Fair trials for all: to end military trials in Egypt and restore civil justice

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Military trials for civilians are an unacceptable course of action in most countries, however successive Egyptian governments have referred thousands of civilians to military courts since January 2011. Although the Chief of the Military Judiciary indicated in 2011 that this was no more than a temporary response to exceptional circumstances, the government has since legitimised this exception and protected it through constitutional change. They have failed to investigate the many violations associated with these trials, including the recent death sentences handed down to seven civilians, including a minor, after a trial that lacked the minimum requirements of due process.

This paper discusses the constitutional and legislative status of military trials and their expansion and application to hundreds of students, journalists and peaceful demonstrators. It also gives some examples of the ways in which many of the accused have been denied their right to a fair trial. The paper concludes with a number of quick recommendations for putting Egypt on the right track. The country desperately needs to open a new chapter of justice for its citizens rather than legitimising injustice and miring the country in a vicious circle of violence and counter-violence.

Introduction

Since Egypt’s January 25 Revolution in 2011, successive governments have increased the number of civilian trials in military courts. These trials have happened in violation of international human rights conventions, to which Egypt is a signatory, under the pretext that exceptional circumstances permitted the use of this extraordinary measure. Rather than leading to improved justice for Egyptian citizens and improved security for the state, the application of military justice has led to systematic violations that have in turn provoked more injustice, anger and violence.

In the first few months after the Supreme Council of the Armed Forces (SCAF) took power in the wake of President Hosni Mubarak’s downfall in February 2011, around 12,000 civilians were tried in military courts. After Mohammad Morsi won the presidency in the first post-Mubarak presidential elections in June 2012, there were some signs that civilians being tried

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in military courts would be released. However, the issuance of a new draft constitution by a legislative committee controlled by the Muslim Brotherhood was a significant setback. For the first time in the history of Egyptian constitutions, the trial of civilians in military courts was to be allowed in special circumstances. This permission was described in the draft constitution in extremely general terms, which would have allowed the security services a wide range of interpretations that could violate citizen rights. In June 2013, Mohammad Morsi was removed from power by his own Defence Minister, Abdel Fattah al-Sisi, and replaced by Adly Mansour. While Morsi’s removal had the support of large sectors of the population, it resulted in Mansour, the Chief Justice of the Supreme Constitutional Court, also serving as interim president. He served both roles until new elections brought al-Sisi to the presidency in June 2014. During the presidencies of Mansour (2013-2014) and al-Sisi (2014 to present), there has been an unprecedented expansion in the number of civilians referred to military courts and efforts to legitimise this exceptional procedure. The provisions of the new 2014 Constitution that allow civilians to be tried in military courts have been taken to extremes, allowing dozens of students and journalists to be tried in military courts.

**The legislative and constitutional status of military trials: legitimising the exceptional**

On October 27, 2014, President al-Sisi issued Presidential Decree No. 136, which expanded the use of military justice for civilians for two more years, and expanded the range of covered crimes to include attacks on a wide array of facilities and public institutions. These include “electrical generating plants, networks and transmission towers, gas and oil facilities, railway lines, road networks and bridges, and other public facilities, installations and properties, and all that falls under their authority.” The provisions of the new decree allow any civilian accused of attacking any of these public properties or blocking roads to be tried in a military court, an accusation often levelled at peaceful demonstrators opposing the government. Decree 136, issued at a time when Egypt has been without a legislature for over two years, was not an exception. Referring civilians to military courts has now become part of a series of systematic violations by the Egyptian authorities against dozens of citizens. However, what was new with this decreewas the unprecedented expansion of this exception and its flagrant violation of the constitution. Not only is it legal to try civilians in military courts for “assault on a military installation,” as allowed under Article 204 of the 2014 Constitution, but now all public installations, roads and bridges were to be treated as military installations. The decree also includes a key additional phrase, “and all that falls under their authority”, which allows for broad interpretation and could mean, for example, that any private installation or small traffic incident in which a government car is involved could be interpreted as an attack on a military facility.

