



The transitional justice impasse in post-revolution Libya: a call for a transformative approach

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Abstract

The effectiveness of transitional justice (TJ) is measured by the achievement of its goals of justice, reconciliation, healing, and peace in countries transitioning to non-authoritarian rule. This article evaluates the TJ experience in Libya the aftermath of the Qadhafi regime, revealing contextual challenges to TJ in Libya from 2011. The findings indicate a close relationship between contextual factors (political context, type of conflict, institutional context) and the trajectory of TJ. Libya's fragile statehood, the nature and the scale of ongoing conflicts, and interference of various regional and external actors have undermined Libya's political transition and complicated prospects for peace and reconciliation. Within the context of political and territorial division and continued human rights violations, the study concludes that Libya's TJ model has been inappropriate and has failed to achieve its ambitious goals. Finally, the article advocates a transformative approach to transitional justice appropriate to this non-paradigmatic case of transition.

Keywords Libya · Transitional justice · Reconciliation · Fragility · Ongoing conflict · Transformative justice

Introduction

Transitional justice (TJ) has developed to include a variety of judicial and non-judicial measures, the most notable of which being criminal justice, truth commissions, reparations, and lustration, applied by states to address the systematic violations committed by a departed regime in the wake of a transition (International Center for Transitional Justice, 2020). TJ faces the expectation that it will support

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democratization, rebuild trust in state institutions, and ensure lasting peace in countries transitioning from conflict and/or authoritarian rule, based on the idea that accountability will deter state and armed groups from resorting to violence. At first glance, the case for TJ seems incontrovertible; questioning it seems to entail critiquing the human rights project. Orentlicher argued that governments ‘[should] not forego trials simply because it seems politically expedient to do so’ (1991, p. 2548). In fact, TJ remains guided by normative idealism: human rights are universal, and interventions are important to facilitate liberal democracy. This idealism has taken the place of empirical analysis (Gready and Robins 2014, p. 343), meaning that TJ may be externally imposed and inappropriate for its political and legal context.

Claims to justice do not easily translate into effective means to achieve TJ, and a ‘one size fits all’ approach sometimes deepens divides or is counter-productive, overlooking the ‘reality on the ground’ (Snyder and Vinjamuri, 2004). Many Arab countries, including Iraq, Egypt, Yemen, and Tunisia, have witnessed fundamental changes in ruling systems without fully implementing TJ due to the absence of political stability, undemocratic elections, or polarization and division (Antar, 2014).

During a popular revolution, a NATO-led military intervention in Libya resulted in the overthrow of the Qadhafi regime on 20 October, 2011. The country has remained in a precarious transitional state ever since, with neither peace nor justice (Aboueldahab, 2019). Multiple mechanisms of TJ have been employed; however, the performance of TJ has been disappointing. The recent problems no longer relate to the violations of the previous regime, but to the transition process itself. Libyan experience has shown that the legacies of the Qadhafi regime (Willcoxon, 2017), in addition to the violent regime change, have created new realities on the ground.

The obstacles to transition in Libya differ from those in most peaceful transitions. Since the regime’s collapse, the country has been mired in conflicts between Qadhafi regime loyalists, revolutionaries, tribes, and militias, and within the militias themselves. Indeed, since 2014, Libya has been a *de facto* fragmented state embroiled in a multi-party civil war involving extensive international interference. Consequently, a new dilemma has emerged concerning how to address the three epochs of human rights violations: the dictatorship era, the revolution, and the years following the revolution, the last of which may represent the worst violations in terms of the number of victims.

The context is important for evaluating transitional justice’s limitations. The core argument of this article is that the complexities of local contexts in which TJ has been implemented affect its objectives and the processes through which it develops. When a TJ policy is designed, it is important to consider the context because different contexts require different approaches (Duthie and Seils, 2017).

This study asks multiple questions: which contextual factors have had significant implications for Libya’s TJ trajectory, to what extent can transitional justice contribute to stopping active conflict and making progress in building peace, and how do we implement a transitional justice approach when countries are in active conflict or when credible institutions and the political will are lacking? An evaluation of the TJ process in Libya will clarify reasons for the dysfunction of transitional justice. According to Marieke Wierda, the former transitional justice advisor to the UN Support Mission in Libya (2015), ‘Transitional justice in Libya has emphasized political



isolation, and trial and punishment of former regime figures', while privileging 'revolutionaries and martyrs' in a manner that has 'risks exacerbating Libya's divisions and [which] will make it more difficult to forge national unity' (Wierda, 2015, p. 174).

