

EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS



المبادرة المصرية للحقوق الشخصية

A review of the Judges' explanation of the verdict: "The Trial of the Century's" verdict on the Gas Case: Impunity in Corruption Cases Continues

A wasted golden opportunity to achieve justice in public funds squandering cases

Egyptian Initiative For Personal Rights

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The case of exporting underpriced gas is perhaps one of the key corruption cases in the modern history of Egypt. It is so due to its magnitude and impact on the lives of millions of Egyptians, the involvement of top state officials, public interest in it, and its historic and political significance. Many analysts and followers of the case maintained the impossibility that the former President Mubarak was unaware or even uninvolved in the case, if only due to the fact that the issue is a matter of “sovereignty” concerning one of Egypt's most strategic natural resources. The matter is also part of the mandate of the General Intelligence Directorate (GID), and an obligation provided for in the Camp David Accords. More importantly, Mubarak is an old friend of the former intelligence officer and the current fugitive businessman, Hussein Salem – a friendship attested to by General Omar Suliman, Egypt's Vice President during the 25 January Revolution, during his testimony for the same case. Moreover, the General stated, in his testimony, that this was a non-tender commission of gas exportation to Salem.

On 29 November 2014, North Cairo Criminal Court acquitted Mubarak, from charges related to murdering the protestors during the 25 January protests, to financial corruption, and squandering public funds, during the so-called “trial of the century”, where Mubarak, his two sons, Minister of Interior (Habib Al-Adli) and his six aides, and Hussein Salem were accused of several charges. The verdict created much controversy concerning the seriousness of the trial, and the impartiality of the panel and the verdict. Many questions were posed concerning the independence of the judiciary, the efficiency of legal procedures, and whether any legislative deficiency exists. The verdict, ultimately, unleashed wide controversy concerning the political and historic dimensions of the case – which is far from being merely criminal; as the supporters of the decision, thereof claimed that the judge could not but issue a verdict based on the evidence at hand, and that the verdict should not be influenced by political or historical considerations, but rather be impartial. The Court had exaggerated in exercising discretion concerning evidence, contrary to the precedence of the rulings issued by the

Court of Cassation. The Court also failed to explain to the general public its absolute disregard of most of the prosecution testimonies, while at the same time it was “satisfied” with most – if not all – defense testimonies, despite that most could not be classified as impartial with respect to the case.

The Court dismissed all prosecution testimonies, including the investigations of the Public Funds Investigations Department (PFID), top officials in the oil sector, and the Administrative Control Authority. All prosecution testimonies were refuted and counted on under the pretext of the non-existence of “any observed or manifest tangible material acts or any visible indications, features, or marks”; or the pretext that the testimonies “failed to show any visible or invisible signs that gives evidence or guide the court in this dark tunnel.”

Prosecution testimonies included the investigations by Colonel Tarek Marzouk Abdul Mughni, the Director of Financial Fraud in the PFID, which proved the involvement of Mubarak in the conclusion of the contract of the Mediterranean Gas Co., the majority of whose shares are owned by Hussein Salem jointly with the Egyptian General Petroleum Corporation (EGPC). This contract was concluded to export Egyptian natural gas to Israel at very low prices and under unfair conditions, only to the profit of Hussein Salem, evaluated at around USD 2 billion, and to the detriment of public funds at the time. The Court dismissed the testimony of the Colonel under the pretext that “investigations alone cannot stand as sufficient proof or independent evidence proving charges. Moreover, they are but an opinion of the person that could prove wrong, be truthful, or falsified.” This has been the argument, which was also supported by the judgments of the Court of Cassation concerning investigations as an expression of the opinion of the speaker. Nonetheless, the dismissal of certain investigations, and the admission of others, raises concerns around selective application of the principle established by the Court of Cassation.