In an interview with an Egyptian television network, the Chief of the Military Judiciary said that the provisions of the constitution allow any civilian to be tried in a military court if a problem arises between him and a member of the military who may work at a gas station or wedding hall owned by the military, anywhere in country. In saying that, he is equating the situation of a soldier who serves the people in one of these investment facilities with that of a soldier or officer who defends his nation. Allowing civilians to be tried in a military court was
first effected in the first draft constitution after the January 25 Revolution when former President Morsi was in power. Article 198 of this Constitution allowed civilians to be tried in military courts for “crimes that harm the armed forces and this shall be defined by law,” with the constitution also defining the other prerogatives of military justice. This is the same widely amended constitution, whose latest version was approved by referendum in January 2014, during the rule of Adly Mansour.

According to Article 204 of the 2014 Constitution, “The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and those under their authority.” This is why the addition of the sentence “those under their authority” is likely to constitutionally validate the military trial of civilians who work at military installations, as well as children and students enrolled at military schools. These same provisions also allow the trial of civilians accused of assaults on “assigned military and border zones.” The word “border” was added here to sanction military trials for civilians in an area amounting to 72% of the total area of Egypt (the Governorates of Matruh, Aswan, North Sinai, South Sinai and New Valley).  

Extent of the use of military trials:

Geographically, the largest number of civilian trials in military courts took place in North Sinai and in the Governorate of Ismailia, near the Suez Canal in eastern Egypt, where dozens of civilians have been tried on an almost weekly basis. Cairo also ranks very high in terms of the number of civilians being tried in military courts, though there are no clear official statistics on their exact numbers. The first and last official statement in this regard was by the Chief of Military Judiciary in a press conference on September 5, 2011. He said that 11879 civilians appeared before his court between January 2011 and August 2011, implicated in 3863 cases, with a total of 6235 sentences. Thousands of other civilians were referred to military courts though their cases were only partially documented by local and international rights groups working in Egypt.

Subjects that fall under military court jurisdiction are not only those related to terrorism, as propagate by the media, but are often expanded to other subjects, including journalists. In 2013, at least 3 journalists were referred to military courts in less than one month. On October 5, 2013, a military court in the city of al-'Arish gave journalist Ahmed Abu Draa, correspondent of Al-Masry al-Youm newspaper and the ONtv channel, a suspended sentence of six months in jail and a fine for publishing inaccurate news on the operations of the armed forces in Sinai. On October 29, the military court in North Cairo sentenced Hatem Abu al-Nour, a journalist with the Watan newspaper, to one year imprisonment with labour. On November 3, 2013, the Military Misdemeanour Court in North Sinai gave freelance journalist Mohamed Sabry a suspended sentence of six months in jail which, according to a statement issued by the Egyptian Initiative for Personal Rights on January 4, 2014, was postponed ten times since his arrest in January 2013.

1 Statistics on which the researcher relied on in defining the geographic area, as published by the State Information Service in Egypt.
In 2014, the North Cairo public prosecutor referred 5 citizens, including 3 journalists, Amro Salameh al-Qazzaz, Islam al-Homsi and Amro Farraj, to a military Misdemeanour Court for leaking information pertaining to General Abdel Fattah al-Sisi, Defence Minister at the time and current President of the Republic, with the referral decision alluding to an “attempt to cause harm to the armed forces.” It is worth noting here that the journalists work for the Rasd internet site, considered close to the Muslim Brotherhood. Paradoxically, the most notorious cases of armed violence, involving groups like “Ansar Beit al-Maqdes,” the most dangerous group waging an open war against the security forces in Sinai, “Ajnad Misr”, a group that operates in Cairo and the Governorate of Giza, and other armed cells, are being prosecuted in civilian courts. The same should apply to all citizens since everyone has the right to a fair trial in an ordinary court.

In another paradox, referrals by the Egyptian authorities of non-officer police members to military courts, allowed by Article 99 of the Police Law (No. 109 for 1971), have declined after the January 25 Revolution while referrals of civilians to the military courts have continued unabated. However, in a reversal of previous government policies, President al-Sisi affirmed his intention to expand the military trials of police members through Presidential Decree No. 130 of 2014. This decree amended Article 94 of the Police Law to read, “The military judiciary is the only party competent to adjudicate in crimes involving members of the police force.”

