

Mawazin

عدالة للجميع
Adala for all (AFA)



Special Issue on the Right to
Access Justice in Libya

Mawazin Magazine

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Access Justice in Libya

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The opinions expressed herein are those of the authors, and do not necessarily reflect the views of the organization.

Edited by:

Dr. Yara Jalajel

Ramadan al-Amami

Illustrated by:

Saif al-Nishi

Translation to English:

Ehab Elshazly

English Editing:

Julia Foley

About Adala for All

Adala for All (Justice for All) is a non-profit association comprising a network of lawyers and jurists who provide free and voluntary legal assistance to victims and seek to bolster the role of lawyers in supporting victims, foremost through promoting fair trial guarantees and access to justice. The association strives to raise the legal community's awareness of the rights guaranteed in accordance with the binding agreements establishing international humanitarian and human rights law.

Our Principles

Our five core principles are:

Humanity, neutrality, independence, voluntary service, and the universality of human rights.

These principles are at the heart of Adalah for All's approach towards achieving its objectives, and constitute the ethical, operational, and institutional framework for the work of the association.

Adala for All does not discriminate among victims on the basis of gender, nationality, race, religious belief, class, or political opinion. We strive to provide assistance and alleviate suffering, guided only by the individual's needs, and give precedence to the most urgent cases.

Our network:

The Adala for All association relies on a network of lawyers and jurists, on both sides of the Mediterranean, who provide legal aid to victims free of charge and voluntarily. The association has two operating offices, in France and the Netherlands. In the first stage of its operations, Adala for All is focused upon bolstering its network and developing its approach towards the fulfilment of its objectives in Libya and other North African countries

The **Adala for All** association works on three axes:

1

Providing legal support and strategic litigation

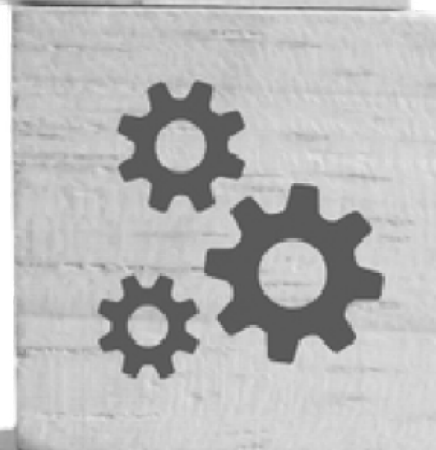
Encompassing the submission of appeals against administrative decisions that curtail public freedoms and undermine the right to access justice. Empowering victims of human rights violations to access free legal support and legal aid, through a network of lawyers who provide pro bono legal support to detainees.



2

Legal Magazine

A periodical magazine publishing research articles by legal experts on obstacles to accessing justice, and the extent of state authorities' commitment to fair trial standards and obligations arising from international agreements and conventions.



3

Legal Academy of Human Rights

Through the academy, Adala for All seeks to enrich the applied legal experience of law students and professional lawyers in training.



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Foreword by the editorial board

Why Mawazin?

Since its 2011 revolution, Libya has been devastated by unspeakable tragedy and carnage that has headlined the news and occupied regional and global public opinion. Yet amid the bloodshed, a spring is blooming. This spring may not be as thunderous as the sound of bullets; it may not dry the tears of those who have lost loved ones to conflict and infighting, the proliferation of militias, and the scourge of perpetual impunity. The onset of this spring in Libya is marked by the emergence of a newer generation -including hundreds of human rights defenders - who are aware of the serious dilemmas facing the country, and have the ability and the determination to cultivate a free future. A free future entails security and peace as part of a comprehensive justice system, without discrimination, under the sovereignty of law made by the people to exercise their free will and give voice to their aspirations within the framework of a developed state that respects all individuals and attains equality and sustainable development.

Much has been written on Libya in recent years, with voices from the international and human rights communities taking the lead, alongside Western and regional voices. But where is the Libyan voice itself among all the intellectual production on Libya? Although it possesses authentic knowledge and profound analytical ability, the Libyan voice remains mostly unheard. From here, the concept of 'Mawazin' came to life.

Adala for All considers that any human rights fieldwork remains incomplete and futile if not accompanied by theoretical analysis from the human rights community and stakeholders to assess the situation and develop visions for the future. 'Mawazin' strives to be the voice of law in Libya, while addressing

other readership, Arab and international, to portray a clear picture of the Libyan legal environment – as seen through the eyes of field researchers and stakeholders.

Justice is associated symbolically with the scale, yet there are in fact many scales, each of which has terms and conditions to be balanced. Achieving justice requires the observation of a number of rules and principles that form a system capable of guaranteeing and maintaining rights and freedoms. There are several realms of law; foremost constitutional law, which transcends all other laws and determines the powers of the governing authorities. Then there is administrative law, which restricts the executive authorities and prevents them from subjugating individuals. Finally, there is criminal law, which pursues the public right and deters crime without undermining the individual's right to personal freedom and defense, depending on necessity. Above all these considerations, international law sets several criteria for prosecuting egregious violations and brutal crimes committed in armed conflicts, including war crimes, crimes against humanity, and the crime of genocide. As a human rights magazine, Mawazin seeks to cover these issues –multiple scales of justice and different types of law, with the aim of reflecting a comprehensive portrait of the Libyan legal and judicial landscape.

This first issue of Mawazin focuses upon one of the principle pillars of the justice system, which is the right to access justice. We approached the principle of accessible justice from several angles, constitutional, criminal, and international, as debated by Libyan and Arab experts and researchers.

The magazine conducted two interviews to convey the voice of Libyans who defend human rights. One interview focused on the role of judicial institutions and their effectiveness, so we spoke to judges and judicial officials in the Libyan Judges Organization. We also interviewed several lawyers working on human rights issues; lawyers are the first line of defense for victims of violations in Libya.

Last but not least, we express our sincere gratitude to the people who made Mawazin Magazine possible, including writers and academics Dr. Koni Ali Abuda and Dr. Jazia Shuaiter, researcher Daaa Shaquoura, and independent journalist Hassan al-Amin. Further appreciation is due to artist Saif al-Nishi for creating

illustrations that have enriched the magazine's visual content. We express our profound gratitude to our partners at POMED for their steadfast support of this project's success. Finally, the editorial team extends its sincere thanks to all the anonymous soldiers of Adala for All, from the proofreading, translation, and coordination teams for their diligent and tireless work in producing the magazine.

As we present the first issue of Mawazin Magazine to our readers, we aspire to form a foundation for further in-depth research on Libyan human rights advocacy. Thus we invite our readers to enrich our content with their own thoughts, opinions, and responses, which will help guide us along our path.

Contact us on our email:

mawazin@adalaforall.org





The Scale of the Constitution

by Professor Dr. Koni Ali Abuda - Faculty of Law, University of Tripoli

Obstructing the Constitutional Circuit and the Right to Access Justice

Libya's Constitutional Declaration guarantees the right of every person to sue, by stipulating in Article 33: "Litigation is a right, safeguarded and guaranteed for all people (...)." Article 33 was included in Chapter IV, Judicial Guarantees. Although there are only three articles in the chapter, it represents an important pillar of the rule of law, wherein there exists the principle of an independent and impartial judiciary.

Judicial independence, as sought by the drafters of the Constitutional Declaration, does not end at "institutional independence," meaning that the concept of judicial independence is not limited to the judiciary as an institutional authority in relation to the legislative and executive authorities, each operating according to their delegated functions. Rather, the concept of judicial independence, as envisioned by the constitutional drafters, extends to the judge when issuing a verdict or a ruling. This is stated in Article 32: "The judiciary is independent and run by courts(...), and judges are independent, and there is no authority over them in their judgments other than the law and conscience (...)."

Institutional or organic independence may be unachievable unless what the drafters of the constitution termed "judicial guarantees," are sanctioned, or, in our estimation, unless fair trial or due process standards are guaranteed in general. Articles 31, 32, and 33 also affirmed:

1. The principle of legality: “There is neither crime nor punishment except on the basis of a text. The accused is innocent until proven guilty in a fair trial.”
2. “The defendant’s right to a defense is guaranteed.” The text of this article is insufficient because this guarantee does not apply to every trial, as it does not apply to punitive or disciplinary trials.
3. This Constitutional Declaration article text is insufficient because any trial requires such a guarantee, unless it is a punitive trial.
4. The right of every citizen to resort to justice in accordance with the law. This text is also insufficient because the right to access justice is the right of every person, not only citizens, as stated by Article 10 of the Universal Declaration of Human Rights. Article 33 attempted to circumvent dedicating this right to all people by specifying it for citizens “(..) and every citizen has the right to resort to his natural judge (..)”
5. The principle of legality through the prohibition of exceptional courts (Article 23-2), and the prohibition of immunizing decisions from judicial oversight (Article 33-2).
6. The principle of invoking the natural judge (or non-exceptional judge), which is significant in Libya given the experience of exceptional courts following the 1969 coup.
7. The principle of bringing justice closer to its seekers and quick adjudication of cases (Article 33-1). Justice is not limited to simply approving the principle of justice in the governing Constitutional Declaration, but it further requires the state’s commitment to safeguarding human rights and freedoms in accordance with international declarations and covenants. This is affirmed in Article 7 of the Constitutional Declaration, which is in line with the general objectives expressed in the declaration’s preamble: “Achieving democracy, pluralism, and a state of institutions and a society of citizenship and justice (..), in which there is no place for injustice, despotism and tyranny (..).”

Although the Constitutional Declaration refers to the judiciary without any description, it is recognized in the field of interpretation to be absolute, which means that the legislator has preserved the judicial structure with the exception of what is exceptional. This analysis is confirmed by Article 35, “All provisions established in existing legislation shall continue to operate, provided they do not conflict with the provisions of this declaration, unless amended or abolished (..).”

The judicial system in place at the time of the Constitutional Declaration remains concerned with granting every person the right to resort to the courts, including the Supreme Court (Article 20 of the Judicial System Law no. 6 of 2006). The Supreme Court’s jurisdiction is specialized to rule on constitutional appeals, which inevitably ensures the right to access justice by guaranteeing the mechanism for addressing constitutional violations, as regulated by law. This means the amended Law no. 6 of 1982 remains in effect, about the organization of the Supreme Court, which grants the right to constitutional challenge, in addition to appealing cassation rulings issued by lower courts.

However, the Constitutional Circuit assigned by the legislator to consider constitutional issues was suspended according to the General Assembly of the Supreme Court’s issuance of decree no. 7 of 2016, regarding the suspension of the Constitutional Circuit’s activities. The decree stated, “Rulings on constitutional appeals are postponed to a date to be later determined by a decision of the General Assembly.” This suspension is similar to another precedent under the previous Gaddafi regime, which came after the restoration of the Constitutional Circuit that had been abolished by the legislature in 1982. The General Assembly had been reluctant to issue the internal regulations referred to by Law no. 17 of 1994 in amending Law no. 6 and to reinstate the Constitutional Circuit with regard to constitutional appeals procedures.

So it is as if history repeats itself, thus raising a dilemma of distinguishing between the two previous constitutional circuits (to be discussed in Section I), before inquiring about the legitimacy and legality of the General Assembly’s decision to suspend the aforementioned circuit (to be discussed in Section II), and what are the implications on the rights of litigants (to be discussed in Section III).

