



Transitional Justice as a relative concept

“The requirements of the Libyan situation to achieve national reconciliation as a model”



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Introduction

The instability that affects societies which are witnessing exceptional political and social circumstances represents one of the most important challenges that threatens social security; this state of instability may be due to a political or military conflict which usually produces two main teams that represent the main players and focus of the conflict where each team cling to the legitimacy of their existence and their right to manage of state institutions.

This conflict might end in the victory over one of the parties, where the victorious party extends its power and holds tight to ruling by power, and might continue as a result of equal power and equal national and international political opportunities,

In both cases, transitional justice represents a toll that enables exiting that extraordinary situation resulted by conflicts, and here a question arises about the nature of the transitional justice system that can achieve its objectives in view of the nature and degree of the stage reached by the conflict; and that's why I am wondering about should the transitional justice system remain the same in both cases where one of the parties to the

conflict won and if the conflict continue without a party winning it?

The Libyan situation does not seem far from this perception, both in terms of the type of conflict nor in terms of the need for a system of transitional justice through which the Libyans can cross into a stage of stability.

In order to study the Libyan situation, we need to ask a series of questions that we consider answer them important in order to determine the transitional justice system's characteristics that suits the situation in Libya

What degree stage the conflict in Libya has reached? And for which stage we need to apply transitional justice? What are the essential elements of the transitional justice system that should be adopted in Libya, according to the justice goals needed to be achieved in the Libyan situation? What are the legislative changes needed for our legal system to achieve the objectives of the proposed transitional justice?

And we answer these questions as follows:

1. The nature and degree of the conflict in Libya is an important element in determining the transitional justice system's characteristics.

Since February 2011 the conflict in Libya continues to this day, and despite the fact that its degree, type, and parties vary from time to time but the instability still exists through all that as the conflict is not resolved at the political system, and the former regime's fall only meant that this regime's stage ended but didn't mean the end of this regime's supporters to the new era that emerged after February's war, and the conflict normally, did not stop at this point as the revolution supporters themselves fell into their own conflicts and they became one of the instability elements in Libya, and perhaps this is the most dangerous conflict of them all as this conflict led to a political split among the newly emerged legislative and executive bodies that exercise their functions and every one of them claim their own legitimacy and charge other parties with committing violations that they should be tried for.

We cannot apply the traditional standards of justice on this volatile situation which Libya is witnessing that the continuing conflict reflects, those standards that are based primarily upon the idea of disclosure showing hidden truths about the past and applying the needed punishment, as for such a justice system must be applied in a society that one of the parties to the conflict have already won, submitted the other weak parties to his will and resolved the conflict in order for it to meet its objectives, as it is usually looked to the losing party as an offending party to this adopted justice system, therefore, applying transitional justice in Libya, with its international standards would only end and failure and deepen the state of division because such a system cannot be acceptable to parties of the conflict as applying a transitional justice system that is based on disclosure, showing hidden truths about the past and establishing the principle of non-impunity require the existence of a capable strong authority and this can only be achieved in the current circumstances through two methods:

A. Either through imposed power from one party to the conflict that would try other parties, and this imposed power or authority would normally be rejected from other parties as it would be a rival to them, not a fair judge, so, the idea of applying transitional justice through imposed power by one of the parties can never

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Scenarios for achieving transitional justice in Libya

Scenario B



conflict



International intervention



International courts tries and applies punishment



Reject what is considered External interference

Scenario A



conflict



Control of one of the parties to the conflict



The dominant party shall judge the other parties



The rest of the parties refused

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represent a real solution to the conflict through which a transitional justice system that is based on accountability and disclosure can be applied, in addition to that, no party to the conflict in Libya would accept disclosing hidden truths about the past supervised by other parties; and all that in fact seems reasonable and realistic and should be taken into consideration when we adopt a transitional justice system in Libya, as the objective from applying a transitional justice system in Libya is to pass from a crisis phase to a strong founded stability phase in which this stability is backed up by the parties conviction of the circumstances given that led to the accepted results, and that shall not be achieved by power as long as all parties are strong and well supported.