Since TJ experiences cannot be reproduced, the current study proposes a modified approach to TJ applicable to contexts with societal division, legal system collapse, and renewed armed conflict. Such an approach could prevent the repetition of violations with impunity and achieve reconciliation, thereby establishing a democratic system that recognizes human dignity, preserves human rights, and addresses the legacies of the past.

Since TJ is a new approach in Arab countries, this study's main contribution to the field is to understand the pre-conditions for its success and to open the door for further discussion regarding the need to reach solutions for similar contexts. The study is contrary to the dominant research strain, which has analyzed the TJ that took place in countries in transition from authoritarianism to democracy, such as Argentina or Eastern European nations; studies of these experiences tell us little about TJ in societies that are still mired in internal armed conflicts, such as Iraq and Libya.

The present research adopted a qualitative case study methodology, using legal analyses of texts, international conventions, and laws, as well as observation to accumulate information and take a comparative approach. We begin with a brief discussion of the expansion of the TJ framework. In the second section, we discuss the TJ mechanisms implemented in post-Qadhafi Libya, namely criminal prosecution, vetting (political isolation), and amnesty. We show how the interests and priorities of different actors fluctuated in relation to the issue of accountability, and conclude that justice has not been the main aim of either international or local actors. The third section illustrates challenges to TJ in Libya, and the final section proposes a transformative approach to TJ.

The expansion of the TJ framework

TJ is a broad concept that incorporates a range of goals and includes judicial and non-judicial mechanisms. Arthur argued that 'there is no single theory of TJ and the term does not have a fixed meaning' (Arthur, 2009). The field is highly geared towards practice, and theory has been seen as almost irrelevant (Buckley-Zistel et al., 2014), because TJ's boundaries change continuously in response to conceptual developments, country-specific experiences, and the expectations of victims.

Traditionally, TJ was associated with the transition from authoritarian to liberal-democratic rule. The notion of 'transition' in TJ is, thus, optimistic: 'after will lead to something better' (Kora, 2010), where 'better' is implicitly understood to mean transition to democracy. During the past three decades, due to the proliferation of internal conflicts in Africa and the Balkans, an international consensus has emerged that turning the page and 'starting over' would no longer be acceptable when large-scale violence has ravaged societies (Fletcher and Weinstein, 2015). The concept of TJ has thus been extended to apply to a range of



contexts, including post-conflict societies and stop ongoing conflicts (Reiter et al., 2014).

Normative debate highlights the role of human rights norms in promoting normative change in international relations by shaping the choices and acts that constitute a political order and rejecting realist assumptions regarding international law's effects (Finnemore and Sikkink, 1998). Sikkink (2011) has discussed that prosecuting former political leaders for past human rights abuses strengthens political stability and prospects for democratic transition and has identified a cascade effect of these trials in the fact that such criminal accountability has become the norm worldwide.

Other scholars have highlighted the tensions within 'irreconcilable goals of transitional justice, for instance between the goal of providing justice to victims and security and peace' (Sriram, 2004). For example, civil war contexts represent obstacles to TJ efforts, as both sides of a civil war can retain the ability to remobilize aggressively against TJ decisions that contradict their interests (Reiter et al., 2014); because peace negotiations sometimes relied on amnesties to secure peace agreement, such as in Sierra Leone in 1999, where key parties were granted amnesties to secure peace as part of the Lomé Peace Agreement (Ainley, 2015). Therefore, Snyder and Vinjamuri (2004) believed that prosecutions do very little to deter future violations and sometimes lead to increased atrocities as they tend to not take into account the political realities. These authors argued that neither the former Yugoslavia nor the Rwanda tribunals have deterred subsequent global atrocities (Snyder and Vinjamuri, 2004).

The revolutions of the Arab Spring rejuvenated scholarly debates on TJ, and claims have emerged supporting transformative approaches. Abdul Hussein Shaaban explains that TJ issues are intertwined with the traditional environment and culture of Arab society, as well as tribal, religious, ethnic, and regional influences, which could heighten polarization and provoke new conflicts (*Today's Opinion*, 14 June 2014). Indeed, in Iraq, the 'De-Baathification Law', which was transformed into the 'Accountability and Justice Law', sparked a sharp societal division and focused only on the violations during Saddam Hussein's regime, regardless of the current reasons for instability (*Today's Opinion*, 14 June 2014). In Syria, direct military interference from multiple countries—including Russia, Turkey, and Iran—and several armed militias enjoy support and funding from regional actors such as Hezbollah. This extraordinary situation has led to further militarization and has made it difficult to establish TJ.