Section I: Suspension of the Constitutional Circuit, despite different governing administrations

The suspension of the Constitutional Circuit's activities may not differ from its dissolution, which covered the period between the enforcement of Law no. 6 of 1982 (which implicitly abolished the circuit) and the enforcement of Law no. 17-94 amending it (first point below). Nevertheless, the most important aspect to note is that the mechanism may differ (second point below).

First: The difference in the mechanism suspending the work of the circuit

The conduct of the General Assembly of the Supreme Court may differ in comparison to the legislature's conduct in regards to the existence of the Constitutional Circuit. In 1982, the General Assembly of the Supreme Court used its sovereignty privilege and abolished the Constitutional Circuit's control over the constitutionality of laws, as had been entrusted to it. The Constitutional Circuit was viewed as standing in the way of 'reforms' that the General Assembly sought to implement. These reforms affected a number of rights, the most important of which are the right to be free and the right to own property, according to the ideology espoused at the time by Gaddafi's literature.

The first precedent of the General Assembly was established during the period of 1993 to 2004. During this time, the General Assembly would agree with the "leader" or out of piety and take a negative stand against the Constitutional Circuit by refraining from issuing the internal regulations on which the circuit's work depends. Then after over a decade of absence, the Constitutional Circuit was brought back to life by the General Assembly's issuance of a resolution approving the internal regulations. (The General Assembly of the Supreme Court Resolution in session no. 283 of 2004).

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In 2016, the General Assembly directly suspended the work of the Constitutional Circuit by issuing Resolution no. 7 of 2016¹, which froze and suspended the circuit's activities, without abolishing it. Although the circuit still exists with its activities suspended, it is dormant and without life. Yet people who are not legal professionals may be deceived into thinking that there must be constitutional oversight by consequence of the Constitutional Circuit's existence, without realizing the extent of the circuit's dormancy.

The misconception of constitutional oversight is perhaps further bolstered by the Supreme Court's continued acceptance of constitutional appeals administratively in accordance with prescribed regulations. The constitutional appeals process is regulated through an application in its original form and sufficient number of copies that is signed and filed by a lawyer who is competent to plead before the Supreme Court. The complaint or application is then handed to the competent registrar of the Supreme Court (Articles 12 and 13 of the bylaws). Needless to say, this process remains only a mechanism without any activity, as the final decision is relegated to the authority of the court – in regards to whether or not the appeal file is referred to the Cassation Prosecution to express its opinion within a specific period, following the announcement of defendants and after submitting the necessary documents in Article 15 of the bylaws.

The head of the Supreme Court is the one who refers the case file to a member of the assembled circuits that deal with constitutional appeals, to develop a report summarizing the facts and legal issues in place of dispute. After the appeal has been reviewed, the assigned advisory member deposits the file to Specialized Registry. The case file is returned again to the head of the Supreme Court to assign a session (Articles 16 and 17 of the bylaws). This indicates that

¹ In fact, the court's position actually began before the resolution was issued, as it stopped issuing verdicts on appeals. Some were referred according to the provisions of the Regulations for Preparation, after the issuance of its ruling in Constitutional Appeal no. 17 of 61, regarding the session of the House of Representatives. This had significant and dangerous repercussions at political and legal levels, such as the division of institutions, and the reactions of the House of Representatives to reject the ruling and issue a decision to transfer the headquarters of the Supreme Court to Al-Bayda, which was not implemented. In this context, see Khalifa Ashour, *Constitutional Control in Libya (transitional phase)*. PhD thesis, University of Tunis El Manar, Faculty of Law and Political Sciences, 2018, Part Two, Chapter One, Section One: The rulings issued on 6-11-2014 are the final constitutional provisions in the transitional period

any appeal is subject to the will of the head of the Supreme Court, which is confirmed by comparing the results of the suspended appeals with the appeals that were accepted but remain inactive, with no further processing.

Second: Dissolution and freezing, two sides of one coin

Observers of the dissolution, suspension, and/or freezing of the Constitutional Circuit find that despite the variety of means channelled towards achieving the intended purpose, the result is effectively the same: a lack of oversight on the constitutionality of laws. This can be confirmed by the immediate appeal of a case affecting rights and freedoms, after the issuance of the law to reorganize the Supreme Court (Law no. 6 of 1982); a punitive text was applied before the law was published. The Supreme Court's response was shocking, when it ruled that it had no jurisdiction to monitor the constitutionality of laws². Jurisprudence experts viewed this as the court abdicating from its responsibility to monitor constitutionality. Even though the legislator abolished oversight control over legislation, in which written authorization is required, the judiciary is not prevented from exercising oversight abstention.³

Citizens found themselves in a similar situation when the legislator returned jurisdiction to the Supreme Court to monitor constitutionality of laws but the General Assembly did not amend its bylaws to specify the procedures for filing constitutional appeals. The situation remained as it was for nearly a decade until the bylaws and regulations were issued in 2004.

Following the decision to suspend the work of the Constitutional Circuit in 2016, Libya returned to a similar situation: ineffective oversight of the constitutionality of laws despite such oversight being enshrined legally. This

² Constitutional Appeal Case no. 28-3, Session 30-10-82, Rulings of the Supreme Court in its combined circuits, Supreme Court Publications, 2008, p. 166. Despite, the Cassation Prosecution concluding that Article 40 of the Economic Crimes Law no. 2 of 1979 is unconstitutional for its violation of the principle of non-retroactivity of punitive laws. Which is the same basis for which the defendants' lawyer sought the assistance of the constitutional circuit in order to avoid judging his clients with a law that was unconstitutional. Therefore, the court ruled that it had no jurisdiction to consider the appeal case, and evaded oversight

³ See: Dr. Koni Ali Abuda, Legislation Validity Oversight in Libya, Lawyer's Journal, Lawyers' Syndicate, Libya, Fourth Year, Issue no. 3, the judiciary's power to address the constitutionality of laws, Lawyer's Journal, op. reference, no. 6, no. 24.

indicates that the effectiveness of laws is not reliant upon the texts contained in the laws themselves, published in the Official Gazette, but it is also - and moreover - contingent upon on the how laws are applied and fulfilled. This can be further illustrated by the General Assembly's issuance of Resolution no. 7 of 2016, in regards to which people were prohibited from exercising their right to challenge the resolution's unconstitutionality, even though such a challenge is theoretically possible, according to legal text. This prompted some people to use the appeal mechanism of the administrative authority to compel the General Assembly to change its position. Others submitted an appeal to the Tripoli Court of Appeal to repeal the resolution of the General Assembly of the Supreme Court. The third administrative circuit issued a verdict to annul the resolution on 24 February 2020, after nearly four years (unpublished verdict)⁴

However, revoking or withdrawing decisions of the General Assembly may not be the end of the suspension/freezing pattern of oversight on the constitutionality of laws at the practical level, because the head of the Supreme Court, as mentioned above, has other means to delay the return to work of the Constitutional Circuit without fearing the obstruction of justice that founded the litigation case⁵.

It is clear that the difference between abolishing and freezing the work of the Constitutional Circuit is merely a difference in degree. In practice, the results are almost identical, similar to two sides of the same coin. What matters to those seeking justice is accessible justice and the protection of their rights or legal positions. And in their defense, they could resort to using oversight of the constitutionality of laws, whether in the form of a plea or a lawsuit filed directly to the Constitutional Circuit (Article 23 of Law no. 6-82 on the reorganization of the Supreme Court).

⁴ It was well received. See the example of Lawyer Al-Mabrouk Shweya, "Libyan Judges Organization" Facebook page, 27-11-2020, <https://bit.ly/3patGNI>

⁵ This is because this case is submitted to the Supreme Court and requires several procedures until a verdict is issued.

Section II: The legitimacy and legality of the General Assembly freezing the Constitutional Circuit

At the outset, it is necessary to mention a cursory reference to (legality – *légalité*) and (legitimacy – *légitimité*), meaning in my opinion, that what is approved by law is legitimate, regardless of whether or not it conforms to what is required, because the condition of the latter is legitimacy.⁶ A question thus arises: To what extent does the decision to freeze the Constitutional Circuit’s activities correspond with the law regulating the Supreme Court, and if it corresponds, is it legitimate from the perspective of justice or human rights?

First: Alleged legality

Supreme Court Law no. 6-82 sets forth the competencies of the General Assembly, which issued the decision to freeze the Constitutional Circuit. Following close inspection of the law, we find that Article 51 grants the General Assembly (which is composed of the head of the court, the court advisors and the head of the cassation prosecution) the authority to decide on “(..) issues related to its system, its internal affairs, the distribution of work among its members or between its departments, and other matters falling within its competence under this law or any other law (..)”. The General Assembly has only been granted what the legislator drafted in the law organizing the court or any other law, which means that it does not have any authority outside its specific jurisdiction.

Article 51 of Law no. 6, in its fourth paragraph, further stipulates that the General Assembly is granted the authority to set its own bylaws list of procedures. Article 55 assigned the assembly the authority to “organize the court’s records and files, how documents are submitted to the court, the conditions for rebuttal, and how the litigants peruse the documents (..)”. The

⁶ This is not the prevailing concept of the two terms: legitimacy is often linked to the general will and compatibility with it. Thus the jurisprudence of the Supreme Court must be understood, which links legitimacy with not violating the law (Administrative Appeal no. 9-14, 9-5-1964). This does not mean that there should be legislative text permitting the work of the administration, but it is sufficient that the work of the administration be based on a general legal principle or a legal rule, whether this rule is written or unwritten), Indexed Collection, Omar Amr, Part One, Al-Noor Library House, Tripoli, no. 314 p. 395.

assembly has the power to choose the counsellor of the disciplinary board for the court's employees (Article 41), and has prescribed powers to the Ministry of Public Service for court employees (Article 35), which is the body before which the court's counsellor takes oaths (Article 8). The Supreme Court holds its sessions outside the city of Tripoli by a decision of the General Assembly (Article 4). Law no. 33 of 2012, amending Law no. 6, adds a new jurisdiction over the extension of service of the president and counsellors of the Supreme Court, who have reached the retirement age (sixty-five years) to the age of seventy at the request of the concerned side. The General Assembly may also decide to release whomever it deems unable to perform their job for any reason, even without their consent (Article 14 amended).

This indicates that the legislator did not grant the General Assembly of the Supreme Court the power to suspend the work of the court or any of its circuits, which was confirmed by the Tripoli Court of Appeal in its ruling mentioned above. The court of appeal supported the arguments of the appellant in issuing a verdict. "(..) The right to resort to the judiciary is one of the basic rights that must not be deferred or obstructed, as stipulated in the Constitutional Declaration Article 33, as well as all international conventions (..)." The court added another argument, which is the Supreme Court itself has set the principle of resorting to the judiciary since 1957 on the occasion of administrative appeal no. 6-3, which required the administrative decision to be "in conformity with the constitution, laws, regulations and principles of public law, such as equality and public freedoms." Other circuits in appeal no. 13 had the same argument, which considered the right to resort to the judiciary as a fundamental right.

The court supported the appellant's argument that the General Assembly's decision to suspend the work of the Constitutional Circuit contravenes the Constitutional Declaration, and lacks a sound purpose. The purpose of administrative decisions is to achieve the public interest; if an administrative decision serves another purpose, then it is flawed (..). Thus, the court concluded, "(..) Any delay in issuing a decision on constitutional appeals for the contested part of the decision of the General Assembly of the Supreme Court for an unknown period, disrupts the achievement of the public interest, and limits resorting to the judiciary in constitutional disputes that are predominant

in the nature of public interest, especially amid Libya witnessing contradiction in the legislative bodies, the executive bodies, and the various administrative institutions (..).”