B. the second hypothesis that could be presented is to apply the transitional justice system in its traditional concept in Libya with the supervision of a foreign authority that undertakes the mission of revealing the truth of the past and applying punishment. There has already been a trend in Libya to call for the application of transitional justice supervised by a foreign party, whether through the application of the mixed court system or even the international courts, but this is a proposition that we do not doubt its refusal by Libyans due to the privacy of the situation in Libya. This will be a foreign intervention, a return to the era of guardianship and submission that Libyans reject and have reservations on with high sensitivity.

In fact, what we are addressing here is the specificity of the conflict in Libya and its effect on the definition of transitional justice system there, this is not just personal impressions, as the recent experience of applying transitional justice in Libya showed the specificity of the Libyan case, as these experiences represented models of justice that serve the interests of one party at the expense of another.

Transitional justice's manifestations in the post-February era clearly embodied the unhidden exclusion and persecution of former regime supporters, and using this exclusionary logic, the political isolation law represented a clinical death to all those who worked in Gaddafi's regime, and the Amnesty law also which was issued by the Transitional National Conference represented an exclusionary model as it excluded Al-Gaddafi's family from the

amnesty regime as Article 1 of the Law No. 35 of 2012 on the Amnesty of certain offenses stipulates that some persons shall be excluded from the application of the amnesty provisions, as this article in paragraph 1 states that: "The provisions of this Law shall not apply to the following cases: 1. Crimes committed by the wives of Mu'ammr Muhammad 'Abd al-Salam Abu- Minyar Al-Qadhafi, his sons, his daughters whether non-adopted or adopted, and his sons in law and officials." In return, the amnesty law issued by the Libyan parliament in 2015 includes exceptions to the amnesty system, aiming at excluding some groups that are considered to be the so-called revolutionaries during the February Revolution from the amnesty system. Article 3 of the Amnesty Act No. 6 of 2015 makes the same exclusionary sense, with the decision to exclude certain offenses from the amnesties. Article 4 of the Act stipulates that the amnesty law does not apply to "killings for identity, kidnapping, enforced disappearance and torture". These are crimes mostly attributed to some of the revolutionaries committed during the February war period, which means that the exception at this stage targets one of the parties to the conflict in Libya, which undermines the most important main pillars of the justice system that must embrace reconciliation in order to achieve community harmony.

It seems clear that these laws have confiscated the objectives of transitional justice, namely, to bridge the gap and settle the differences between the parties. These excluded crimes are the core issues on which we need reconciliation and amnesty that will ensure reparation and ensure non-impunity and criminal accountability, in a manner appropriate to the current stage the Libyan State is witnessing.

The exclusion stated in these laws, is in the context of a exclusionary policy that has stripped the concept of transitional justice of its lofty goals and turned into a mere revengeful or selective justice, that did not aim to achieve a real reconciliation project, but has increased the political division and weakened the effectiveness of the adopted justice system. This is, in fact, due - as we understand it - to the fact that these laws were formulated with a specific philosophy based on the idea of impunity and depriving adversaries of benefiting from the advantages provided in the post-conflict phase, and in return establishing legal guarantees

¹ Published in the Official Gazette, issue 6, first year, 2012.

that shall ensure the impunity of a certain segment, which is those that match the conviction of the legislator.

Although Libya has enacted laws that express a tendency toward achieving transitional justice, such as Act No. 29 of 2013, these laws have not achieved their objectives, since they did not take into account the nature of the conflict in Libya and the current centers of its components. We cannot fail to point out that each of the parties to the conflict in Libya is a popular base that deserves to be considered for any project of transitional justice. Transitional justice is not a purely legal act aimed at punishment and justice in its abstract sense, it is a system of community harmony, and it is, therefore, a popular system according to the nature of its objectives and means of achieving it.

Law	Law No. 35 of 2012	Law No. 6 of 2015
Issuer	Transitional National Congress	Libyan Parliament
The excluded party	Gaddafi family	The so-called revolutionaries during the February Revolution
The text of exclusion in the law	"The provisions of this law do not apply to the following cases: 1. The crimes committed by the husband of Muammar Muhammad Abd al-Salam Abu Minyar al-Qaddafi and his sons and daughters, either by origin or by adoption, by his in-laws, by his in-laws and by his aides.	The Amnesty Law on "Identity Murder, Kidnapping, Enforced Disappearance, and Torture" does not apply

The exclusionary policy of transitional justice in the Libyan experience through applying amnesty laws did not provide a realistic alternative through which justice can be achieved for cases excluded from the Transitional Justice laws' scope of jurisdiction, the fact that led to delaying the solution, prolonging the problem and opened the way for the crisis development; as punishment

2 ³ Published in the Official Gazette, issue 15, Second year, 2013.



for killings, arbitrary displacement, and arbitrary detentions were excluded from amnesty under Act No. 6 of 2015, and even applying this requires a strong state that has power and can practice it throughout the country, which can be achieved only by transcending the circumstances of the stage, through a restorative project that will bring justice and restore security and peace.