It is argued that restorative justice (RJ) can act as a catalyst for TJ by restoring the relationships between victims, abusers, and the community. Some scholars (Gready and Robins, 2019) have proposed a transformational justice entailing 'a shift in focus from the legal to social and political' by considering socio-economic rights and addressing exclusion and population needs to prevent future conflict instead of regressing to the past. An example of this expanded TJ framework can be found in Northern Ireland, where TJ projects were based on non-violent resolution of conflicts through a bottom-up approach, with emphasis on building bridges between communities and the state by engaging in conflict management and crime prevention at the local level (Eriksson, 2009, p. 303).



The transformative approach, therefore, aims to expand TJ policies to incorporate more adaptive political and social tools, which can help to eliminate the roots of the conflicts, prioritize what citizens and victims need, and addressing structures of exclusion, through concerted intervention spanning local and global levels. Fisher and Stewart indicated that TJ must push for ‘creativity’ and ‘local solutions’, and that the Arab Spring could impact TJ (Fisher and Stewart, 2014).

TJ measures in post-revolution Libya

International criminal prosecutions

Prosecution of perpetrators of severe human rights violations, whether through international or domestic courts, is considered an essential pillar in the transitional justice policy to stop violence; examples include the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda (ICTR) in 1994. The prosecution of political leaders in Libya took center stage in the pursuit of TJ during the revolution, when, on 26 February, 2011, via Resolution 1970, the UN Security Council (UNSC) unanimously referred the Libyan case to the International Criminal Court (ICC) under Chapter VII of the UN Charter to investigate the UN Human Rights Council’s findings (International Criminal Court, 2011). The UNSC has, to date, only used its referral authority in Darfur and Libya (Kersten, 2016a, p. 7). For instance, international attempts to refer the case of Syria to the ICC failed because of Russia and China’s use of their vetoes in 2014 (BBC News, 22 May 2014). Furthermore, in Yemen, Ali Saleh received blanket immunity from prosecution, with support from the United Nations, the United States, and the European Union, after a Gulf Cooperation Council initiative (Jeb and Raghavan, 2011). These decisions demonstrate how international actors have adopted different approaches to accountability (Aboueldahab, 2019).

The option of a negotiated solution arose in 2011, when the African Union (AU) proposed a ‘roadmap’ for Libya during its transition to democracy. The National Transitional Council (NTC)—the first transitional authority—and Libyan rebels rejected the roadmap, as it did not stipulate that Qadhafi must exit the Libyan political scene (Chmaytelli, 2011). The ICC issued arrest warrants for Muammar Qadhafi, his son Saif Al-Islam Qadhafi, and former Head of Intelligence, Abdullah Al-Senussi, in June 2011; however, no further action was taken (BBC, 2011).

After the regime’s collapse in Libya, the cascading of the ICC declined. Peskin and Boduszynski (2016) argued that international backing for the ICC in Libya has ‘waxed and waned’, which was unique in that ‘the initially unprecedented international support for the ICC was followed soon afterward by a sharp decline of the ICC backing’, indicating that the aim of ICC support was the marginalization of the Libyan regime. Successive Libyan governments insisted upon trying Saif Al-Islam Qadhafi, intelligence chief Al-Senussi, and the former Prime Minister Al-Mahmoudi (Aboueldahab, 2019), and saw the ICC’s intervention as violating the state’s sovereignty (Peskin and Boduszynski, 2016, p. 274). On 28 July 2015, the Tripoli Criminal Appeal Court sentenced Saif Al-Islam to death in absentia in Case No.



630–2012, along with Al-Senussi and six other defendants (BBC News, 11 August, 2015).

Calls for accountability during active conflicts can fuel tensions when perpetrators believe their group's survival is at stake, leading to increased violence. Some scholars have opined that international intervention and referral to the ICC make peace less likely in Libya, and when Qadhafi had been subject to arrest warrants, instead of stopping his criminal activity, he was bound to dig in his heels and fight to the death (Sands, 2011). Further, the executive director of the World Peace Foundation, Alex De Waal, emphasized that 'each side fearing annihilation if it loses' and negotiation and diplomacy give rise to peace. He added that Western policymakers aiming to end genocidal killing should not overlook diplomacy tools, and the main priority should be to end mass atrocities, rather than prosecute the perpetrators of the crimes (de Waal, 2006).