The court decided to annul the decision under appeal, not only on the basis of the validity of the appellant’s argument, but also because such cases against the respondent or defendant, who is the President of the Supreme Court, did not discuss the subject of the appeal; instead, they simply discussed the acceptance of the case. The court had rejected the case at an earlier stage, when discussing the request to halt the implementation of the decision. According to the court, the prosecution’s note did not reflect a consistent position; sometimes, the appeal is handled in terms of form and jurisdiction, and other times, the appeal is handled by an urgent verdict. The prosecution’s opinion was to reject the appeal on the grounds that the Supreme Court does not issue an administrative decision, but rather, it issues a judicial verdict, which is binding on lower courts. This is not a sound opinion. The court said, “The decisions of the Supreme Court, while exercising its administrative function through the General Assembly, are either organizational -related to the distribution and organization of work between its various departments- or they are administrative, in that they affect the legal status of others, so such decisions are subject to appeal by annulment (..).” The court concluded that the opinion of the Public Prosecution is invalid because the General Assembly’s decision was issued within its administrative capacity and outside the scope of judicial function, and therefore it is subject to appeal.

The verdict shows that the court did not specify the necessary justifications for challenging the appellants’ defense, nor did it justify reaching the verdict. Rather, the court attempts to convince the subsequent oversight court, if there is an appeal in cassation, that what the ruling has concluded is an application of the judiciary of the Supreme Court itself. The appeal court considered the verdict as “(..) A reminder of these rulings is only due to the high status and prestigious position of our esteemed court. Despite the political sensitivity of these provisions (..), my response to the appellant’s request to annul the General Assembly’s decision to suspend the Constitutional Circuit activities is only the fruit of the jurisprudence of the Supreme Court’s judiciary in

constitutional disputes, which is one of the building blocks of political life over time.”

Accordingly, and since the legality is dependent on the existence of a text that justifies the procedure or decision, its absence, in the hypothesis in question, leads one to say that the decision to suspend the Constitutional Circuit’s activities is illegal.

Second: Lack of Legitimacy

Consequently, the suspension of the Constitutional Circuit is also illegitimate. Regardless the source of the illegitimacy (natural law, justice or human rights), the suspension created unjust conditions under which people could not object by filing a lawsuit or a plea for unconstitutionality. Do the circumstances of the transitional period justify such a decision? Who remembers the negative effects of the ruling issued by the Constitutional Circuit, concerning the election of the House of Representatives in 2014, in which it concluded that the Seventh Amendment of the Constitutional Declaration was unconstitutional; this ruling was the basis upon which the House of Representatives was elected.

Some may find justification for the General Assembly in fear of new divisions that could further rupture national unity⁷. However, the manifestations and fluctuations of the transitional phase in Libya following the fall of the Gaddafi regime cannot destroy the basic principles upon which the legal system in Libya is based. These include the principle of separation of powers, which has become ambiguous since the Constitutional Declaration was issued in 2011; the principle of guaranteeing the right to litigation, and the principle of legitimacy. Perhaps the confirmation of such principles, particularly legitimacy, can be found in the following Supreme Court ruling, which stated:

“It is illegitimate for the legislative authority to issue a law or for the executive authority to issue a decree or a law that eliminates or diminishes the

⁷ The rupture began in 2014 following the Constitutional Circuit’s famous ruling that the Seventh Amendment was unconstitutional, upon which the House of Representatives was elected. Consequently, the General National Congress took advantage of the situation held on power until now, but under the cover of the political agreement (becoming the Supreme Council of the State).

independence and immunities of judiciary members (...).” (Constitutional Appeal no. 1-14⁸)

On another occasion, the Supreme Court as a constitutional court affirmed that stripping constitutional rights of the effective means to protect them – i.e. stripping a person of their right to resort to the judiciary to seek redress, would render the constitutional text related to these freedoms futile in practice. In other words, the constitutional text in practice becomes violated so long as the legislator can withhold the rights of judicial protection on the basis of the legislator’s right to regulate education or to regulate litigation. This is because the rights specifically stipulated in the Constitution must not be permitted to fall under the legislature’s authority, in regards to regulating such rights or confiscating them. (Constitutional Appeal 1-19).

If the legislator does indeed regulate or confiscate such constitutional rights, then the court’s General Assembly does not have any right to deprive constitutional rights of the organized means of protecting them, including the right to litigation, whether such litigation is related to challenging unconstitutionality or defending it. It is insufficient to say here that the aforementioned General Assembly simply stripped constitutional rights of their protective tool – the judiciary – but regardless, the General Assembly has completely suspended the role of constitutional rights during the transitional period in Libya, following the division resulting from the election of the Council Representatives.

An inherent established right cannot be restricted under the legislative authority of the General Assembly. The General Assembly’s authorities and responsibilities are organizational and specific. Moreover, the problem is not necessarily with the exercise of oversight, but with the ability of the judges of the Constitutional Circuit to handle appeals and reach solutions serving the principle of legality, the supremacy of the constitution, and the rule of law;

⁸ Constitutional Appeal Case no. 28-3, Session 30-10-82, Rulings of the Supreme Court in its combined circuits, Supreme Court Publications, 2008, p. 166. Despite this, the Cassation Prosecution concluded that Article 40 of the Economic Crimes Law no. 2 of 1979 is unconstitutional for its violation of the principle of non-retroactivity of punitive laws. This is the same basis for which the defendants’ lawyer sought the assistance of the Constitutional Circuit in order to avoid judging his clients with a text that was not published. Therefore, the court ruled that it had no jurisdiction to consider the case.

while maintaining societal cohesion and preserving national unity. Finally, the General Assembly, with its current stance, violates Article 31 of the Supreme Court Law, which states that the principles of the Supreme Court are mandatory for the courts and for all institutions. It is thus flawed for the General Assembly to set any other precedent than good faith in upholding these principles and the institutions that fall under them, as the guardian of legality and the rule of law.

Section Three: Freezing and Litigants' Rights

Regarding the organization of the work of the Supreme Court departments, including the Constitutional Circuit, we find that the amended Supreme Court Law no. 7 of 1994⁹ singled out the Constitutional Circuit, which is exercised by combined circuits, to adjudicate appeals raised from anyone with a direct personal interest in any legislation that contravenes the constitution. The Constitutional Circuit considers any substantive legal issue related to the constitution or its interpretation raised in a case before the courts (Article 23, first and second); meaning that the suspension affected all functions of the Constitutional Circuit (first), and it is uncertain that the courts will compensate for the lost work of this circuit (second).

First: Freezing the Constitutional Circuit, the Right of Appeal, and Unconstitutionality

Since 1953, the system of oversight on the constitutionality of laws in Libya is distinguished by its dedication to the right of anyone who is harmed, directly or indirectly, by the violation of the constitution by legislation. A harmed person thus has the right to challenge or argue the legislation's unconstitutionality, and prevent its implementation. According to the Supreme Court, "This right is established without waiting for any legislation to actually be implemented (..)" (Constitutional Appeal no. 3-6).¹⁰ Freezing the work of the Constitutional Circuit, on a practical level, entails:

⁹ See: Dr. Koni Ali Abuda, Legislation Validity Oversight in Libya, Lawyer's Journal, Lawyers' Syndicate, Libya, Fourth Year, Issue no. 3, the judiciary's power to address the constitutionality of laws, Lawyer's Journal, op. reference, no. 6, no. 24

¹⁰ Session 29-2-1964, Collection of Rulings of the Supreme Court in all its combined circuits, op. reference, p.88

1. Depriving people of their right to directly challenge legislation that does not adhere to the Constitutional Declaration, which is the current source of legality or legitimacy according to the Supreme Court. Although citizens are able to initiate the right to appeal in accordance with established procedures, the appeal will remain frozen, thus leading to an accumulation of appeals, and further deferring justice in a judicial system that already suffers from slow due process procedures.¹¹ In principle, the implementation of laws depends on simple publication in the Official Gazette. After publication, the laws are then applied even if flawed or tainted with unconstitutionality, as the original drafted laws are deemed valid until the Constitutional Circuit rules on their unconstitutionality.
2. The matter does not end with the right to file a lawsuit; the freezing also, in practice, infringes upon the right to plea. Litigants can find themselves exposed to the application of legislation (laws or regulations), and can raise this or plea before the trial court, but to what end or for what result? The case will remain suspended. Even if the court adopts the plea, it will not be able to proceed with it, as long as there is no solution from the suspended Constitutional Circuit. Litigants thus faces a contradictory situation in regards to the law and justice, while being stripped of the means to protect their rights. What does a right without protection mean? This negative conclusion does not necessarily reflect reality, because the courts, in the exercise of their function, can compensate for the imbalance.

Second: Courts and reducing the effects of freezing

Freezing the Constitutional Circuit has undesirable consequences upon the rights of litigants. As mentioned above in the previous paragraph, this situation raises the question: to what extent can these consequences be remedied by referring the litigant to lower courts to request a ruling in regards to the application of any legislation or legal text that contradicts or violates the

¹¹ For over two decades, the postgraduate program in the law of pleadings has been devoted to the phenomenon of slow justice, which is not due to the judge and advisors alone, but the legislator contributes to it through the fluctuation of their policy, the inaccuracy of drafting and the resort to general drafting in issues governed by continuous development. The litigants also repeat requests for adjournment, failure to submit documents, memoranda, and means of defense on the dates designated by the Supreme Court as organizational dates, etc..

implemented constitutional rules? The reorganization of the Supreme Court in 1982 by Law no. 6 and the abandonment of constitutional oversight by the Supreme Court was met with criticism due to the absence of a text granting jurisdiction, rendering it impossible to apply texts that conflict with the constitution or its equivalent in application of the principle of gradation in legislation.

A judge's duty is inclined towards verification of the veracity or legitimacy of the applicable rules. When a judge excludes violating rules, it is not considered a violation of the principle of separation of powers, as oversight here is akin to the oversight abstention, which does not require the presence of a published law or bylaw. Given that the Supreme Court has exclusive jurisdiction over the Constitutional Circuit, is it possible for a judge to fulfill their obligation of exercising oversight in the current reality wherein the Constitutional Circuit is ineffective due to its illegal and illegitimate suspension by the General Assembly the Supreme Court?

The answer is no, it is not possible, because the circumstances are not the same. The legislator today is not against oversight, the opposition instead comes from the judges charged with guarding legitimacy and proper implementation of the law. The law organized the means of changing the judge's stance regarding oversight. These means are the litigation procedures regulated by the pleadings law: wherein the judge can be opposed in specific circumstances stipulated exclusively in Article 720, including the circumstances of denial or delay of justice without justification.¹²

The freezing carried out by the General Assembly constitutes a justification that does not prevent litigation of the assembled departments concerned with examining appeals and constitutional issues. This statement was rejected, because the principle of gradation of legislation and ensuring the right to litigation is a priority. Perhaps what confirms the effectiveness of this method

¹² Dr. Magdi Al-Shabaani posed a question: Is the suspension of the Constitutional Circuit by the Supreme Court "a denial of justice"? He affirmed, "The current situation has made the judge unable to rule according to their faith and conscience, and if that is the case, then the Supreme Council should request the judiciary to stop the work of the entire judicial authority. There is no difference between the constitutional, administrative, Sharia and criminal judges, because of the judges' inability to deliver justice, the circumstances are the same, otherwise what we are witnessing is a clear denial of justice." Ain Libya 18-11-2017, <https://bit.ly/3scXFGu>

lies in the history of constitutional oversight in Libya, with resorting to the threat of litigation. After the restoration of jurisdiction over constitutional oversight of the Supreme Court by Law no. 17 of 1994, and the reluctance of the General Assembly to issue its internal regulations or bylaws, some lawyers threatened the head of the court with resorting to litigation if the regulations were not issued, which occurred in 2004.