Among the core prosecution testimonies ignored was that of Muhammad Kamel el-Essawi, the former First Undersecretary of the Minister of Petroleum for Gas Affairs, in another case also on the underpriced selling of

natural gas to Salem's company, which was used in the “trial of the century.” El-Essawi affirmed that he was mandated with preparing a pricing study for estimating the value of the production of natural gas, and for establishing contractual conditions with the company owned by Salem. The study maintained that the cost of producing MBTU (the British thermal unit used to measure gas) at the time, was USD 1.5. Moreover, a condition stipulating periodic review of the price of gas is mandatory in any contracts for the sale of gas. The results of the study were presented to the Supreme Committee for Gas, chaired by Sameh Fahmy, who mandated Hassan Muhammad Akl, the former Deputy of the EGPC, and Ismail Karrarah, the Deputy of the EGPC, to prepare another memorandum, in which the cost was calculated after excluding charges and taxes paid by EGPC, as well as the cost of prospecting gas from the deep Western Delta field – which is very high. As such, production cost was lowered to USD 0.68 per BTU, as Essawi testified. The cost proposed by the Essawi report was completely dismissed, and the approval of the Council of Ministers, based on the second study, was taken, only to serve the profiteering of Hussein Salem. If the testimony is true, this action had a serious impact, not only in the form of a lost profit arising from selling gas at such low prices, but also as a direct loss due to the sale of gas at a price lower than the cost of prospecting.

Defense testimonies came from individuals who occupied top positions in the state at the time of the crime, such as that of the former Prime Minister, Atef Ebeid, who himself approved the pricing decision and contractual conditions with the Hussein Salem Company in 2000. The very same ex-Prime Minister approved the establishment of the project of the East Mediterranean Gas Company to operate as a Free Zone company. The papers of the other case known as the case of “top officials of petroleum sector” include many correspondences between Atef Ebeid, Hussein Salem’s Company, and the petroleum sector concerning the contract. This is in addition to the testimony of the former Prime Minister, Ahmad Nazif, under whose term the contract of selling gas to the Government of Israel was concluded in 2005. The Court was satisfied with all the defense testimonies, despite the partiality of the witnesses and even their possible involvement, at

least by way of facilitating, as top officials of the state, who approved and agreed to the sale of gas in this manner. This is also the case, particularly that many of the defense witnesses are convicted or tried in other cases of corruption and public funds squandering (Atef Ebeid in the case of al-Bayyada land and Ahmad Nazif in the case of vehicle license plates).

Has the verdict purely legal, with no political considerations?

Despite the claim that the judge relies solely on papers, proof, and evidence without being influenced by any political considerations, still the verdict explanation was laden with political and rhetorical phrases that are not of a legal nature. One of the examples of this is a paragraph directly cited from the verdict's explanatory document:

This is indeed proven by the establishment of the international American Hebraic scheme, according to which the political order known as the Greater Middle East Project is established, which briefly relies on the division of the larger Arab countries to a number of smaller states, in order to achieve their goal of preserving the Zionist entity's position to exercise hegemony over the Middle East. [This support comes to enable the Zionist entity] to achieve its numerous dreams and to loot the natural resources bestowed by God, through instigating the fear of al-Qaeda and of some groups disguised in the robes of religion, both of whom are thirsty for power and rule. Some of these groups were able to build financial empires – whose origin is only known by the Almighty. The axis of evil, formed by America, Israel, Iran, Turkey, and Qatar, followed two paths to connive in the Arab world: first, the military invasion under the lie of the existence of nuclear weapons, as was the case in Iraq in 2003; and second, in order to avoid this military cost and the human toll it claimed – which could turn their people against them – they entered through the door and hid behind what they have ostensibly called the US program of “democracy and good governance”. They described this as the war of the fourth generation, by claiming the non-violent change of

authoritarian ruling regimes, by provoking religious, sectarian, ethnic, or tribal differences.

- “It was important that political youth movements or human rights organizations appear to achieve the desired goal, through supporting them with funds from foreign countries, even if these groups were opponents, and even if at the expense of deducting such funds from aid dedicated to their countries. This is indeed what was implemented on the ground with some organizations hiding behind the guise of religion and their supporters, leading to the division of Lebanon, the split of the Sudan to North and South in the nineties, the severing of Yemen into two parts, the inflaming of Tunisia, and sowing in Libya the seeds of strife as of February 2011.”