The 'political isolation law' (PIL)

As seen in the communist regions of Eastern Europe in 1989, authoritarian regimes collapse as soon as their oppressive security apparatuses cease to work. Some have suggested that a democratic transition of power is not possible without reforming the state's security apparatus (Antar, 2014). Lustration was implemented in the Czech Republic to prohibit former Communists from occupying political office (David, 2011), whereas Hungary and Poland gave former officials a second chance in return for revealing the truth. In contrast, the post-Gaddafi Libyan state purged political opponents associated with the former regime, to appease militias. When armed groups besieged the parliament and several ministries in May 2013, Libya's General National Congress (the interim parliament) was forced to pass the Political Isolation Law (PIL), which is indeed a vetting law based on the idea of exclusion of officials and structures that sustained the Gaddafi regime.

Article I of the PIL contained a list of criteria which identifying positions held or actions that occurred between 1 September, 1969, and 23 October, 2011, targeting people in high-level positions, such as local officials, university deans, student union leaders, and people who had dealt with Gaddafi's family. The PIL also includes those who have consistently glorified Gaddafi or his regime or supported the Green Book or those who took a hostile position towards the 17 February Revolution (Human Rights watch, May 4, 2013). Those deemed to have met these criteria can be barred for 10 years from holding legislative or executive posts at national or local levels, judicial positions, diplomatic posts, or leadership positions in the country's security and military institutions (David and Mziouet, 2014). Under this law, several important leaders of the revolution who played leading roles in boosting the revolution's and the rebels' political legitimacy were excluded.

Opponents of the law point out that Libya's already fragile institutional system has been affected, since many high-ranking, qualified, and experienced leaders have been excluded. Wierda (2014) argued that this law has been a form of settling accounts with the old regime and has never aimed to reform institutions. The law decisively contributed to the breakdown of the country's defense institutions



as a result of the dismissal of numerous law enforcement and military personnel tasked with protecting Libya's land borders (Amirah-Fernández, 2013). The PIL 'has undermined Libya's transition towards democracy, justice, and rule of law', according to Smith (2013), who argued that applying this law meant the removal of key political figures, which caused more political instability and chaos. This exclusion heightened polarization, leaving the excluded no other recourse but to join the insurgency.

Purges may further facilitate institutional reform by eliminating the influence of officials from the previous regime; however, this comes at the cost of depriving the new state of people with certain administrative skills (Posner and Vermeule, 2003). In Iraq, for example, the process of de-Baathification that took place after the fall of Saddam Hussein in 2003 did not make any assessment of an individual's integrity or deeds; instead, the evaluation was based on the individual's party membership (Sissons and Al-Saiedi, 2013), thereby resulting in the dismissal of many government officials, police officers, and members of the armed forces who may not have been guilty of serious rights violations. This failure created a widespread dynamic of fear, resulting in many of these individuals feeling they had no other option but to throw in their lot with the insurgents, a situation that continues to this day (Sissons and Al-Saiedi, 2013). Marginalization reinforces feelings of hostility and exclusion, which contradicts the logic of TJ and leads to arbitrary acts of revenge and vengeance (Sriram, 2004).

Amnesty

The revolution of 17 February divided Libyans into two categories: *thuwar* (revolutionaries), who were considered honorable, and *azlam* (Qadhafi supporters), who were associated with corruption (Shariqa, 2013). On 2 May 2012, Law No. 38, 'On Some Procedures for the Transitional Period', was issued by the interim National Transitional Council; it provided a basis for the immunity of persons who had committed crimes aimed at promoting or protecting the revolution. According to the law: 'There is no penalty for any military, security, or civil acts carried out by the revolutionaries, which were necessary to save or protect the 17 February Revolution' (National Transitional Council, 2012: article 4). Some have noted that admitting the legitimacy of the rebels' engagement in criminal processes represented a challenge to the TJ trajectory, and this acceptance would transform it into retaliatory justice (Ferchichi et al.).

Various legal and military crises ended with the division of the elected House of Representatives 'parliament' and the executive authority in the east and the west in 2014 (Tashani, 2016). The elected House of Representatives, in Tobruk, issued Law No. 6 of 2015 on Amnesty, which provided conditional amnesty for all previously charged people who were deemed responsible for certain crimes between 15 February, 2011 and the issuance of the law (Tashani, 2011). The controversy escalated after the interim government's Minister of Justice for eastern Libya issued a letter on 10 April, 2016, ordering the Zintan Prison warden to release Saif Al-Islam (Tashani, 2011), evidence of the extent to which the state has fragmented.