Another lawyer resorted to another method, which was to challenge the freezing decision before the administrative judiciary. The Administrative Judiciary Circuit of the Tripoli Court of Appeals responded to the request, and annulled the relevant decision. This is a natural course, because Administrative Judiciary Law no. 88 of 1971 permitted the appeal before the administrative judiciary circuits of the courts of appeal in the final administrative decisions (Article 2); where the basis for the appeal is lack of jurisdiction, defect in form, violation of laws and regulations, error in implementation or interpretation, or abuse of power.¹³ This procedure is quite protracted because the ruling of the circuits is not final. However, it is permissible to challenge it by cassation before the Administrative Circuit of the Supreme Court, although with the time that this requires and the possibility of the ruling being overturned, we are thus brought back to square one.

Litigation is the first procedure, the most appropriate and shortest, perhaps given that the case is filed directly before the Supreme Court. Nevertheless, litigation in this context is not a complete either. The jurisdiction, after the verdict the of the competent circuit of litigation is issued, is vested in the assembled circuits of the Supreme Court (Article 725 pleadings).

However, excluding the participation of the subject courts in compensating the role of the Constitutional Circuit does not entail diminishing its other role in the oversight of legality outside issues of a constitutional nature. This was also exploited by those with conflicting interests, especially the temporary judiciary, which is the system of orders on petitions and urgent cases. Thus the overall

¹³ See: Koni Ali Abuda, *Judicial Science Law, the Libyan Judicial System*, Publications of the National Center for Research and Scientific Studies, Tripoli, 2003, p. 407 et seq., and Muhammad Abdullah Al-Harari, *Fundamentals of Administrative Law*, University Library for Printing, Publishing and Distribution, 7th edition, p. 273 et seq.

complexity of the scene was further exacerbated alongside further division or fragmentation of various institutions.¹⁴

Several justifications were given to the position of the Supreme Court, including the difficulty of fulfilling the task of constitutional oversight amid political division, the lack of security, and the proliferation of weapons that were used to storm the Supreme Court after the election of the House of Representatives. These justifications led to the suspension of the Constitutional Circuit. Nevertheless, that did not prevent the lower courts from considering numerous petitions and lawsuits related to the transitional path or its events, including sovereign positions, referral of the draft constitution, elections, and so on. Judge Khalifa Ashour explained and referred to this in his doctoral thesis, which considered that reliance upon the Supreme Court – with its old structure- to bear the burden of constitutional oversight during the transitional period (and without detracting from its prestige or highness and integrity of its advisors) is the main reason for the Supreme Court’s suspension of the Constitutional Circuit.”¹⁵

The task of oversight - disrupted by the freezing of the Constitutional Circuit - obstructed the various fields of litigation without discrimination, the decision stated, “Appeal or plea in legislation is contrary to the Constitution (Article 23 of Law no. 6).” This deprives litigants of a fundamental means of defense, which turns the case in favor of those supporting the freezing of the constitutional circuit.

As a conclusion:

The decision of the General Assembly of the Supreme Court to suspend the work of the Constitutional Circuit came as a result of the regressive waves¹⁶ caused by the circuit’s ruling in Appeal Case no. 17 of 61 on the procedures for the election of the House of Representatives in 2014. The Supreme Court cultivated the outcome of this decision by meddling in the political conflict, which caused the majority of the people to question its rulings and provisions,

¹⁴ See: Khalifa Ashour, thesis, previously referred, Part Two, Chapter Two, Topic One.

¹⁵ bis

¹⁶ Compare this: Khalifa Ashour, previous reference

and its prestige. Perhaps the lesson learned is that the judiciary must maintain its independence, and be keen on distancing itself from areas of political conflict by adhering to the values of impartiality, integrity, and the rule of law. As for choosing the easiest path, which is to disable the institution or some of its components, this would deprive people of a basic right guaranteed by the constitution, the right to access justice. The right to access justice is the sturdy bridge linking together the protection of rights and freedoms, and is a fundamental pillar of the rule of law. The judge, according to Ibn Ashour¹⁷, is required to have “authenticity of opinion and knowledge, safety from the influence of others over them, and justice.”

To this day- after the verdict issued by Tripoli Appeals Court to annul the decision suspending the Constitutional Circuit, and after the General Assembly of the Supreme Court’s decision to activate the work of the circuit - the issue remains unresolved. The Cases Administration of the Supreme Court did not accept the aforementioned verdict, so it appealed in cassation (Appeal no. 68-69). The appeal was based on the following: The Tripoli Appeals Court is not specialized to look into the case, and the General Assembly’s decision is a judicial decision issued by the Supreme Court rather than an administrative one.

The issue remains regarding the integrity of the establishment of the Constitutional Circuit. The Administrative Circuit of the Supreme Court, if given the opportunity to review the aforementioned case after a referral by the President of the Supreme Court, can process the right of appeal for constitutional oversight by accepting the appeal and reversing the judgment. Thus addressing the issue of oversight cannot be primarily contingent upon the text of regulations, provisions of law, or articles of the constitution. Rather, oversight must be based upon respect by both the governing and governed, whether those being addressed or those applying; and it is this respect that represents the essence of the rule of law.

¹⁷ Muhammad Al-Taher bin Ashour, *The Purposes of Islamic Law*, Dar Al-Nafaes, 2011, p.510



The Scale of the Judiciary

Interview conducted by journalist Hassan Al-Amin

Libyan Judges Organization

“Insecurity is the greatest challenge facing the rule of law and human rights guarantees in Libya”

At Mawazin Magazine, we endeavor to monitor challenges facing the right to access justice in Libya, and to bridge the gap in legal expertise and knowledge as a regular and reliable source for scholars and experts interested in Libya locally, regionally, and internationally. As part of that endeavor, our pilot issue features interviews with prominent lawyers and human rights defenders in Libya. In this interview, we will become acquainted with one of the most important and effective organizations in Libya in regards to strengthening the rule of law, defending judicial independence and impartiality, and disseminating human rights principles throughout the Libyan judiciary.

Mawazin Magazine contacted Mr. Aqila Luqm, member of the Management Committee of the Libyan Judges Organization, and asked him a number of questions. We are grateful to Mr. Luqm for his answers to these questions.

Introduction

The Libyan Judges Organization is an independent civilian nongovernmental organization, neutral to any reference of political authority or religion. The organization does not engage in political activity beyond that residing within

the scope of its core objectives, which are to strengthen the rule of law, defend judicial independence and impartiality, and disseminate human rights principles.

Establishing the organization was an intuitive response to the change Libya witnessed after 2011, and to the openness of civil society.

Establishing the organization was an intuitive response to the change Libya witnessed after 2011, and to the openness of civil society. The organization was thus founded on 16 April 2012 by a group of judges and members of the public prosecution who were striving to achieve unequivocal independence of the judiciary from any authority, and to elevate Libya's judicial system to international standards.

Phases

The most important phase of the Libyan Judges Organization was its initial establishment. The concept itself was original; in Libya there was no presence of any established independent entity to defend the judiciary. At the same time, the organization's founding and the launch of its activities coincided with multiple challenges, such as the proliferation of weapons and conflicts throughout the country between militias of varying allegiances. Some of these militias directly targeted the judiciary, which undermined the organization's output especially after a number of judges and prosecutors were forcibly disappeared and assassinated. The armed conflict afflicted more than the organization; it created instability and insecurity for members of the judiciary and the prosecution, who faced displacement to scattered areas or left the country in fear of threats.

The most difficult challenge was introducing the concept of a non-governmental organization to members of the Supreme Judicial Council, and for them to accept it. Despite the grim circumstances and the plethora of hardships following its establishment, the organization succeeded in creating a relatively new environment in which the capacities of members of the judiciary

and the public prosecution were developed and fostered. The organization cooperated with local, regional, and international organizations, and implemented several training programs for judicial and prosecutorial members, while engaging in dialogue on an array of legal issues.

Despite the grim circumstances and the plethora of challenges following its establishment, the organization succeeded in creating a relatively new environment in which the capacities of members of the judiciary and the prosecution were developed and fostered

Nevertheless, the organization's activity began to noticeably decline in 2015, for many reasons attributable to the oversight of its work by the Supreme Council of the Judiciary, security services, and militias. This led to a reduced scope of participation in the organization's activities, due to fear for the safety of its members.

Security challenges and their impact on the work flow of courts and prosecutions

Security challenges played a major role in obstructing the law enforcement process. Militias and political factions controlled most state institutions, afflicting the work of the judiciary and diminishing the authority of courts and prosecutions. The role and effectiveness of the official security services declined in the face of the proliferation and dominance of armed groups. This also diminished the role of the public prosecution and the judiciary. The judiciary was left powerless, without the support of other institutions in executing its decisions. Judicial authority was lost amid the rise of these groups and their ability to effectively control many vital institutions in the country, including prisons and detention sites.

Obstacles facing the judiciary in the oversight of detention centers

The situation of prisons and detention sites in Libya is very problematic, with a number of them controlled by illegal militias. Judges have lost their access to places of detention. When a court verdict freeing or releasing detainees has been issued, even agencies claiming their legality and loyalty to the state can refrain from implementing the release orders, including those issued by the Attorney General.

In addition, there are clandestine detention sites neither known nor controlled by the judiciary. This is common knowledge to which all in Libya are privy. Official statements

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confirming the presence of secret places of detention have been issued by successive governing authorities. Meanwhile, courts and prosecution offices have been directly targeted on several occasions, thus exposing members of the judiciary and the public prosecution office to risk at all times. Other judicial entities and legal service offices face the same risks.

What is the role of the organization in the transitional period, elections, criminal justice, and judicial independence?

Currently and in reality, the organization has no role, due to the multiplicity of conflicting parties in the country. The organization's activities under current circumstances pose a risk of conflicting with the dominant party, which may lead to threats against its members of assassination or abduction, or punishment by the Supreme Council of the Judiciary. That being said, the

organization continues to work on documenting violations committed against the judicial authorities, whether individuals or institutions.



The Scale of Criminal Justice

By Dr. Jazia Shuaiteh, Professor of Criminal Law at the University of Benghazi

How the Libyan criminal justice system's commitment to fair trial principles

affects the right to access justice

Introduction

Since 2011, there has been hope that Libya would embark upon peaceful endeavors to prevent conflict and restore the foundations of justice in a post-conflict environment, strengthening the rule of law and its enforcement. Libya has faced numerous challenges, especially political and security challenges, which have led the country into a vicious cycle of insecurity and impunity. These challenges have conceivably been an obstacle to every official authority, whether legislative, executive, or judicial.

Justice activists are aware that the right to access justice is upheld under specific conditions. Institutions offering the opportunity to access justice must be available and accessible to the public, especially those afflicted by grievances. People must have the ability to seek justice and file complaints, and persons filing their cases should be supported and attended to. In order to achieve accessible justice, institutions should be capable of settling disputes on the basis of legal rules, including religious or customary provisions, and

capable of implementing these provisions and decisions within a framework based upon the rule of law.¹⁸

The question remains: Are guarantees for accessing justice, as set out by international standards, available in Libya?

