights-based measures to confront and correct the crimes committed by the former repressive regime.⁸ Thus, in the context of transitional justice, the transition is that from an oppressed society to a more democratic, free society. The starting point for implementing transitional justice is liberation from the repressive, authoritarian practices of the former regime, and it is these practices which justify recourse to the exceptional legal concept that is transitional justice.

In political contexts such as that seen since February 11, 2011 in Egypt, where violence and systematic violations have continued to be committed against the political opposition, it is impossible to analyze exceptional measures taken by the new authorities within the framework of transitional justice. This is because the repressive practices seen on a daily basis demonstrate that the country remains hostage to an authoritarian political reality. Indeed, any attempt to dismantle the repressive institutions of the former regime carried out by any party which adopts the same authoritarian approach will be resisted by broad segments of society, as such moves will be seen merely as attempts to re-establish the old tools of repression, albeit under a different name.

The Mubarak regime, the Supreme Council of the Armed Forces, and the current government appointed under President Mohamed Morsi and the Muslim Brotherhood have all been involved in various human rights violations. These violations can be classified as follows:

1) Excessive Use of Force in Confronting Peaceful Protestors: Under the SCAF, both the police forces and the army consistently resorted to the use of force in order to disperse protesters. Force was used in many incidents between February 2011 and the presidential elections, the most serious incidents being the Maspero events, during which the army’s armoured personnel carriers ran over Coptic protesters on October 9, 2011, the Mohamed Mahmoud clashes in November 2011, the December clashes in front of the Cabinet in December 2011, and the massacre which took place at

⁷ Report of the UN Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” Aug. 23, 2004, <<http://www.unrol.org/files/2004%20report.pdf>>.

⁸N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge: Cambridge University Press, 2006, p.1.

a football match in Port Said in early February 2012 and the protests which followed it. In all of these cases, excessive force was used to disperse peaceful protestors. Live ammunition was often used, with snipers aiming at the torsos and heads of protestors. Such practices have claimed the lives of hundreds of peaceful protestors, as well as other individuals who were not participating in protests, and injured thousands more. It should also be noted that violence was used in June 2011 and in November 2011 against the families of those killed and injured during the revolution, with police forces forcibly beating victims' relatives who were demanding better treatment and state acknowledgement for their cases.

Such practices have continued since President Mohamed Morsi assumed power, as excessive force has been used against striking workers in July and September 2012 and against students of Nile University in September 2012. One protestor was shot dead during clashes at the American embassy also in September, and several others were injured. The Ministry of Interior has refused to review its regulations regarding the use of firearms, which allow police to shoot at protestors at close range, often resulting in serious injuries or death. Human rights NGOs have proposed several regulations that comply with the relevant international standards, yet all suggestions have been ignored by the consecutive ministers. Police violence against protestors not only increased under the presidency of Mohamed Morsi, but such violence began to be used also by members and supporters of the ruling party, who played an increasing role in confronting and suppressing the political opposition. The matter peaked on the night of December 6, 2012, when hundreds of supporters of the president surrounded a peaceful sit-in being held in front of the presidential palace; the supporters of the president then beat, dragged, insulted, and even killed a number of opposition protestors.⁹

2) Torture: Torture was and continues to be widely used as a method of investigation by the police. The Egyptian army is also reported to have engaged in torture, especially against those detained in military prisons.¹⁰ The military was also behind the infamous “virginity tests” which female protestors were forced to undergo after being arrested by the military police from Tahrir Square in March 2011, one month after the revolution. As of April 2011, human rights NGOs had revealed dozens of cases of deaths as a result of torture; all of these cases remain unpunished. Unfortunately, families of the victims have often resorted to violence against police stations

⁹ For more information regarding the clashes which took place at the Ittihadeyya Presidential Palace, see the report by the CIHRS at <http://www.cihrs.org/?p=5361&lang=en>.