History shows that amnesty is granted as a means of securing political transition, securing a negotiated settlement (Kersten, 2016a, b), or if countries are at risk of another civil war during a transitional period, as in post-Franco Spain or post-Dirty War Argentina (Encarnación, 2014). However, in the Libyan case, political actors have re-articulated conceptions of amnesty to serve their interests. Law 38 did not aim to build peace; it aimed to protect the rebels from prosecution. In addition, the Ministry of Justice's decisions in eastern Libya regarding the release of Qadhafi's prisoners were intended to attract the popular base supporting Qadhafi's men (*Al-Arabiya*, 3 July 2019).

Contextual challenges for TJ in Libya

The complexities of each context represent a significant backdrop in understanding the obstacles facing TJ. The main factors that have had significant implications for the manner of TJ implementation and the response to the massive human rights violations in Libya are as follows.

Statehood fragility, and armed groups

TJ, like democracy, is not a spontaneous act; it is closely dependent on the existence of state institutions. Whether implemented purely domestically or through international organizations such as United Nations, TJ programs can face obstacles in terms of determining legal responsibility, offering reparations for victims, and making substantive structural changes when state institutions are weak (Fletcher et al., 2008). Studies of more successful TJ processes have argued that these societies have generally been characterized by strength of law, a functional and well-developed legal system, and pre-conflict institutions founded on Western liberal principles. Thus, even when these countries were suffering from substantial democracy deficits, their pre-existing judicial and legal structures provided a foundation for TJ measures (Fletcher et al., 2008).

Libya was deprived of constitutional law for approximately four decades, and the absence of TJ tools, such as a constitution, made it difficult for the country to achieve its goals. In 1977, Qadhafi announced the declaration of the People's Authority and the adoption of the *Jamahiriya* system and abolished the country's constitution, successfully concentrating all power in himself (Fasanotti, 2017). The *Jamahiriya* system was constructed around Qadhafi's *Green Book*—which he called the 'Third Universal Theory'—rather than political parties or state institutions (Lamont, 2016). Following Qadhafi's military coup of 1 September, 1969, the situation of the Libyan judiciary deteriorated significantly; it began to suffer from interference, which badly affected its integrity and independence (Diver and Miller, 2016). After the fall of the Qadhafi dictatorship, the situation worsened even more. Attempts to rebuild the state have been difficult, and the return of constitutional life is still faltering due to the lack of constitutional practice. One of the hallmarks of a successful transition is a constitutional law that guarantees citizens' fundamental rights, along with a



constitutional court tasked with safeguarding those rights. Over the nine years since the collapse of the regime, Libya had only the constitutional declaration of August 2011, and no other documents to guide the next stages (Shariqa, 2013, 16).

One of the critical challenges for the security of Libyan society is the armed groups, most of which stand against the rebuilding of the army and police and engage in weapon proliferation. The Secretary-General of the League of Arab States, Ahmed Aboul Gheit, said that although there are no ethnic or sectarian divisions in Libya, like those in Syria and Yemen, the weakness of the country's institutions and the profits the militias make from its current status are elements that impede its political transition (Al-Raed Network, 22 March 2019). Following the armed intervention, there was no comprehensive long-term strategy for disarmament and reintegration. Local authorities' attempts to collect arms and disarm the population proved fruitless, and outside efforts to train Libya's security institutions have failed because there is no effective command chain and no military structure for them to join (Showaia, 2014). Qadhafi neglected the traditional army and police in favor of elite 'praetorian' units such as the Seventy-Seventh Brigade and Khamis Brigade (Sayigh, 2015), headed by his sons Mutassim and Al-Saadi, to prevent the possibility of a coup d'état. These units dissolved with the collapse of the regime, and the NTC has gathered only a handful of officers and soldiers to begin the process of military reconstruction (Wehrey, 2014). Thus, the army was unable to enforce control over armed militias or ensure security during the transitional stage (Salem and Kadlec, 2012).