The answer to this question requires us to differentiate between the legal context of legislative policy, where it is necessary to calibrate the texts of Libyan law with the optimum standards for a fair trial¹⁹, and the legal context of judicial implementation, which must be calibrated with the principles stipulated in Libyan legislation, starting with the constitution, laws, regulations, and decrees. It is necessary to examine the obstacles that hinder judicial reform towards guaranteeing the principle of accessible justice, and to explore potential solutions to overcome these obstacles.

The legal context for access to justice at the legislative policy level

Legal provisions related to a fair trial and accessible justice have a constitutional context, which should be robust and inclusive, for any country to be able to assert that justice and its facilitation are constitutionally protected. As for Libya, a permanent constitution has not been agreed upon since 2011, despite the fact that the draft constitution issued by the Constituent Assembly in 2017 contained some articles guaranteeing the right to access justice through the principles of a fair trial.

Article 61 of the draft constitution established the right to litigate, guaranteed for everyone, while affirming the right to resort to a natural judge and that no law or administrative decree should be immune from judicial oversight. Article 62 sets forth the principles of innocence and criminal legality. Article 63 stipulates several procedural principles facilitating the right to accessible justice, including the right to the assistance of a lawyer, the right to a translator,

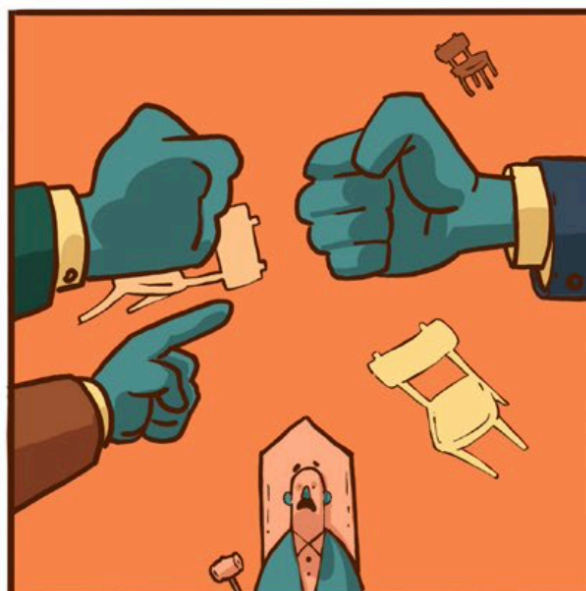
¹⁸ Jan Michel Otto et al., Searching for justice in post-Gaddafi Libya, report on the investigative project on mechanisms for achieving justice, “Van Vollenhoven Institute for Law, Governance and Development”, Leiden University, Netherlands, 2013.

¹⁹ Amnesty International, Guide to a Fair Trial, Second Arabic Edition, London, 2014, index no. 30/002/2014 Arabic, <https://bit.ly/3hcTnbA>

and the guarantee of the availability of state judicial assistance. Part Four focused on the constitutionality of the Judiciary Authority Regulations, the most important of which are Article 118 on the principle of judicial independence, and Article 123 on the prohibition of exceptional courts.

As for the constitutional charter in effect now, it is the interim constitutional declaration and its numerous amendments, including the 2015 political agreement and the 2021 roadmap. Chapter Four in the interim constitutional declaration is dedicated to judicial guarantees. The chapter includes three articles representing the most important principles of a fair trial and the right to justice: the principles of legality, independence, and the presumption of innocence, together with the right to the assistance of a lawyer, and the right to a fair and swift trial.

As for the political agreement, the principles of a fair trial were considered as trust measures stipulated in Article 26 of it. Some of the paragraphs of Article 26 stipulate that the obligation to provide effective protection is entrusted to the competent judicial authorities, who should be enabled to review cases of detention and arrest, and to immediately release any



prisoner or detainee held without legal basis. The article also stipulates that judicial authorities retain the authority to hold detainees and prisoners in officially recognized facilities, in accordance with the Libyan laws in force.

The political agreement requires the implementation of Transitional Justice Law no. 29 of 2013, and appoints the Board of Directors of the Fact-Finding and Reconciliation Commission. The political agreement also calls for commitment to the independence of the National Council for Public Freedoms and Human Rights, and for commitment to supporting the council in fulfilling its roles, including that of visiting prisons and following up on detainees.

The roadmap linked the principles of fair trial and national reconciliation in Article 6. Article 6 states that “the path of national and social reconciliation to address the effects of various conflicts” should be launched “by ending the phenomena of arbitrary arrest and enforced disappearance, and releasing prisoners of conscience and those forcibly detained without a right, and working on the voluntary and safe return of displaced persons inside and outside of the country, and reparation without forfeiting the right to sue.”

The sub-constitutional Libyan legal context regulated the right to access justice through several principles of fair trial that are included in articles of criminal laws, including the Criminal Procedures Law of 1953, the traffic law, the drug law, the terrorism law, the juvenile law, and the military procedures law. Although these special criminal laws provide a reasonable guarantee of the right to accessible justice, they still require legislative interventions to be compatible with and correspond to international standards for a fair trial and access to justice.

For example, Libyan legislation lacks an obligation upon the judiciary to uphold the right of the accused to access procedural information during the investigative stage of inference and investigation; the inference or investigative authority is permitted to access procedural information. Article 61 of the Code of Criminal Procedure allows for the absence of the accused in cases of necessity and urgency. Any procedural information that is inaccessible to the accused should be in the accused’s favor or should be a decision made in the interests of the accused. If the investigative authority neglects such information or does not claim it, then by law the investigative or

inference authority is waiving its right to access procedural information and/or make demands upon the accused in regards to information that it has not shared with the accused. In addition, the right to seek the assistance of a lawyer before the investigative authorities is obligatory only in felonies, in contrast to standing before the inference or investigative authority, despite its importance.

Although the right to be presumed innocent is a constitutional principle, Article 25 of the Code of Criminal Procedure may be interpreted as a breach of it. Article 25 stipulates that a judicial police officer must immediately hear the statements of an arrested suspect. If a vindication cannot be reached, the suspect should be sent to the public prosecution within 48 hours. Therefore, the burden of proof at the inference stage falls on the accused. The investigator's manual issued by the Ministry of Justice confirms that the accused has two options: to either confess and be interrogated, or to deny the accusations, and then be confronted by the prosecution with various evidences to compel confession.²⁰

Libyan law adopts the search and investigation system in principle, containing simple features of the filing system for complaints and accusations through the ability of the victim to file a misdemeanor case directly before the judiciary. Apart from that, only the public prosecution is authorized to file cases, after approving the investigations of the judicial police authority, or verifying investigations in case of violations and misdemeanors, or after the prosecution has concluded its investigation. On criminal charges, the public prosecution as a general rule or the investigative judge as an exception, must pass through a procedural gate before reaching the judiciary, called the "accusation chamber", consisting of an individual judge who has broad competencies in investigation and indictment.

Hence the defect in Libya's procedural system, where the investigation is entrusted in principle to the indictment side, which is the public prosecution. This is a strange paradox. The investigative judge does not receive the case unless upon request. Although the accused may request an investigative judge

²⁰ Criminal Investigator's Guide, General Attorney's Office, General People's Committee for Justice, 2006, p. 34 & 36.

to investigate the case, the request may be refused, and the accused has no right to appeal against a refusal, as stated in Article 51 of the Code of Criminal Procedure, regardless of whether the refusal is groundless or not.

As for the right to procedural promptness, it is unclear in Libyan law. The legal periods of pre-trial detention are unlimited, and there is no legal penalty for extending the term of detention or unjustifiably prolonging it.²¹

There is no constitutional or legal guarantee of the right to reparation for error in the application of justice, for any person whom the investigative authorities decided not to file a lawsuit against or the court ruled for their acquittal. However, the right to compensation is included in Article 64 of the constitution draft.

The right to a natural judge is also subjected to legislative abuse. Military Penalty Law no. 49 of 1956 and Military Procedures Law no. 50 of 1956 have determined the jurisdiction of military courts, in terms of personal competence to:

- Officers employed in the Libyan army or belonging to a military force affiliated with it.
- Military school students, non-commissioned officers and soldiers of the Libyan army or any military force affiliated with it.
- Military prisoners, whether Libyan or foreigner.
- Civilians jointly with a military person in committing a military crime in the case of a military operation.

The Military Procedures Law has been subject to numerous amendments since February 2011; such changes have been prompted by prevailing political conditions in Libya. For instance, at times the legislative authority would stipulate that civilians must be tried before the ordinary court, and at other times it would stipulate that civilians must be tried before the military court.

²¹ Moussa Arhoma, Mediator in Explanation of the General Provisions of the Libyan Code of Criminal Procedure, Part One, 1, 2020, Mediterranean Publications, Benghazi, Libya. p.400.

Law no. 11 of 2013 was promulgated to amend the laws of military penalties and procedures. Accordingly, Law no. 11 of 2013 amended the Military Penal Code, limiting those subject to its provisions to regular military personnel who have a rank stipulated in the Military Service Law and regular military prisoners. This limitation excludes civilians working in the army as well as volunteers in the army.

Law no. 11 of 2013 also amended the Military Criminal Procedure Code, limiting the jurisdiction of the military courts to crimes committed by those subject to the provisions of the Military Penal Code- military officers and military prisoners - as stipulated by this law. Nevertheless, the General National Congress returned to expand the military's jurisdiction by virtue of Law no. 5 of 2015, which includes the jurisdiction of military courts for crimes stipulated in the Military Penal Code and General Criminal Code. The House of Representatives also amended this jurisdiction in Law no. 4 of 2017, enabling the military prosecutor to interrogate and summon civilians in the capacity of armed militias or perpetrators of terrorism crimes.

Challenges facing the right to access justice through judicial practice

As for judicial implementation of the law, in practice it is below the standards of that which is explicated by the original text of the law. In many cases, judicial implementation withdraws constitutional and legal protection from the right to access justice. For instance, we find that the law provides for alternatives to pre-trial detention, such as bail, and precise procedures that must be followed. Nevertheless, reality in practice confirms that pre-trial detention is routinely expanded and prolonged. Accused detainees are often transferred without any documentation, and detention is extended without legal follow-up or renewal.²²

In addition to inhumane conditions of detention, women do not have a designated place in the detention center, with the problem of shared

²² Jumaa Bouzid, Summary of the Public Prosecution's Instructions, part one, The General People's Committee for Justice, Benghazi General Attorney's Office, 2006, p. 5.

bathrooms among other lingering issues.²³ A woman officer said that she and a woman detainee sleep in the office of the head of investigation until the detainee is transferred in the morning to the prosecution, and from there to prison.

Moreover, in excess of thirty articles of the Penal Code stipulate the death penalty. The court, however, has been reluctant to implement capital punishment in regards to premeditated murder, pending the pardon of the blood guardian, which is a violation of the right to a swift trial.²⁴ In terms of military judicial application, according to data issued by the United Nations Support Mission in Libya (UNSMIL), Libyan military courts have sentenced at least 22 people to death following trials of an exceptional nature between 2018 and 2020. According to Libyan human rights organizations, at least 31 death sentences have been issued.

Currently, there are no official published figures indicating the average duration of criminal litigation in Libya or how long criminal cases take - on average - from the moment the case is referred until the verdict is issued. Despite this lack of official data, we underscore that prisons are overcrowded with people waiting for their right to receive justice.