¹⁰ For further information about those condemned by military courts, see the joint intervention presented by the 20th session of the UN Human Rights Council by CIHRS and the group No to Military Trials entitled, available at <http://goo.gl/8wuKm>.

where their sons were tortured due to lack of accountability mechanisms. The authorities continued to neglect to pass new legislation to combat the prevalence of torture in accordance with Egypt's international commitments. In this context, torture began to take on a new dimension when members of the Muslim Brotherhood and other supporters of the president abducted dozens of opposition protestors on December 5, 2012 during the clashes at the presidential palace, detaining and torturing them within sight and earshot of security forces and the Republican Guard, which even encouraged such acts in some cases. Furthermore, the president used information obtained through torture in an attempt to justify the repressive practices of the authorities during a televised speech on December 6.

3) Enforced Disappearance: Political activists continue to be targeted by enforced disappearance. As there has been no clear process to reform the security institutions in the country, such methods continue to be used widely. Recent incidents were reported in July 2012.

4) Arbitrary Arrest and Detention: Victims of arbitrary arrest mainly included protesters or others who are often taken randomly during mass arrests conducted by the police or the army. Political and union activists and other citizens continue to be subjected to arbitrary detention even after Egypt's first democratic elections. Civilians also continue to be subjected to military trials; indeed, Article 198 of the new constitution explicitly provides – for the first time in Egyptian history – for the referral of civilians to military courts in cases of “crimes which harm the armed forces”.

Absence of Accountability, Justice, Trust, and Reconciliation

Continued Lack of Accountability for Past Violations

The acquittals in all the cases that were brought to the courts since February 2011 are indicative of the absence of political will to prosecute members of the old regime for systematic and gross human rights violations they committed both before and during the January uprising. This absence of accountability has encouraged the official security forces, including the military, to commit further violations against pro-democracy protesters following the revolution. Over the last two years, hundreds of pro-democracy protestors have been shot and killed, thousands wounded, female protestors subjected to forced virginity tests, and male protestors sexually molested and tortured in military prisons. All of these crimes have gone unpunished. In mid-October 2012, a civilian judge was mandated to

investigate complaints filed by victims' families and members of the public against former SCAF leaders Field Marshal Mohamed Hussein Tantawi and Lieutenant General Sami Anan regarding their roles in the infamous Maspéro massacre of October 2011. This represented a major step forward, as it is the first time in Egypt's history that military leaders are investigated by the civilian judiciary vis-à-vis alleged crimes committed by the military. However, the investigation had not begun as of the issuance of this report. Moreover, this step was taken on an ad hoc basis in the absence of an adequate framework to review and reveal alleged crimes committed by SCAF in 2011 which resulted in the killing of more than 100 peaceful protesters and the injury of thousands more. As such, the need to create an adequate and comprehensive framework to enforce the principle of accountability in cases of crimes committed by the SCAF or during its administration of the country - which requires real and clear political will first and foremost - still persists.

In terms of documentation and acknowledgment of violations, the Egyptian state has failed to set a unified standard by which victims of violations from the Mubarak era should be recognized. Victims of the last 30 years of human rights violations have been denied justice and remedy; even those who participated in the protests in 2011 are accused of being thugs or foreign spies. There has been no official acknowledgment of state responsibility for the killings committed during the revolution or for the gross human rights violations committed in the previous decades. There has also been no acknowledgment of torture, nor have any measures for accountability been set in place to address victims' demands. Moreover, Egyptian courts have avoided examining allegations of human rights violations committed during the 30 years of Mubarak's rule, even as Egyptian citizens continue to be subjected to military trials.

Those considered to be victims of the repression against the revolution by the state are officially entitled to monetary compensation, and a compensation fund was set up in this regard in June 2011. However, no official plan exists to establish any form of rehabilitation or commemoration for surviving victims or the families of those that were killed. In the overall absence of recognition and justice for violations, the compensation fund appears more designed to appease and silence dissent than to ensure accountability, justice, and reconciliation. The successive transitional governments have opted not to provide for psychological assistance, nursing care, and other vital needs to rehabilitate victims, nor has legal assistance been provided. Families of the victims also reported having been mistreated by the state officials in charge of issuing their monetary compensation and complained of increased bureaucratic procedures and difficulties when

applying for their compensations. The fund has no clear vision or mechanism to maintain the scope of its work, especially in light of the continuation of the violence and the addition of new victims.