Thus, although the exceptions contained in the aforementioned laws aimed to subject cases and defendants exempted from amnesty to a penitentiary system, they had the opposite effect that ended in impunity for defendants, where they benefited from that and strengthened their status and increased their hostility to the conflict group who were holding the legislative and law-making power. This exception reinforced the feeling of hostility and exclusion for those who were excluded, which contradicts with mere logic that should prevail for the sake of peace and community security.



All these negative consequences of Libya's transitional justice system are due to the protracted long conflict in Libya and the failure to choose a system that suits the nature of this conflict. The transitional justice system that must be adopted in Libya should take into account that justice that should be achieved must include all pre-17th February revolution stages, as it is the period that witnessed a severe political and social division within the Libyan community fabric. Discrimination in treating those stages will promote division, injustice and inequality.

The most important elements of transitional justice in Libya:

The nature of the political and social conflict in Libya makes it imperative to adopt a special system of transitional justice that is based on the idea of reconciliation and bypassing the past as a basis for a justice system. This can be achieved only through adopting an integrated political, economic and legal system that promotes community harmony and establishes the spirit of citizenship, through ending the hotbeds of tension first by adopting a fair system of wealth distribution and a positive political quota through an equal opportunity system that distributes political jobs geographically on the basis of efficiency, as this will achieve overcoming one of the most important factors of the current division among Libyans. This will ensure ending one of the main reasons for prolonging the crisis in Libya which is the feeling of economic and political injustice.

Legally, adopting a "popular legal system" in which individuals play a major role in resolving and settling the conflict will be one of the most important solutions for achieving effective national reconciliation among Libyans. This is one of the most important

steps toward a fair settlement that is acceptable to the perpetrator, who is often difficult to submit to a traditional judicial system because of his influence, and at the same time, this shall establish an effective system, as it will represent an acceptable solution for the victim, whose position is usually expressed through a popular base to which he/she belongs.

The traditional punitive system will, therefore, remain a reserve system that can be achieved only when restorative settlement fails, and therefore we will have a system defined as follows:

A restorative settlement system that ensures combating impunity, and not applying punishment. As restorative punishment is not necessarily a traditional punishment, as it may be applied through compensation, not traditional punishments, this is known as "Penal Compensation" in criminal jurisprudence, and the punishment, in this case, may just be an apology for the victim by the conditions the victim set for the purpose, or it may be amnesty in exchange for pleading guilty, provided that this is done in a consensual way between the offender and the victim. A restorative settlement would, therefore, include compensation, apology or pardon with the consent of the victim.

In order to implement a fair and restorative system, the experiences of some States, such as France, which adopt systems of reconciliation and mediation, but these systems shall be modified to suit the Libyan situation, whether in terms of the nature of crimes or social composition.

A traditional punishment system is applied to a small scale to a range of serious crimes that have not been resolved by restorative means.

Conclusion

Adopting restorative justice as a concept of transitional justice requires:

Going beyond the idea of revealing facts far from the reconciliation's scope, it is not feasible for a society seeking community peace to detect crimes and violations and to dispense the past and bring it back to the present, as it is similar to those who im-

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port past problems to add to present crises, which is clearly contrary to the objectives of transitional justice as we understand it. It aims at healing the rift and restoring community harmony. The revelation of the past is only a condition of transitional justice to the extent that victims demand it within the framework of a system of reconciliation.

The need to amend the Code of Criminal Procedure by adopting a system that allows the termination of criminal litigation by restorative means, through the adoption of exceptions to the principle of judicial punishment, as well as explicitly providing alternatives to criminal proceedings, including mediation and conciliation.

Avoiding the State’s absolute amnesty regime away from the principle of reconciliation, as it provokes the victim’s feelings and promotes a sense of inequity, amnesty must be a result of the victim’s consent