Practical challenges to accessing justice

Challenges in upholding the right to access justice in Libya can come from within or outside the justice system, and include:

Insecurity:

There is the phenomenon of militias throughout Libya, which perpetrate violations and crimes with impunity. Victims are thus left without any means of redress or justice. At the same time, militias adopt mechanisms for self-entitlement; they take what is viewed as their right by attacking other(s) and also by seizing state institutions. In fact, there are citizens who prefer to resort

²³ During a training course prepared and supervised by the author of the article during 2019/2020.

²⁴ A number of judges confirmed this in many research interviews conducted with them on academic events.

to militias in questions of justice; as militias are more efficient and swift in fulfilling both the right (justice) and the wrong (injustice). With the predominance of militias throughout the country, there is virtually no implementation of the law, and no enforcement of judicial rulings.

Social and Political Divisions:

These divisions - with regional, ideological or ethnic components - reduce opportunities to apply the principles of a fair trial, and infringe upon the right to access justice. We must not overlook the negative influence of politics, customs and traditions, and corruption in Libya. Justice - and especially transitional judicial systems - have been politicized. Manifestations of corruption are observable in the justice sector, while customs and traditions interfere in a variety of ways that undermine the principle of accountability.

Fluctuations in the Concept of Justice:

A precise definition of the term “justice” is currently lacking in Libyan society. We have observed a civil definition of justice that differs from the Islamic definition of it. Civil justice refers to the application of international law in all its sources, while the constitution is considered a supreme reference for all laws; this is an advocacy approach to justice. Whereas Islamic justice entails the application of Islamic law to the exclusion of others, as the only source of legislation. Justice cannot be derived from any source except Sharia law.

Moreover, justice for victims of the ousted Gaddafi regime differs from justice for victims of the transitional period. For victims of the former regime, justice entails the total uproot of the regime and its supporters and associates. While for victims of the transitional period, justice entails uprooting supporters of Sharia and the Muslim Brotherhood.

Libyan society also has new terms for justice, such as “transitional justice” and “restorative justice”.

Recommendations on Feasible Steps to Ensure Victims' Right to Access Justice

The combined efforts of all parties is imperative to overcoming current obstacles in Libya:

On the International Level

Libya needs the support of the international community in terms of implementing and upholding justice. Nevertheless, this must come with a realization that international support will not produce results unless provided from the framework of an in-depth understanding of law and historical, social, political, economic, and cultural contexts specific to Libya.

Thus, the international community can support access to justice in Libya by participating in institutional reform of the justice sector, whether through training and rehabilitation or by contributing to electronic justice, or by exercising jurisdiction over cases that fall within the jurisdiction of the Libyan judiciary. At the same time, international community support may not lead to effective investigations and judicial prosecutions, if the Libyan state itself does not have a genuine will to achieve justice.

On the Legislative Institution Level

Libya's legislature can take practical steps towards reform, the most important of which are:

1. Ratify international conventions, including the 1951 Convention Relating to the Rights of Refugees and its 1967 Protocol. This convention will enable irregular immigrants and those defending their rights to have better access to justice. Libya's failure to sign this convention has allowed it to ignore numerous standard obligations under international law. There is no asylum law in Libya or procedures regulating asylum. And for asylum seekers fleeing persecution or other hardships, there is no formal mechanism for seeking protection.

2. Sign the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. After this convention is ratified, the competent authorities will be able to carry out visits to any place under their jurisdiction and to regulate where detainees are held; either by virtue of an order issued by a public authority, or its approval, permission, or inaction. When necessary, these visits would be conducted with the aim of strengthening the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.
3. Support the democratic path by holding elections and ending the transitional phase with the mutually-agreed upon permanent constitution.
4. Comprehensively reform legislation, especially criminal laws and legislation, with regard to the constitutional articles previously referred to in “The legal context for access to justice at the legislative policy level” section under the “The Scale of Criminal Justice” (p.19)
5. Amend the Criminal Procedures Law to guarantee more rights for defense lawyers, and to strengthen judicial oversight of the police and prosecution in the pre-trial stages.
6. Support the Transitional Justice Law no. 29 of 2013, its amendment and activation of its executive regulations, and the incorporation of the real estate ownership file into this law. Real estate ownership is a controversial file in Libya, due to the inheritance of encroachment on property from the previous regime, which was aggravated during the transitional period. The grievances of ethnic groups and geopolitical regions must be addressed, considered, and integrated into the general framework for transitional justice.

On the Executive Institution Level

Several steps that Libya’s executive institution can take towards reform:

1. Support the institutional reform of security, military, and justice bodies.
2. Refrain from supporting militias, instead disband and demobilize them, and refrain from integrating militias as groups into the Ministry of Interior or

Defense. It shall suffice that militia members be integrated as individuals according to their capabilities and based on their training, with a focus on social, psychological, economic, and practical integration.

3. Support national reconciliation through the file of transitional justice in all its political, economic, and social forms. National reconciliation has an effective impact on the process of state building, the rule of law, and the fulfillment of justice, through the Presidential Council of the Government of National Unity, to which this file referred, in accordance with the Geneva 2021 Roadmap.

On the Judicial Institution Level

1. Judicial bodies, especially the Supreme Judicial Council, which was not affected by institutional division, must strive to increase transparency and governance, and to verify that rulings in important social cases are based on reasons and merits with judicial precedents, according to a correct legal foundation, while adopting a contemporary informed vision through the available academic knowledge in legal and social sciences.
2. The necessity of reviewing the issue of flawed judicial changes, directed at the reappointment of specific judges and prosecutors as public attorneys, and reducing the frequent transfers of judges. These powers are granted to the Judicial Inspection Department, as proposals approved by the Supreme Judicial Council. The judicial system should move towards having specialized judges in specialized cases.
3. The Higher Judicial Institute and the Lawyers Syndicate should cooperate with faculties of law for the purpose of developing expertise and providing high-quality courses in legal practice and theory, across Libya.
4. Train judicial police and those in charge of the judicial authority to observe human rights, and follow proper procedures and standards for a fair trial.
5. Conduct accurate research on electronic justice and the extent to which it reduces the obstacles faced by most justice seekers, and the extent to which it increases the efficiency of the courts in coping with the burdens of

accumulated and ongoing cases, especially given the external challenges posed by the Coronavirus pandemic and the unstable security situation.

6. Follow an empowering feminist policy by respecting and sustaining the important roles of women judges and lawyers within the Libyan legal system, with a focus on their roles in family court circuits and domestic violence circuits.

On the Academic Institution Level

1. Assign Libyan universities to implement research projects related to legislative policies with regard to accessing justice, and legal and institutional reform, and encourage joint research groups between Libya and those abroad in the justice field.
2. Revise and develop legal curricula to meet the actual needs of the justice system in particular with regard to human rights, and marginalized groups such as women, children, the differently-abled, and migrants.
3. Establish legal centers supervised by academics, offering training courses that are available for legal professionals.



The Scale of Advocacy

Interview conducted by journalist Hassan Al-Amin

Independent Libyan Lawyers:

“The legal profession is a ‘rescue mission’... a noble profession of prioritizing legal principle over financial revenue... lawyers are the basis of the judiciary and justice...”

At Mawazin Magazine, we endeavor to monitor challenges facing the right to access justice in Libya, and to bridge the gap in legal expertise and knowledge as a regular and reliable source for scholars and experts interested in Libya locally, regionally, and internationally. As part of that endeavor, our pilot issue includes interviews with prominent lawyers and human rights defenders in Libya. This interview was conducted by independent journalist Hassan al-Amin with lawyers who chose not to disclose their identities for personal safety reasons.

Defending victims of human rights violations

We began the interview by discussing the role of lawyers in defending victims of human rights violations in Libya. Lawyer (W.A) explained more about that role to us: “We provide legal assistance to victims of human rights violations, and judicial assistance to those who need it. This is our duty. The legal profession is a ‘rescue mission.’ It is a noble profession that requires prioritizing legal principle over financial revenue, since the right to litigation is guaranteed by the Constitutional Declaration, the International Covenant on

Civil and Political Rights, and the Charter of the United Nations. This support to victims of human rights violations is crucial, given the tumultuous security situation in Libya and the mounting problems weighing down the country's judicial system. In addition to that, some victims of rights violations are unable to afford legal support, and people in Libya in general lack legal awareness in regards to protecting their rights. Our role as lawyers thus becomes a real opportunity to resist the scourge of impunity, and to support building the rule of law that we seek in the country.”

Promoting access to justice

In regards to the role of the Lawyers Syndicate in promoting access to justice, Lawyer (W.E) noted, “The work of the Syndicate is professional; it is a professional umbrella that takes into account the affairs of its network of lawyers and develops their skills through training courses and dialogue sessions. The Syndicate aims to develop skilled lawyers with a high level of professionalism and comprehensive knowledge about human rights issues – who are also imbued with the conduct and values of the profession, which is the basis of advocacy and legal work alongside an awareness of the importance of voluntary or pro-bono work. The Syndicate also has a role in interacting with issues of public concern, including opposing impunity, clarifying the conditions and standards necessary for a fair trial, and educating lawyers about their rights and obligations towards victims. The role of the syndicate, of course, is to contribute in the building of a virtuous and active legal society.”

Lawyer (M.D.) stressed on the important role of lawyers in achieving justice and ensuring that victims attain their rights. Lawyers are a pillar of the judiciary and justice. (M.D) continued, “I think that the role of the Syndicate in ensuring access to justice in Libya's transitional phase depends on the extent of its ability to inclusively serve all lawyers, by providing them with protection and opportunities for professional development while promoting their proficiency at handling the exceptional legal and advocacy situation in Libya. Certainly, this would widen opportunities for victims to access remedies and guarantees of a fair trial.”

Lawyer (W.E.) believes that “We must strive to build an aware, robust, and empowered community of lawyers, through training and dialogue. Lawyers are expected to have a role in raising public awareness in regards to legal and rights advocacy, with a focus on transitional justice.” In this regard, Dr. (T.G.) adds, “Legislative authorities must be pressured to adopt clear and effective standards for transitional justice, to achieve justice, implement the law, guarantee that perpetrators do not go unpunished, and respond to the requirements of national reconciliation, which is one of the most important prerogatives in Libya now.”

We must strive to build an aware, robust, and empowered community of lawyers, through training and dialogue. Lawyers are expected to have a role in raising public awareness in regards to legal and rights advocacy, with a focus on transitional justice.

Important achievements and efforts since 2011

Lawyer (M.D.) elaborated upon the notable efforts and achievements since the 2011 revolution until now, “Since the revolution in 2011 until now, a group of lawyers have diligently volunteered to monitor human rights violations, and to provide legal and litigation assistance to victims of human rights violations and armed conflict in Libya, including cases of torture, enforced disappearance, and extrajudicial murder, among other inhumane acts. This group of lawyers helped in training on how to monitor and document violations, and on how to provide effective legal assistance to victims. Their exceptional work and support helped victims to access justice and redress in cases that took place locally and internationally, in addition to advocacy and support campaigns on the local and international levels, from 2012 until now.”

Challenges

Lawyers in Libya face numerous challenges in promoting access to justice and monitoring trials. “The main challenge lawyers face in facilitating victims’ access to justice is the division of security bodies in Libya. Some victims are

held in places of detention unaffiliated with official state institutions, which often prevents them from appearing before the court or having access to legal representation,” explained Dr. (T.G.).