Following the election of President Morsi, a committee was established by Presidential Decree no. 10/2012, issued in early July 2012, to review the cases of all victims from the revolution. All victims of the former regime were once again overlooked, and the role of the committee was limited to carrying out a fact-finding mission, with no indication of what its role might be following the completion of its investigations. Moreover, neither the findings of the committee's investigations nor the committee's hearings will be made public. In fact, the members of the committee are forbidden from making any comments to the press. In addition, the committee is only mandated to present recommendations to the president, and no clear indication was made authorizing the committee to review the findings of the investigations carried out by the public prosecution over the past 18 months. The committee submitted its confidential report to the presidency at the end of 2012.

Civil society organizations have been working to document the number of victims and their social status so as to keep record of all those victimized by the state. Several volunteer initiatives, such as the initiative "Lan Nansahum" (We will not forget them), have emerged with the aim of collecting records and preserving the memory of the revolution's victims. Following the uprising, several NGOs have also presented proposals to the consecutive Egyptian governments regarding the establishment of a comprehensive transitional justice mechanism to ensure remedies to victims of past human rights violations, including proposals for the establishment of truth and reconciliation commissions and specialized tribunals. However, the policies adopted by the SCAF and the interim governments have resulted in the creation of additional victims as the state continues to use violent practices against its own citizens.

Distrust between State Institutions and Citizens

No effective measures have been taken in order to genuinely reform the Egyptian Ministry of Interior and the State Security Apparatus, and prominent members of the former regime have remained in their posts. The police state, once introduced under Mubarak, was reintroduced again throughout the past year, with the same patterns of human rights violations that were committed under Mubarak.

The laws issued in 2011 and 2012, whether by the SCAF, by the dissolved parliament, or later by the elected president, failed to seriously address the issue of victims of violations. In addition to the lack of accountability and the continuation of brutal police practices, no laws have been set in place in order to punish torture in prisons, for example, or to adequately protect victims' rights.

Ironically, the Ministry of Interior proposed six draft laws¹¹ that further reinforce the grip of the police state over the public life in Egypt, directly threatening the rights to peaceful assembly, to association, and to freedom of opinion and expression. If these draft laws are adopted, they will guarantee an effective return to authoritarianism and likely lead to increased victims of violations in the future. Moreover, given its ongoing repression of citizens, it would appear that the Ministry of Interior has not undergone any reform or changed its policies of repression.

Genuine Reconciliation Currently Impossible

In absence of clear measures for accountability, the term “reconciliation” has instead become associated with impunity, as the concept of reconciliation has been misused to ensure amnesties for those who committed human rights crimes or were involved in corruption during the Mubarak era. For example, the government introduced amnesty laws that would provide for “reconciliation” with businessmen who were involved in financial misconduct under Mubarak, yet the state has failed to establish reconciliation mechanisms that would enhance dialogue and ensure transparency with regards to such crimes.

Until now, victims have yet to be recognized as victims, and no serious measures have been taken to prevent impunity. The lack of accountability for the Mubarak regime as well as for ongoing human rights violations forces us to ask if a process of transitional justice has in any way occurred. It would appear that perhaps a political transition has taken place without being accompanied by a transition toward rule of law, accountability, or social reconciliation. As a result, responses to repressive state policies have primarily come from civil society activists and NGOs. In addition, the burden of assisting the victims of the police state has also fallen to civil society activists rather than the government. However, civil society in Egypt

¹¹ These bills were presented under the SCAF and again adopted by the Ministry of Interior following Dr. Mohamed Morsi's assumption of the presidency. See CIHRS' report “Criminalizing the Egyptian Revolution,” Oct. 2012, available at <http://www.cihrs.org/?p=4623&lang=en>.

suffers under Law No. 84 of 2002, which restricts the role of civil society groups, imposes strict bureaucratic and government oversight on their work, and significantly limits funding opportunities. This situation was exacerbated when President Morsi's government hastily attempted to pass a bill even more repressive than the current law.

Questioning Judicial Independence

Immediately after the fall of Mubarak, public opinion and even political analysts surprisingly disregarded the perception - ironically also held by most judges - that the Egyptian judiciary lacks independence.¹² As per the legislation regulating the work of the judiciary, the executive branch of the government exerts enormous influence over the judiciary, as evidenced by the powers enjoyed by the President, the Minister of Justice, and the Minister of the Interior over the judicial branch.¹³ The public prosecutor himself, who is in charge of investigating complaints of violations and presenting evidence to the courts, is far from being independent.