Since the ousting of the former regime, militias have continued to substitute for the role of the state and have arrested thousands of Qadhafi followers (UN Support Mission in Libya, 2012). The lack of strong state institutions generates the need for militias to provide protection and play a role in the transition; however, these groups have become a constant threat to security, government departments, and vital institutions, becoming more brazen in their resistance to the central government. They place huge pressure on decision makers; for example, Islamists who were oppressed under the Qadhafi regime played a crucial role in the adoption of the PIL, which was motivated more by a desire for state capture than state building (Lamont, 2016). Qadhafi's capture and his execution without trial was an evident sign that things were not headed in the right direction. Wierda admitted that the United Nations had made the mistake of assuming that the militias would surrender to the state, which did not happen (Brookings Institution, 2017). Rebels carried out revenge killings and other attacks against members of Qadhafi's security apparatus and other suspected loyalists associated with the Qadhafi regime or suspected of having committed crimes on its behalf (Amnesty International, 2012, p. 31). NATO and the international community did not support the new authorities of the Libyan state in their efforts to obtain control of the territory or to engage in state-building; thus, Libya could not effectively manage its transition, and post-war security remained in the hands of the militias.

Under these conditions, implementing a balanced or fair TJ system is all but impossible. Despite the regime change, Libya has not evolved into a democratic state; on the contrary, it has *devolved* into a failed state. Violence points to the failure of the post-revolution Libyan government to provide for the basic security needs



of its people (Amnesty International, 2012, p. 31). Meanwhile, political revenge and military violence resembling ancient modes of tribal revenge have spread among some regions and groups in the country (BBC News, 22 February 2011).

The nature and scale of the conflict

The nature and scale of persistent conflict during transitional periods create obstacles for TJ processes (Duthie and Seils, 2017). In Libya, the armed humanitarian intervention failed to provide a post-war stabilization process. ‘Winning’ marked only a shift from major combat operations against former regime forces to ongoing internal conflict. The ongoing conflict reached a level similar to that during the uprising and the previous regime. Lessons from Iraq, where the United States removed Saddam Hussein from power by force and without introducing important reforms, show that such actions generate concern instead of national unity.

The conflict in Libya plays out on a three-level structure (Varvelli and Lovotti, 2019), with each feeding and influencing the other. The first level involves local actors, which, since early 2012, have been part of numerous conflicts for control of governance, territory, money, and oil resources. The conflict reached its climax in 2014, when a former Qadhafi-era officer and dissident, Khalifa Haftar, launched Operation Dignity. Both Qadhafi loyalists and anti-Islamists supported him because of his promise to crush the Muslim Brotherhood (Wehrey, 2014). Thereafter, the country was de facto split into two rival governments, one in Tripoli and one in Tobruk’ (Kausch, 2019). One of the factors behind Haftar’s Tripoli military offensive in April 2019 was partially related to the financial marginalization of eastern Libya, along with gaining control of the Central Bank (Varvelli and Lovotti, 2019).

The second level concerns regional actors. After the Arab uprising of 2011, another regional conflict emerged—no less dangerous than the Sunni–Shiite conflict over the regional order—which was a struggle between Saudi Arabia, the United Arab Emirates, and Egypt on one side versus Turkey and Qatar on the other. Regional powers did not penetrate Libya through the Sunni–Shiite binary, since the Shiite component was absent in Libyan society; rather, they entered through a liberal/Islamic dichotomy (Hajjal, 2018). The conflict resembles a proxy war between regional actors, as often occurred during the Cold War, and has played a role in increasing the duration of the country’s internal conflict (Mahony et al., 2017, p. 6). This conflict is the main cause of the breakdown of state-building and has led to further militarization (Megerisi, 2019). The motivations behind this regional conflict are multiple but can be summarized as geopolitical ambitions and the ideological clash over the Muslim Brotherhood, which Egypt and the Gulf states see as a terrorist organization, whereas Turkey and Qatar are concerned with political Islamic parties. Increased Turkish military support has saved the Government of National Accord (GNA) and Tripoli from a very destructive advance by Haftar’s army. The presence of Turkey in Libya has expanded dramatically to a point where it is very unlikely to withdraw, especially after the signing of the maritime agreement between the two countries in 2019. This agreement demarcated an exclusive economic zone



that offers Turkey financial benefits and blocks Greece's access to territory it claims as its own (Hill, 2020).

At the global level, the French–Italian rivalry over North Africa and the issue of whether Paris or Rome will be the leading international voice on Libyan affairs have compounded Libya's already significant problems (Fasanotti, 2017). Although nominally backing the UN-led political process, Italy and France both support rival factions that best align with their own economic interests in accessing Libyan oil for their respective national oil companies. Italy's economic interests are in Tripoli, whereas France backs Haftar in the east and south (Ceccorulli and Coticchia, 2013). Meanwhile, in April 2019, France blocked a European Union statement calling for Haftar to cease his offensive in Tripoli (Baczynska and Guarascio, 2019).