“Articles in the Criminal Procedures Law are often ignored, especially during the investigation phase, in regards to periods for custody and precautionary imprisonment. Detainees can face unlimited extensions of this pre-trial period, amid an absence of mechanisms for grievance

Since the revolution in 2011 until now, a group of lawyers have diligently volunteered to monitor human rights violations, and to provide legal and litigation assistance to victims of human rights violations and armed conflict in Libya, including cases of torture, enforced disappearance, and extrajudicial murder, among other inhumane acts.

and appeal regarding the extension of their imprisonment,” continues Lawyer (W.E.).

“We are at a stage where we do not need to change the Criminal Procedures Law; instead, the articles of this law need to be reactivated. We are launching a campaign in support of doing so,” asserted lawyer (W.E.).

Lawyer (W.E.) continues, “Another problem lies in the non-compliance of judicial officials in implementing the public prosecution’s orders, and the weakness of judicial bodies in the country in terms of arrest and investigation. A vast number of unresolved cases has accumulated, whether in the centers or prosecution offices, which is an exhausting process for the judiciary, lawyers, and the public prosecution, and obstructs the process of addressing these files. Numerous and sundry problems exist, including the limited daily work time for court and prosecutorial staff. This is one of the obstacles that the Ministry of Justice must overcome. There is also a lack of understanding in regards to the criminal procedures to be followed.”

The role of lawyers in electoral appeals

Our interview addressed another important aspect related to the role of lawyers in electoral appeals. Lawyer (W.E) emphasizes, “Lawyers have a major

role in this regard, beginning with the clarification and interpretation of the electoral law. The electoral law and its executive regulations, issued by the High Electoral Commission, pose a clear conflict, causing major confusion in the appeal stage. There is a conflict in the decisions of the Supreme Council of the Judiciary and its abrupt withdrawal of some decisions, which has exacerbated the confusion in regards to the issue of electoral appeals.” (M.E.) concludes, “The promulgation of legislation must be based on well-studied legal foundations and principles, and must not be hasty as what has occurred at this stage.”

The role of lawyers, (W.E) believes, begins first with “emphasizing the right to participate in the electoral process for the candidate and the voter.” The right to candidacy and the right to vote is constitutionally protected, he noted. Electoral lawyers are “important to electoral appeals and elections oversight, considering that they are the closest to these issues and thus the best able to understand them.”

The right to candidacy and the right to vote is constitutionally protected. Electoral lawyers are important to electoral appeals and elections oversight, considering that they are the closest to these issues and thus the best able to understand them.



The Scale of Accountability

by Mr. Diya Shaqqura, Legal Researcher

Accountability and Transitional Justice

On grave violations of human rights in Libya

States undergoing political transitions often accelerate measures related to transitional justice, which is considered an important part of transitioning from a stage of conflict or authoritarian rule to a stage of peace and democracy. The way in which a society addresses past human rights violations is critical to that society's ability to achieve sustainable peace and stability.²⁵ Libya is no exception. The Gaddafi regime fell in October 2011, after an ironfisted 42-year rule that left a legacy of colossal human rights violations. Since then, Libya has hastened to adopt laws of transitional justice, in order to address its brutal past.

There are two primary factors to take into consideration when viewing Libya's transitional process. The first factor is related to the four-decade duration of Gaddafi's rule, in which Libya's expertise and capabilities were channeled to benefit the former regime at the expense of development and the opportunity for a dignified life among the people, accompanied by an abysmal track record of human rights violations. The second factor is concerned with the period of the revolution and its aftermath. In contrast to the transitional path in its neighboring country Tunisia, Libya's revolution came at a high cost in terms of losses in lives and property, the proliferation of weapons, the security turmoil

²⁵ Jeremy Sarkin, Why Transitional Justice Needs to be Conceptualised in Arab States Theoretically as well as Empirically. Arab Policies. Volume 47. November 2020. P.8. available: <https://bit.ly/3qzHNwi>

that followed, and the human rights violations and war crimes under international law.

Moreover, the exceptional situation in Libya has complicated efforts to establish an effective transitional justice system following the revolution. Protests that became violent, armed conflict, and political division have all led to the failure of successive governments to impose national control over the country. Without a strong central government and effective state institutions, Libya was unable to prevent armed groups from filling the political void, seizing control of areas and igniting civil war. Efforts were channeled towards resolving ongoing conflicts and divisions, rather than towards achieving the transition to democracy, which encompasses the establishment of an effective transitional justice system and the building of democratic institutions.

The debate on transitional justice in Libya was raised again amid the 2020 political negotiations, where participants in the first Berlin Conference on Libya underscored the need to strengthen transitional justice institutions. There is a close correlation between transitional justice mechanisms, democratic institutions, and the reconciliation process. In general, transitional justice mechanisms and democratic institutions are tools for reaching peace, while reconciliation ensures stability and sustainable development in society. A society undergoing a transitional phase towards democracy will face institutional failure without transitional justice procedures, as its institutions and executive, legislative, and judicial authorities will be less resilient in facing public economic and political crises, especially without gaining citizens' trust.²⁶

Figures of the old regime running for the presidential elections at the end of last year, 2021, revived discussions on the importance of accountability for perpetrators of grave human rights violations. It also raised several questions about the possibility of holding elections before completing the transitional justice process and achieving national reconciliation. All these questions return to the dialectic of priorities between achieving justice, reconciliation, and the possibility of reaching a political transition that leads to peace in Libya. With no transitional justice to ensure accountability for perpetrators of grave human

²⁶ Anja Mihr, Transitional Justice and the quality of democracy – from democratic institution building to reconciliation, in Sim special 37, 2012, pp11-12

rights violations²⁷ in addition to the resulting threat to the legitimacy of the upcoming elections,²⁸ achieving political transition and sustainable peace seems unfeasible.

Transitional justice can be defined as “the operations and mechanisms related to the reforms of society to understand the legacy of excessive past violations, in order to provide accountability, establish justice, and achieve reconciliation.”²⁹ Transitional justice is based on a set of elements, the most important of which is accountability for crimes in accordance with international law. Libya has a duty to investigate, criminalize, and penalize crimes in its domestic laws. But the current situation in Libya does not reflect this, due to the absence of a clear legislative policy for transitional justice and the disjointedness of its various laws, undermining potential accountability for those accused of crimes.”

First: Incoherence in the legislative policy of transitional legislative structures

Since the fall of the Gaddafi regime in October 2011, there have been three legislative structures in Libya: the National Transitional Council (2011-2012), the General National Congress (2012-2014/2016), and the House of Representatives (2014-current). These structures, whether appointed like the National Transitional Council, or elected like the National Congress and later the House of Representatives, have issued more than seventeen laws related to transitional justice.³⁰

²⁷ Ahmed Ali al-Atrash, *Transitional Justice and National Reconciliation in Libya: The Dialectic of Priorities*, Al Jazeera Center for Studies, 6/10/2021. <https://bit.ly/3qvy3Du>

²⁸ The periodic update report of the Cairo Institute for Human Rights Studies and the Libyan Platform Coalition: *The absence of accountability and the rule of law in Libya threaten the peace process and the legitimacy of the elections*. Defender Center for Human Rights, 11/10/2021, available <https://bit.ly/3LKUf1>

²⁹ Report of the United Nations Secretary-General to the Security Council on “The rule of law and transitional justice in conflict and post-conflict societies,” 2004, UN Doc. 616/2004/S, p. 6

³⁰ List of Laws Relating to Transitional Justice, Geneva Center for Security Sector Governance, Part IX: Transitional Justice and Reconciliation, available at: <https://bit.ly/3tBPow9>

In regards to legislative affairs during the transitional period, it can be observed that there is a condition of legislative excess in relation to transitional justice.³¹

In general, legislation before and after the revolution is distinguished in that - for numerous reasons- it faces the same obstacles, foremost among which is the extent of the legality and legitimacy of the legislative structures that carry out legislative work and issue laws.³² Legislative work is divided between structures of revolutionary legitimacy, such as the Transitional Council, and structures that are undermined by doubts about the extent of their legality, such as the House of Representatives.³³ Thus, this division has been reflected in legislative policy related to transitional justice; for example, legislation passed by the Interim Transitional Council tends to be in line with the frameworks of revolutionary legitimacy; while legislation passed by legislatures suffering from a crisis in legitimacy, such as the House of Representatives, tend to represent attempts to legitimize their existence or overcome skepticism and doubts in regards to their deficiencies.

The National Transitional Council has issued transitional justice legislation aimed at severing any ties with the former regime and its figures, such as Law no. 37 of 2012 on the criminalization of glorifying the tyrant and insulting the revolution, which was later repealed due to its unconstitutionality.³⁴

The Transitional Council has also issued laws related to the establishment of transitional justice: Law no. 17 of 2012 and its revision by Law no. 41 of 2012 and Law no. 35 of 2012 regarding the amnesty of specific crimes, and Law no. 38 of 2012 regarding procedures for the transitional phase. These laws,

³¹ Marwan Tashani, Transitional Justice chaos in Post-Revolution Libya: Saif al-Islam Gaddafi as a Model, Legal Agenda, 24/11/2016, available at: <https://bit.ly/3izlWAP>

³² Suleiman Ibrahim, Legislation making in Post-February 2011 Libya, Defender Center for Human Rights, 2/7/2021, available at: <https://bit.ly/3NT4FRt>

³³ Parliament's legislation has been questioned, because the basis for its election was the Seventh Amendment of the Constitutional Declaration, which the Supreme Court ruled unconstitutional.

³⁴ This law was repealed by a ruling of the Constitutional Court as unconstitutional in June 2012

regardless of their objectives,³⁵ were issued prematurely, hastily,³⁶ and confusedly, resulting in selective justice instead of transitional justice. The legislative policy of the Transitional Council, at that time, clearly ignored the violations committed during the revolutionary period, established an exception for all grave violations of human rights, and gave full coverage and immunity to violations committed by revolutionaries, freeing them from any pursuit of accountability or justice for their crimes during the revolution. Article 4 of Law no. 38 of 2012 stated that “there is no punishment for military, security, or civil actions necessitated by the 17th of February revolution, with the aim of achieving or protecting the revolution.” The amnesty law also excluded crimes committed by members of the Gaddafi family, his in-laws, and his aides from the scope of its implementation.³⁷ This selective policy also included the issue of reparations, with the Transitional Council issuing Law no. 50 of 2012, which codifies discrimination among victims by singling out political prisoners with their own legislation, even though the transitional justice law covers them.

The General National Congress was the first elected legislative structure following the February 2011 revolution. The Congress has attempted to remedy the problems that permeated the National Reconciliation and Transitional Justice Law no. 17, by amendment through the issuance of Law no. 29 of 2013. Regardless of its problems,³⁸ the 2013 law expanded transitional justice implementation “to cover the events from September 1, 1969 until the end of the transitional period with the election of the Legislative Council according to the constitution.”³⁹

35 For example, Article 3 of Law no. 17 of 2012 states that the aim of the law is to achieve social reconciliation.

36 Marwan Tashani, *Transitional Justice in Libya: Troubled paths amid absence of a societal vision and political will*, DAAM Democratic Transition and Human Rights Support Center, DAAM Journal, Volume no. 5, pg. 49.

37 “The provisions of this law do not apply to the following cases: 1- Crimes committed by the so-called Muammar Mohammed Abu Minyar Gaddafi, his sons and daughters, either biological or by adoption, and his in-laws and aides.” Article 1, Law no. 35 of 2012, regarding amnesty for some crimes.