Public opinion also tends to forget that the Mubarak era witnessed widespread impunity for crimes committed by police and NDP officials, who were shielded from accountability and punishment. This is illustrated by the hundreds of complaints that were filed with the Public Prosecutor's office in previous decades and never investigated, many of which were ultimately closed without action. At the same time, however, Mubarak's regime did not hesitate to mobilize judges and investigative authorities to target critics and opponents or to reinforce the lack of accountability for its own actions.

Independent judges have struggled since the 1990s to free the judiciary from the interference of the executive. Executive influence is exerted through the

¹² After President Mohamed Morsi took office, the "Judicial Independence" movement ceased calling for the immediate amendment of the law governing the judiciary, which the movement had been advocating for under both Mubarak and the SCAF. The two judges who had prepared an alternative bill assumed senior positions in the new government - the head of the Constituent Assembly charged with drafting a new constitution and Minister of Justice. One of the most prominent figures of the movement became vice president, as well. As such, the "Judicial Independence" movement and its three main leaders stopped calling for judicial independence, and some judges became party to consultations with the president regarding how to subdue the judiciary altogether.

¹³ For more information on the independence of the Public Prosecutor's office see: Abdalla Khalil "The Public Prosecutor, Representative of Society or Subject of the Executive?" Cairo Institute for Human Rights Studies, 2006; "The General Prosecutor between the Judicial and Executive Authorities" in Nabil Abdelfattah, "Judges and Political Reform in Egypt" pp. 119-153, Cairo Institute for Human Rights Studies, 2006.

Judicial Inspection Department;¹⁴ administrative pressures on judges' work, such as through the rules of transfer and internal and external lending; the supervisory role of the Minister of Justice and the broad sanctions that it can impose on courts; and the control that the Ministry of Justice has over the budget of the judiciary.¹⁵

The Egyptian judicial system is not in on the verge of collapse. Its institutions are functioning, and it boasts the oldest legal tradition in the region. Despite the critiques presented above, it should be clearly acknowledged that the degree of institutional and moral autonomy enjoyed by Egyptian judges is greater than that of their peers in other Arab states. Nevertheless, the question remains: Is the current system able to adequately investigate the massive crimes that were committed under Mubarak's rule and bring the perpetrators to justice?

Prosecuting a Friend

According to lawyers and judges who attended the trials of Mubarak and other members of his regime, the evidence and investigations presented by the public prosecution are far from being serious, causing many to believe that the decision to sentence Mubarak will be easily appealed and that he will be acquitted on the grounds that his sentence was not supported by sound legal evidence. In contrast to many modern legal systems, the public prosecution in Egypt combines the investigative and prosecutorial powers, thus casting doubt on the impartiality of its investigations. Egyptian law stipulates that only the public prosecution can investigate criminal complaints against public officials and order their referral to a criminal court. Both victims and their relatives are prohibited from criminally suing perpetrators of violations directly.¹⁶ Rather, it is the prosecutor who must decide whether the allegation is serious enough to warrant an investigation, at which point he/she proceeds to investigate the incident. Based on the results of the investigation, the prosecutor writes a memorandum recommending whether the case merits continuation through a trial. Subsequently, the prosecutor's supervisor should approve this decision. Complainants cannot appeal for a judicial review of the prosecutor's

¹⁴ "A department... [that aims to]... inspect the work of judges and presidents of courts of first instances" Article 78 of the Egyptian judicial authority law.

¹⁵ For further information, see: Magistrate Mahmud al-Khdayri "How Law no. 4 of 1972 on the Judicial Authority Legitimizes Attacks on Judicial Independence" in "Judges and Political Reform in Egypt" pp 101-117.

¹⁶ Nevertheless, at the start of an investigation by the public prosecutor, victims can lodge a civil claim that gives them standing in the case.

decision. The only possible method of appeal is through action of the public prosecutor himself.¹⁷

When making his/her decision, the prosecutor relies on reports prepared by technical experts like the Forensic Medical Authority, questions witnesses, and examines documented evidence. The technical experts themselves are also subjected to the interference of the executive branch and the public administration in their work. Technical experts are not guaranteed any immunity, and, like the Public Prosecutor, they are subject to the authority of the Ministry of Justice.¹⁸ In addition, Egyptian law does not provide for a witness protection program. In highly complicated cases involving current and former members of national security, as well as police and military officers, the absence of these protection programs usually leads to the failure of investigations to be conducted fairly and impartially.