The Court decided that the 25 January Revolution was motivated by a conspiracy that sought to compromise the country and divide the lands, exploiting public anger against the ruling regime. The Court used rhetorical statements utterly unrelated to the law, insinuating that the case itself and the accusations against the former president are all but fabrications. This was a clear attempt at slandering the youth and all that is related to the Revolution. The statement comes in line with the predominant trend and discourse circulated on the level of executive power and by the power-supporting media. This was not the case at the time of the first verdict, which confirms that the Court is influenced by the prevalent political conditions. All of the aforesaid could make us safely say that the political conditions had influenced the Court. Statute of limitation as a tool of impunity

One of the issues that have been overlooked is the long friendship that linked Hussein Salem to the Mubarak family. This was proven by testimony of the former GID Director and Vice President, Omar Suliman. This relationship is further confirmed by the other part of the case linked to the acceptance of gifts in the form of five villas in Sharm el-Sheikh, given by Salem to Mubarak and his two sons, Gamal and Alaa. This gift was accepted with the full knowledge of the recipients that it was meant to exploit the power of the President in the governorate of South Sinai. The Court decided

on the dropping of the case due to statute of limitation. The decision was predicated on the fact that the crime is time-bound and effective on demand, acceptance, or receipt. The Court had established that the time-bound crime is “the crime that is committed and concluded immediately upon committing the act”. However, if this criminal status persists, the crime shall continue throughout, according to the explanatory note of the verdict.

The verdict is predicated on the fact that since the acceptance of the gift (i.e. committing the crime), Hussein Salem’s company, the owner of the villas has not undertaken any constructions, expansions, modifications, annexes, finishing, or refurbishing itself, with Mubarak's family authorizing the Arab Contractors to do so. This – in itself – was sufficient evidence, from the viewpoint of the Court, to negate the nature of persistence, as if the other offender, the party offering the gift, is the company and not its owner, Hussein Salem!

It would have been possible that the Court considers the whole issue of the gas exportation and its non-tender commission as one of the outcomes of accepting the gift. This would have sufficed to revive two parts of the case by proving the liability of Mubarak in authorizing the sale of gas to the Hussein Salem company without offering the contract for tender, on the one hand; and proving the delay on the lapse of legal action by prescription due to the persistence of the criminal conditions for a period of time.

However, one of the positive aspects and the lessons learnt is the recommendation of the legislator to start calculating the date of the completion of the crime in cases of abuse of power at the moment of the enforcement of the power of the bribe receiver, and not the moment of the acceptance of the gift. This comes in line with the recommendations of Transparency International, upon describing statute of limitations in corruption crimes as the “countdown towards impunity.” TI proposes several procedures, importantly flexibility in identifying the period of prescription in the case of public positions that secure some form of immunity for the person at the time of committing the crime. The question posed would be: was there a possibility to disclose this incident and open investigations

before the end of the period of statute of limitations, when Mubarak was still in power.

Flexibility in determining statute of limitations would have enabled the calculation of the actual crime on the day of his formal ousting on 11 February 2011, for the mere possibility of the persistent abuse of power by the bribe recipient, in this case the President, to the benefit of the bribe giver, the businessman, as well as the persistence of immunity.

What was seen by all, but the court!

One of the testimonies admitted by the Court was that delivered by the former Prime Minister, Ahmad Nazif, who confirmed that the cost was adequate and approved by “experts”, and that exportation did not harm the national economy. This comes in flagrant contradiction to the opinions of independent experts and courts. The Court orders by the Administrative Court on the sessions held on 18 Nov. 2008, and on 6 January 2009 decided the discontinuation of gas exportation to Israel at prices below internationally agreed ones and under the market value. This is in addition to the decision made by the Criminal Court condemning Sameh Fahmy and Hussein Salem in the case, dubbed in the media as the case of the “exportation of gas to Israel.” There was news that Fahmy’s defense confirmed that orders of exporting gas to Israel relied on instructions issued by the former President, Mubarak, which is only logical explanation given the manner in which the state was run concerning such a “sovereign” and serious file. The Israeli side itself has admitted that the prices were indeed very low.