38 For more on Law no. 29 of 2013, see: International Commission of Jurists, *to end impunity – A Roadmap to Enhancing Transitional Justice in Libya*, p. 7, 2020, available at: <https://bit.ly/3LaYRRc>

39 Article 3, Law no. 29 of 2013

The Congress, in response to popular pressure,⁴⁰ issued a new law that reflects the overall state of confusion and the absence of a clear legislative policy related to transitional justice, Law no. 17 of 2012.⁴¹ The law meted out a ten-year ban from political and sovereign positions of any figure in Gaddafi's regime, with the assumption of ties with the regime. This law increased polarization in society and deepened the political and military conflict. Hopes for achieving broad and inclusive justice in Libya were diminished and instead a severe form of political exclusion was introduced, amid a broader political conflict on legitimacy and authority in new Libya.⁴²

While the National Congress pursued an exclusionary legislative policy in regards to those affiliated with the pre-revolutionary Gaddafi regime, the House of Representatives⁴³ pursued a policy of reconciliation, amid political and societal division, and suspicion in regards to the legitimacy of legislation issued by the House of Representatives.⁴⁴ The House of Representatives issued a General Amnesty Law no. 6 of 2015, granting amnesty to all Libyans for crimes committed from February 15 to the date of its issuance in September 2015. This amnesty law was met with substantial criticism for being

40 This law was issued under the threat of arms from the militias controlling the National Congress

41 Due to concerns about the unconstitutionality of this law and to avoid its repeal by a Supreme Court ruling, the Constitutional Declaration was amended two months before the law was passed. This intensified the criticism of this law, which was considered a political weapon to control power and legitimacy. Kamal M Showaia, *Transitional justice in Libya: Between current challenges and future prospects*, *Macquarie Law Journal*, Vol 13, 2014, pp.67-68.

42 *Transitional Justice in the Middle East and North Africa*, Center for International and Regional Studies, Georgetown University, Qatar, Brief Report no. 16 of 2018, available at: <http://bit.ly/3iAHVY8>

43 The Libyan House of Representatives came as the third transitional legislative authority in Libya to succeed the General National Congress based on the Seventh amendment of the Constitutional Declaration.

44 Parliament elections were held on June 25, 2014, but divisions between members of the House of Representatives and members of the General National Congress overshadowed the work, as some members of the National Congress refused to recognize the legitimacy of the House of Representatives following its the decision to transfer its work to Tobruk. Some members of the House of Representatives and members of the General National Congress in November 2015 appealed to the formation of the House of Representatives, which was announced by the Supreme Court, which was also rejected by the House of Representatives supporters, who considered that the court issued its decision under duress.

a detailed amnesty law tailored to the interests of some political figures affiliated with the former repressive Gaddafi regime.^{45 46}

Overall, legislation and legislative work after the revolution has become a tool for manipulation and improvisation according to political and ideological whims,⁴⁷ due to the absence of a clear legislative policy. The different legislatures since 2011 have also neglected to develop legislation that guarantees transitional justice, instead going to extremes in issuing either conciliatory legislation or its opposite, purifying and punitive legislation. The former excludes from accountability perpetrators of grave violations and crimes according to international law while the latter effectively forfeits any hope for reconciliation.

Second: The impact of floundering legislative policy on accountability for perpetrators of gross human rights violations

Libya had witnessed decades of repression under Gaddafi's rule, with systematic crimes and violations of human rights. These human rights transgressions did not end with the fall of the Gaddafi regime in October 2011; they persisted during and after the revolution, especially after the political and security situation deteriorated, with conflict spreading across Libya, particularly in the south and west. Human rights violations⁴⁸ have proliferated during the armed conflicts across Libya, and are classifiable as serious crimes under international law according to the United Nations' investigation

45 Marwan Tashani, Transitional Justice Chaos in Post-Revolution Libya: Saif Al-Islam Gaddafi as a Model, Legal Agenda, 24/11/2016, available at: <https://bit.ly/3izlWAP>

46 Jazia Gibril, Aspects of 'Transitional Justice' in Libyan Political Contexts, Legal Agenda, 14/1/2020, available at: <http://bit.ly/3uqNlud>

47 Mahmoud Hamad, Transitional Justice in Libya: Several legislations are ineffective in reality, Arab Politics, Vol. no. 47, November 2020, p. 80, available at: <https://bit.ly/qzHNwi>

48 Report of the High Commissioner for Human Rights, Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya, UN Doc. A/HRC/31/47 2016, and Report of the Office of the High Commissioner for Human Rights on the situation of human rights in Libya, UN Doc. A/HRC/43/75 2020.

mission.⁴⁹ Nevertheless, all transitional justice laws issued and implemented by successive transitional legislative structures have failed to address these violations, hold those responsible accountable, and provide justice and redress for victims.⁵⁰ The incoherence of the legislative policy related to transitional justice, whether it takes a purifying punitive form or a conciliatory form, has resulted in legislation that fails to achieve comprehensive transitional justice, including accountability for gross human rights violations and guarantees of the right to access justice and redress.

Transitional phase legislation should have a clear legal foundation – in the national constitution – that enables it to address the requirements of the transition. Foremost among these requirements is establishing the main pillars of transitional justice, and supporting efforts to achieve the objectives of transitional justice in Libya.⁵¹ Nevertheless, a clear legal foundation is lacking in the articles and amendments of Libya's constitutional declaration. The absence of a well-defined vision for the transitional phase and transitional justice in particular has resulted in disjointed legislation that is punctured by many loopholes. By way of comparison, the Tunisian Constitution of 2014 provided guarantees for criminal justice in Article 148⁵² by prioritizing accountability over amnesty, to hold accountable those responsible for grave human rights violations.

49 Libya: UN Report concludes commitment of crimes against humanity and war crimes, Investigation Mission Press Release, Office of the High Commissioner, 4/10/2021, available at: <https://bit.ly/36kAt0U>

50 The Body of Principles for the Protection and Promotion of Human Rights through Measures to Combat Impunity defines this phenomenon as: “The inability, in law or practice, to hold perpetrators of violations accountable, by filing criminal, civil, administrative or disciplinary cases, because they are not subject to any investigation allowed to charge them, to arrest them, to try them, and, if proven guilty, to sentence them to appropriate penalties and to reparation for the harm inflicted on their victims.
UN Doc. E/CN.4/2005/102/Add.1, p.6

51 Amanda Cats-Baril, Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building. International IDEA Policy Paper no. 22, 2021.

52 “The state is obligated to implement the transitional justice system in all its fields and for the time period specified by the legislation related to it. In this context, the plea for non-retroactivity of laws, the existence of a previous amnesty, the pretext of judicial connection, or the abolition of crime or punishment with the passage of time is not accepted.” Article 148 (9) Constitution of the Tunisian Republic of 2014.

On the legislative level, the confusion created by the sundry laws issued by three successive legislative structures has resulted in the evasion of accountability for all vying parties to the conflict, whether associated with the state or armed groups and militias, for the crimes committed during and after the 2011 revolution. The legal texts do not fulfill their obligation to establish an integrated and comprehensive transitional justice system that guarantees accountability for serious crimes under international law.

Law no. 38 of 2012 clearly stipulated procedures for the transitional period regarding crimes committed by the revolutionaries, with the aim of achieving or protecting the revolution. The law considered that the acts of revolutionaries for the success of the revolution do not require legal punishment or prosecution. The law thus immunized perpetrators of grave human rights violations against criminal liability. In an attempt to bypass law no. 38 of 2012 and its consequences, the General National Congress issued Law no. 29 of 2013. Although Law no. 29 introduced wider and more comprehensive articles, it remained ambiguous regarding the implementation of its provisions in regards to crimes committed during the revolution and its aftermath.⁵³ The Libyan House of Representatives later issued Law no. 6 of 2015 regarding general amnesty for Libyans who committed crimes during the revolution.

Whether through their provision of amnesty or through the ambiguity of their articles in regards to crimes committed during and after the revolution, all together the legislation of the post-revolution period has served to bolster pervasive impunity, in contravention of the Libyan state's obligations to investigate crimes under international law. Amnesty for these crimes is prohibited under international law if (1) it prevents the prosecution of persons who may be responsible for war crimes, genocide, crimes against humanity, or gross violations of human rights; (2) it interferes with victims' right to effective remedy, including redress; or (3) it restricts the right of victims and communities to know the truth about violations of human rights and humanitarian law.⁵⁴

⁵³ Report of the International Commission of Jurists, p. 10.

⁵⁴ Tools of rule of law for post-conflict states-Amnesty Measures, Office of the United Nations High Commissioner for Human Rights, 2009, p. 11.

Under international law, failure to hold accountable those accused of serious crimes violates the right of victims to access justice and effective remedy, according to Article 2 of the International Covenant on Civil and Political Rights. In addition, the failure to investigate and prosecute such violations encourages the establishment of a culture of impunity, and contributes to the recurrence of such violations.⁵⁵

The reason for the failure of transitional justice in Libya lies not only in the vague and incoherent legislative policy, but also in the lack of a broader and more comprehensive framework to address the phenomenon of impunity in the country since 2011. Libya has become one of the largest countries in the world home to pervasive and ever-increasing impunity, resulting from years-long instability and turmoil alongside deteriorating security and political conditions. The overarching political division in 2014 has nurtured a national environment ripe for impunity while threatening the overall viability of the state. State sovereignty over the entirety of its territory is a prerequisite for the effective enactment of any legislation, especially transitional justice legislation.⁵⁶

In addition to the legal challenges facing Libya's judiciary,⁵⁷ the negative repercussions of the dominance of militias over the judiciary and the deterioration of the security situation constitute a major obstacle to judicial independence. The Libyan judicial system has been targeted by many acts of violence, death threats, and other forms of intimidation, which pose a threat to the safety of judicial authority personnel, who are at constant risk of assault or attack up to assassination. This threat is further heightened by the inability of security services and governmental judicial police to create a safe environment for the judiciary to function effectively and independently.

The political division and armed conflict in Libya has contributed to a shift in priorities, wherein efforts and attention were focused on resolving unremitting

55 UN Doc A/HRC/48/60, p. 8.

56 Mahmoud Hamad, previous reference, p. 80

57 For more on the challenges of the judiciary in Libya, see: The International Commission of Jurists, *Challenges to the Libyan Judiciary: Ensuring Independence, Accountability and Gender Equality*. Available at: <https://bit.ly/letwxa>

conflicts and divisions instead of achieving democratic transition, inclusive of a transitional justice system and democratic institutions. This in turn has affected the holding of elections, with the emergence of candidates accused of serious crimes under international human rights law.

Conclusion:

Achieving national reconciliation in Libya requires an unequivocal application of the accountability principle. This is not only important for victims of human rights violations and their families, but it is also imperative for a society experiencing transition from authoritarian rule to democracy, peace, and stability. It is necessary to implement and activate the obligations related to accountability for those accused of crimes committed before, during, and after the Libyan revolution, as a recognition of the victims as rights holders, and as an opportunity for the legal system to establish justice and order. Accountability would strengthen the rule of law, and contribute to the achievement of transitional justice and national reconciliation.

It is not possible to achieve transitional justice without first having in place a set of conditions, the most important of which are a stable constitutional system, the prioritization of transitional justice, the unification of state institutions, and a national consensus on the importance of transitional justice and its role in establishing sustainable stability and peace.



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