In July 2011, an Egyptian rights NGO filed a complaint with the Prosecutor's office alleging that "police officers in the Marg Police Department are exerting pressure on victims of the January revolution to drop their complaints, and then threaten citizens who file complaints about this pressure".¹⁹ This complaint, like many other complaints that were submitted by lawyers and NGOs, was closed with the knowledge of the office of the public prosecutor, as were the majority of complaints that his office received prior to, during, and after the January revolution.

It is important to note that the investigations process for the crimes committed during the revolution has also been severely undermined by the continued abuse of power by the police. Intimidation of victims and destruction of evidence, including records of the Ministry of Interior, are but a few examples of the seriousness of this manipulation. Despite several cosmetic assurances that the Ministry of Interior has reformed its policies and practices (such as changing the slogan of Egyptian police, creating a new department to communicate information with human rights NGOs, arresting accused policemen, abolishing the notorious State Security Investigations apparatus and substituting it with National Security Services, etc.), the Ministry of Interior has failed to undergo a serious vetting process. A decision was made a year ago by the Interior Minister to dismiss some 669 high-ranking police officers; however, this decision has not been received

¹⁷ Infra note 4.

¹⁸ For more information about the independence of Forensic Medical Authority, see the notes of a roundtable discussion held at CIHRS in September 2011 with forensic experts, available at <http://www.cihrs.org/Arabic/NewsSystem/Articles/2991.aspx>.

¹⁹ See Press Release by the Egyptian Initiative for Personal Rights, available at <http://www.eipr.org/en/pressrelease/2011/07/11/1197>; see also <http://www.eipr.org/en/pressrelease/2011/09/12/1249>.

positively,²⁰ as the Ministry has failed to explain on what basis these officers were dismissed and whether these officers were incriminated in perpetrating the torture that was systematically practiced in Egyptian police stations.

Thus far, lawyers and other observers of the trials of members of the Mubarak regime have expressed concern with the charges and evidence presented by the public prosecutor. In an interview last June, a judge clearly stated to the CIHRS that any independent judge would deem the evidence gathered and presented against Mubarak and his regime as insufficient to condemn them and would have to acquit them immediately.

The system currently in place is not adequate or able – and perhaps unwilling – to deal with these trials. This is not an insult but rather the result of the long years of oppression which led to the January 25 uprising. Regardless of the question of the impartiality and independence of the judge looking into a particular case, there are significant loopholes in the investigations process and legislative context which need to be addressed. This view was explicitly expressed by the UN Committee Against Torture in Paragraph 20 of its Confidential Inquiry on Egypt in 1996, which recommended that the government "set up an independent investigative mechanism, including in its composition judges, lawyers, and medical doctors, that should effectively examine all allegations of torture, in order to bring them expeditiously before the courts."²¹ The system in place in 1996 is no different than the system which remains in place today. At the time, the system wasn't adequate to investigate the horrendous acts of torture systematically practiced by the government; hence it is only logical to conclude that as the institution currently stands; justice would not be achieved.

Lack of Political Will Blocks Progress on Human Rights

Until now, the prosecution of Mubarak and his regime members remains a political issue rather than a legal one. A review of the timeline of the arrests, detention orders, and prosecution of members of the former regime reveals that these arrests and court hearings always took place at key political moments, usually on the Wednesday or Thursday prior to a mass protest scheduled on a Friday. Protestors have named these measures the "Friday

²⁰ CIHRS has discussed these changes with Human rights experts, security experts and representatives of the ministry of interior in a public debate in September 2011. For the minutes and conclusions of this debate see <http://www.cihrs.org/Arabic/NewsSystem/Articles/2964.aspx>

²¹ Committee Against Torture, Art. 20, Examinations Re: Systematic Torture, CAT A/51/44 (1996).

gift.” Tellingly, the months that witnessed no large protests also failed to see any arrest or prosecution of any member of the former regime.