Despite the fact that, unlike oil, there is no standard price for natural gas, still many economists tried to calculate the losses by comparing the price to the lowest international predominant price at the time. EIPR had published lately a report dedicated to the gas transactions at the time of Mubarak’s regime¹. The report stated that the losses arising from the exportation of gas to Jordan, Spain, and Israel, cost the state treasury around USD 10 billion

¹ See EIPR report on the issue:
<http://eipr.org/en/pressrelease/2014/03/13/1999>

during the period 2005-2010, by relying on precise certified calculations, based on the prices as stated in the case documents, related to the issue of exporting oil for very cheap prices.

This discrepancy in prices does not appear only upon comparing the sale price of Egyptian gas to that produced by other countries, but also upon comparing the sale price of Egyptian gas to various countries. Egypt sold its gas to Israel, Jordan, Syria, and Lebanon for USD 1.25, USD 1.0, USD 5.00, and USD 5.5 per BTU respectively. This was confirmed by the two court orders for discontinuing exporting gas to Israel in 2008 and 2009 issued by the Administrative Court and the Supreme Administrative Court. Both Courts relied for their orders on the fact that gas is exported to Israel at prices much lower than international prices. Essawiy's aforementioned testimony confirms that gas was sold at a price less than that of prospecting, not only less than international prices or even comparable to Russian gas, which is deemed to be the cheapest of all.

Confessions of Israeli experts confirm these views as well. Ramez Halabi, the economist of Tel Aviv University stated in an interview with the channel Russia Today, held on 26 February 2011 that Israel "imports approximately the worth of USD 4 billion of Egyptian gas annually... on the short term. There is a negative impact resulting from failing to pump Egyptian gas to Israel... There are alternatives from several countries with respect to liquid gas in general. However, we need to know that over the past ten years, importing from Egypt has been saving Israel USD 10 billion. First, the prices at which Israel buy from Egypt are very low; and second, this forces other companies to compete to lower their prices."

Finally, this court order opens the discussion of two key legal points: the first is connected to the absolute discretionary power of the court empowered to rule on the merits of the case in evaluating evidence, admitting what it deems appropriate, especially in the case of the testimonies. The court would be exercising this discretion without being subject to the oversight of the Court of Cassation or obliged to explain the justifications behind admitting the testimony of a given witness and not the

other. It is sufficient to maintain that the court is satisfied without any need for further explanation of the source of this satisfaction.

The second point is connected to bringing legal action before the criminal court of Egypt which is conducted on one tier only. The Court of Cassation is not deemed part of the tiers of litigation, since it is a forum rather than being a court of subject matter, except in particular cases. Article 96 of the Egyptian Constitution of 2014 provides that the Appeals Act shall regulate the verdicts issued by the criminal court. Despite the fact that almost one year has lapsed since the issuance of the Constitution, still the mere talk about amending Criminal Procedures Code concerning appealing the verdicts issued by the criminal court has not been raised. Such is the case despite the multiple amendments and legislation appearing since the issuance of the Constitution.

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1. A lawsuit examined by the Cairo Criminal Court, where the former Minister of Petroleum, Sameh Fahmi and the fugitive businessman, Hussein Salem, as well as four top officials from the oil sector faced charges for exporting gas to Israel at low prices, through a company owned by Hussein Salem. This led to wasting large sums of money. Similar to many of the post-Revolution cases of corruption during the Mubarak regime, the Court of Cassation ruled a re-trial after the criminal court issued the defendants sentences up to 15 years of imprisonment. The trial continues, with 21 February 2015 set as a date for issuing the verdict.
 2. Transparency International (2010): Timed out: statutes of limitations and prosecuting corruption in EU countries:
http://www.transparency.ee/cm/files/statutes_of_limitation_web_0.pdf .
 3. See the EIPR report issued in January 2013 under the title “Corruption of Gas Contracts.
 4. Sobhi, Mahmoud (2014). “The Defense of Sameh Fahmi: Mubarak issued orders of exporting gas to Israel.”
<http://dotmsr.com/ar/501/1/133714/>
 5. “Russia Today” (2011). Impact of the change of the Egyptian Regime on Israeli Economy.
<http://tinyurl.com/odgr4ku>.