The reach of the military courts also expanded to include student trials. In November 2014, five students from al-Azhar University were referred by the prosecutor general to the military judiciary for attempting to set fire to one of the University’s gates, an act that should fall under the riot act rather than being labelled terrorism. Furthermore, in December 2014, two students from Alexandria University were referred to the military prosecutor after they were arrested in a cafe and accused of setting fire to al-Wardeyan police station in west Alexandria. However, although the prosecution’s referral document violated a basic legal principle which states that “the law cannot be applied retroactively,” this did not stop their referral to the military judiciary. The arrest of these two students took place in early October 2014; i.e. before the decree was issued to allow civilians to be tried in military courts for attacking public facilities. This same legal violation was also committed against seven students from Zagazig University after clashes erupted between the police and a number of student demonstrators inside the university in October 2014, before the decree was issued. Nevertheless, it was applied retroactively and their referral to the military prosecutor went ahead. According to the Academic Freedom Monitor, an agency that monitors the condition of Egyptian students in detention, no less than 172 male and female students were referred to military courts between July 2013 and the last week of March 2015, with sentences totalling 293 years handed down.

The Constitution clearly states in Article 204 that, “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, military secrets, or 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...” But this provision has
often been violated. A good example is the case of Doctor Ahmad Azmi Ali, who was arrested without any obvious reason and disappeared after the security forces broke into his clinic in the city of Al-Arish. His family found out, after several attempts, that he was detained in a military prison in Ismailia, a location that the authorities still deny is used to house civilians. He was later accused in another case of attempting to “bomb the office of the military prosecutor in North Sinai,” and he is still in jail as these lines are being written.

The right to a fair trial

According to Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the African Charter on Human and Peoples’ Rights, the presence of the lawyer of the accused during interrogation is a minimum right for interacting with the legal authorities. The ICCPR states that it is their right “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” However, these rights are systematically violated in every case referred to the military courts, starting with the circumstances and manner of the person’s arrest and place of detention. In many cases, the period preceding the individual’s referral to a military court is too long, averaging 45 days of forced disappearance. During that time, the concerned authorities deny knowing his place of detention, and once he is accused they change the date of his arrest to coincide with the referral date.

The arrest process is sometimes very violent and interrogations are always carried out without the lawyer’s presence, in violation of accepted legal norms. Officers from the general prosecutor’s office go to the place of detention and interrogate the accused under illegal conditions that do not ensure his rights. Many such violations have been documented, chief among which are cases in which the accused is interrogated while blindfolded and forced to sign documents that he cannot see.

Likewise, the lawyers are unable to exercise their right to defend their clients, as in the case of Abdel Rahman Sayyed, a minor whose lawyer was able to meet with him only once before the final sentence was pronounced. The testimony of eyewitnesses at the time and place of his arrest contradicted those quoted by the security services, but his lawyer’s request that the testimony of these eyewitnesses be heard was denied. There was also no opportunity to fight the case in court; in less than three months, and following only three court sessions, death sentences were handed down to Sayyed and six others in the case, which became known as the “Arab Sharkas” case. The Minister of Defence has already approved the sentences.

Military trials for civilians – further expansion or retreat under pressure?

Ever since the Egyptian authorities began referring civilians to the military courts in the wake of the January 25 Revolution, several pressure groups have emerged, chief among which is a group called “No Military Trials for Civilians.” This group has networked with several other legal bodies and civil society organisations to form a rejectionist front that puts pressure on Egyptian decision-makers to end the practice of trying civilians in military courts. They have called for transitional justice that compensates the victims of unfair trials and holds the violators of their rights and dignity accountable instead of blaming the victim.
These groups succeeded in compelling the SCAF to issue several pardons during its time in power (February 2011 to June 2012) and to stop the implementation of sentences handed down by military courts to hundreds of civilians. We were able to document pardons for 2613 civilians. Media and international pressure campaigns also succeeded in obtaining pardons for 630 civilians from former President Morsi during his tenure (June 2012 to July 2013).