Moreover, Russia has been given a free hand to play a more intrusive role in the current civil war. Moscow hopes to have a say in the dispute talks and re-establish the trade prospects that were disrupted by Qadhafi's demise. For Russia, the alliance with the LNA and Haftar provides a possible opportunity to improve its position in North Africa. Arnaud Dubien, director of the France-Russia Observatory, explained 'Vladimir Putin sought to reinvest in the African continent, and more generally in former Soviet allies', adding that Russia has little to lose by playing a role in Libya and concluding, 'from a strategic standpoint, the risk is low, but the gains have the potential to be very high indeed' (Daou, 2017).

Rethinking the transitional justice approach

One of the main goals of TJs is to bring about conditions for lasting peace. However, as Nagy (2008, p. 276) argued, 'the question is not whether something should be done after atrocity but how it should be done'. Given the lack of strong judicial authorities, which allowed sub-national groups to challenge the state's authority, TJ processes in Libya have been unable to overcome the complex challenges that have prevented their implementation. Furthermore, the nature and dynamics of the parties to Libya's armed conflict are complex and shifting, presenting implications for the success of TJ processes. Consequently, a new dilemma has emerged concerning how to deal with the three epochs of human rights violations that need to be addressed: the dictatorship era, the revolution, and the years following the revolution, the last of which may represent the worse violations in terms of the number of victims. The ICC's inability to investigate the new severe and systematic violations post-revolution has minimized the standing of the court as an impartial institution, and it has not addressed the roots of the conflict.

In the context of the marginalization of 'justice' in all its forms, and especially in the name of 'peace', history shows that peace obtained through negotiations without accountability is usually fragile; for example, the Taif agreement that ended the civil war in Lebanon in 1989 did not hold warlords accountable for their crimes, which allowed them to return to political life and thereby undermined an already fragile peace (Fraihat, 2016).

Libya needs a concept of justice that is more 'transformative' than 'transitional'. According to Gready and Robins (2014), the transformation toward a positive peace,



which eliminates the triggers of violence, echoes the demands of TJ. The authors further explain that conflict transformation can show the importance of using local resources to resolve the root causes of conflict. TJ should be more concerned with economic and social rights to maximize its ability to address the root causes of violence. The tools of such a transformative approach include the following.

- (1) One of the solutions to the Libyan crisis involves a rethinking of the mechanisms to redistribute income among municipalities and regions, with oversight from an international commission, without discrimination between regions and groups. This rethinking must include all who have suffered political, social, and economic exclusion (Centre for Humanitarian Dialogue, 2018).
- (2) RJ is a first step; RJ puts less emphasis on criminal prosecutions and more on reestablishing security and sustaining national dialogue, and it should thus serve as a more appealing first step to a certain level of reconciliation in Libya. This step could repair broken relationships within the society, granting ex-regime figures an opportunity to reveal the truth of their crimes and seek forgiveness for their past. Previous studies have found that only combinations of RJ mechanisms that include amnesty, such as truth commissions, improve the condition of human rights and democracy in these situations (Reiter et al., 2014). Other studies of the role of justice in post-conflict societies have concluded that some combination of trials, a truth commission, *and* amnesty can assist democratization by encouraging the development of a peaceful society that does not feature arbitrary vengeance (Mihr, 2013). In Sierra Leone, for example, mechanisms combining RJ with criminal and retributive justice were adopted. In the first stage, the Truth and Reconciliation Commission was established under the Lomé Peace Agreement in 1999. However, the Revolutionary United Front Party's violation of the Lomé Agreement prompted the implementation of other mechanisms, including criminal prosecution (Ainley, 2015). President Kabbah's request to the United Nations to try those responsible prompted the Security Council to issue Resolution No. 1315 of 14 August 2000 to establish an independent Special Court for Sierra Leone to try those bearing the greatest responsibility for the serious war-time violations of international humanitarian and Sierra Leonean law (Security Council Resolution 1315, 2000).
- (3) In weak states, tensions emerge between obligations to reform the security and judicial systems and the need to ensure service delivery. For example, in the wake of the US occupation in Iraq, violence spread due to the disbanding of the army and the police, which made it difficult to implement TJ there. Even after the process of rebuilding the security services was complete, many of their leaders were appointed on a sectarian basis, regardless of competence, naturally weakening citizens' confidence (Hsoubi Al-Arnouti, 2020, p.58). Institutional reform can offer a solution by designing a program that defines the qualities required for future government employment rather than a backward-looking sanction for past behavior. Such a program should screen a person's suitability according to specific criteria, for example, integrity and capacity.
- (4) Disarmament, demobilization, and reintegration (DDR) programs: Without disarmament programs, none of the justice and reconciliation measures can