The ruling regime has until now avoided examining allegations of human rights violations committed by its predecessor, focusing instead on charges of corruption and mishandling of public funds. Mubarak and his two sons, his Prime Minister, his Ministers of Interior and of Housing, and other secretaries and close advisors of Mubarak, such as his right-hand-men Hussein Salem and Ahmed Ezz, all face trial on charges of corruption for the illegal amassing of wealth. The former Minister of Interior has already been sentenced to 12 years in prison on charges of corruption, yet no of these were convicted for acts of killing, torture, or any other civil and political rights violations committed during or prior to the revolution. During the past two years, only ten low-ranking police officers have been convicted - some in absentia - of killing protesters during the January revolution. In other cases, trials have ended in acquittals, with one such recent decision setting off a riot in the courthouse.

Mubarak has been accused and convicted of conspiring in the premeditated and attempted murder of protesters during the uprising, abusing power to amass wealth, and allowing gas to be sold to Israel below the market price. These charges are nearly impossible to prove, especially after the alleged destruction of all evidence, records, and documents that could lead to this conclusion. In fact, Mubarak’s lawyer has argued tirelessly during the past few months that Mubarak himself did not sanction the killing of protestors. Testimonies by Field Marshal Tantawi and other high-level officials even deny his very knowledge of the killings. As such, his conviction surprised most observers and was criticized as politically motivated to avoid public outrage, and it was said that Mubarak was used as a scapegoat to cover up crimes committed by the state.

It is also obvious that the SCAF and the Muslim Brotherhood have so far adopted stances against investigating crimes of the past. With the exception of corruption charges, the criminal trials of the Mubarak regime have reduced the crimes committed under Mubarak’s rule to those crimes committed in the eight days between January 25 and February 2, 2011. Thus, it appears that the military rulers and the public prosecutor want to limit the goals of the Egyptian revolution to a mere struggle against corruption. Once more, the ruling authorities are using the same strategy as the old regime, which reduced the demands of the Egyptian people to the mere provision of bread.

The trials of the former regime were surrounded by consecutive delays, acquittals, and the refusal to investigate crimes of the past. The right of senior security officials and members of the former regime to due process and a fair trial before the civilian judge of relevant jurisdiction was fiercely guarded, while a completely different standard of justice was applied in cases of accused civilians, including bloggers, political activists, and suspected thugs. Such civilian defendants have been referred to military trials lacking due-process guarantees, including the right to appear before the civilian judge of relevant jurisdiction. The situation remained largely the same following the transfer of power to President Mohamed Morsi, as the trials remained politicized due to the lack of independence and impartiality within the state's institutions. At the same time, trying Mubarak cannot wait until comprehensive institutional reforms take place. However, the experiences of other regions of the world have demonstrated that the establishment of independent and impartial transitional justice mechanisms can guarantee that the achievement of justice go hand in hand with the process of political transition to democracy. Unfortunately, the current lack of political will in Egypt threatens to thwart both processes.

The pivotal question is how to achieve transitional justice in a society where the institutions of the state were undermined or eliminated by years of political repression. In Egypt, this dilemma is made all the more difficult by the lack of internal security, the divisions within and between the various social and political segments of society, and the depletion of the country's resources. Moreover, achieving transitional justice also faces the challenges of the lack of institutional independence within the justice sector itself, the absence of local technical expertise, the prevailing sense of shock and betrayal in society, and the lack of confidence on the part of citizens in the state's institutions. There is a lack of respect for human rights and rule of law within the government, and the political forces which have come to power lack crucial legal and political experience and have consistently attempted to undermine the institutions of the state or to utilize them to serve their own political goals. Achieving transitional justice and establishing rule of law are not mere technical frameworks to be established; rather, they are fundamentally related to the political context. Indeed, the first requirement of transitional justice is that the state in question be undergoing a genuine transition to a new democratic order.

Justice will only be achieved if there is sufficient political will to make a clean break with the past, hold those responsible for violating Egyptians' rights to account, and compensate the victims of these abuses. This can be realized in numerous ways, but disreputable exceptional laws should not be one of them. Certainly, a far-reaching program of transitional justice

involving trials, fact-finding commissions, and reparations and rehabilitation will be a costly process in the short term. In the long term, however, failing to address these issues wisely and in a democratic comprehensive manner will prove to be much more costly for the state and its citizens.