The discussion above indicates that military trials are unfair, politicised, and used as a tool to frighten the peaceful opposition, human rights advocates and ordinary citizens. Unfortunately, far from showing any sign of changing these practices, the current regime has instead issued more restrictive legislation that allows further violations of citizen rights. On the other hand, members of the police have waged a long struggle to end the practice of referring them to military courts. This practice violates the provisions of the constitution in which the police are defined as a civilian institution, as well as the principle of equality among all members of the police force, since non-officers could be tried in a military court, but officers are given preferential treatment and can only be tried in civilian courts. Two members of the police, Tarek Abdel Aziz and Ahmad Jamal Atiyeh, successfully challenged the sentence handed down to them by a military court, the High Administrative Court, which in turn referred the case to the Constitutional Court. The latter court ruled on the constitutionality of Article 99 of the Police Law (No. 109 for 1971), which allows non-officer members of the police to be tried in military courts. On November 4, 2012 it decided that the Article was unconstitutional.

Although the Article was deemed unconstitutional, in September 2014, President al-Sisi issued Presidential Decree no. 130, decreeing that police members affiliated with the Interior Ministry can only be tried in military courts. The anger that decree provoked among members of the police compelled the Prime Minister to issue Prime Ministerial Decree No. 420 of 2015 establishing a new administration at the Interior Ministry, “General Administration for Discipline and Disciplinary Matters,” which implicitly means stopping the implementation of Sisi’s decree.

What can be done?

As has become clear, although the military trial of civilians is an exception throughout the world, it has been legitimised in Egypt through practice, the law and the Constitution. It is often used as a punitive tool without ensuring the basic right of the accused to a fair trial. The very poor detention conditions in both civilian and secret military prisons increases the importance of protecting the rights of the accused. These prisons have been the source of many documented cases of coerced disappearances, illegal interrogation practices, forced confessions through torture, physical and psychological humiliation, medical neglect and widespread disease among the detainees.

While there are several shortcomings in the ordinary judiciary’s implementation of justice, the solution does not lie in establishing a parallel military judicial system but in addressing these shortcomings. This could be done through radical and comprehensive changes that ensure justice, allow for quick litigation, guarantee the independence of the judiciary, prevent it from becoming politicised and make sure that it is a defender of freedoms rather than of the authorities. What makes the situation even more dangerous is that legitimising the exceptional process of sending civilians to military courts, and focussing on security solutions and
collective punishments, will only increase the determination of armed groups who see their discourse and self-image as mere reactions to the transgressions of the Egyptian state.

Placing Egypt on an acceptable political path requires the urgent implementation of several steps.

President al-Sisi, as head of state and Supreme Commander of the Armed Forces, should:

• Annul Presidential Decree No. 136 of 2014. This decree signifies a dangerous deterioration of the justice system by allowing civilians charged with attacks on public facilities to be tried in military courts. This decree also expands the prerogatives of the military courts, normalises their use for civilians and allows the security services to use accusations of attacks on public facilities to restrict personal freedoms.

The Chief of the Military Judiciary should:

• Reveal the numbers and names of all civilians referred to the military courts.
• Immediately release all those who have been exonerated by the ordinary judiciary before being referred to the military courts.
• Refer all other civilians to the ordinary judiciary and releasing them while their cases are being considered.

The Defence Minister should:

• Nullify the endorsement of the sentences handed down to seven civilians who have been denied their right to a fair trial.
• Refer their case to the ordinary judiciary.
• Investigate the revelations that the accused have been severely tortured.

All those involved in the Egyptian justice system should:

• Consider putting an end to the death penalty. This would signal a big step forward on the path towards radical justice. Implementing the death penalty enshrines injustice, violates the sacred right to life, particularly for those subject to unfair trials, and provokes more violence and counter violence.
• End all violations of the legal principle that says “punitive measures cannot be applied retroactively.”

The next parliament should:

• Review and amend articles in various pieces of legislation that flagrantly violate human rights.
• Take appropriate steps to amend Article 204 of the Constitution that allows civilians to be tried in military courts. The amendment should make it clear that it is forbidden to try civilians in military courts under any circumstance and ensure that both civilians and former military personnel accused of contravening a military order are tried in ordinary courts.
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