be implemented. These programs seek to remove weapons from the hands of combatants, remove these combatants from military structures, and help them integrate socially and economically into society, since ex-combatants can be obstacles to a peace process. Although disarmament programs emphasize security and target ex-combatants, while TJ measures primarily target perpetrators and their victims and work towards accountability, disarmament coexists or overlaps with TJ mechanisms in several post-conflict situations.

Conclusion

TJ represents more than a debt to victims; it has not only developed to pursue goals related to ensuring accountability and ending the culture of impunity but has also become a key element in promoting democracy and political stabilization, reconciliation, lasting peace, and the non-recurrence of mass atrocities. This study has clarified the relationship between TJ and the various local political constraints by analyzing Libya's experience of TJ and exemplifying how TJ should be settled upon according to the specific circumstances of each national context. It is important to consider 'how' to implement TJ mechanisms, as well as 'when' and 'why'.

This study has analyzed the vetting measures under Libya's PIL and found that they have been unrealistic, and have undermined reconciliation. The exclusionary policy stripped the concept of TJ of its goals, thereby rendering it a merely retaliatory or selective justice that does not aim to achieve real reconciliation. Moreover, it increased the state of political division and became a factor in the power struggle between the ex-regime and the new political elites (Calhoun, 2004). In particular, the defeated party was perceived as an illegitimate actor.

Transitional justice tools have been used to serve international and local actors' interests in the Libyan conflict. The ICC was considered an effective diplomatic tool to marginalize Qadhafi's regime; however, the intervening states quickly abandoned the Court. The effects of the ICC in Libya have been bound by the political considerations and interests of the UNSC's major stakeholders. Additionally, the study demonstrates that the ICC could not play a role in preventing atrocities in post-revolution Libya due to the type and nature of the conflict. Further, whereas the priority for the NTC and the National Conference was to bring the elements of the former regime to justice, reconciliation with that regime has become a priority for the House of Representatives in the eastern city of Tobruk since the civil war of 2014.

Libya's TJ experience has been unsuccessful and has faced practical and institutional dilemmas due to the heritage of the previous regime and the emergence of new challenges accompanying the change, which are related to issues of weak state institutions, insecurity, and armed groups. The study has analyzed the three levels of the Libyan conflict and how they are intrinsically linked, emphasizing that the characteristics of the conflict have played a key role in its persistence. All these factors undermine stability, state building, and the transition to democracy, and have affected, to a large extent, the implementation of TJ and its effectiveness in the Libyan context.



The appropriate sequencing for international and local policymakers and human rights activists is to first acquire a comprehensive understanding of the local context and then ask whether, what, and when TJ interventions should be initiated. This study does not call for ignoring truth, justice, and redress, nor for postponing them indefinitely, but finding a modified understanding of TJ. DDR programs and TJ can no longer be separated and should be located squarely within debates on justice, reparations, and reconciliation (Laplante and Theidon, 2006).

There is a need to develop a TJ policy that employs a transformed/modified approach, which is better customized to the Middle East and North Africa (MENA) regional contexts and motivated by victim requirements taking into consideration, the special circumstances, degree of legal development, and social, economic, political, and cultural conditions of the region so it can be effectively applied in the context of regions experiencing ongoing turmoil, such as Syria, and Yemen.

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References

- Aboueldahab, N. (2019) Peace and Justice in Libya's Transition. Rowaq Arabi, 6 May, <https://rowaq.cihrs.org/peace-and-justice-in-libyas-transition/?lang=en>, accessed 12 May 2021.
- Ainley, K. 2015. Evaluating the success of transitional justice in Sierra Leone and beyond. In *Evaluating transitional justice: accountability and peacebuilding in post-conflict Sierra Leone*, ed. K. Ainley, R. Friedman, and C.T. Mahony, 241–264. UK: Palgrave Macmillan.
- Al-Arnaouti, M. 2020. Transitional justice and implementation obstacles, Iraq as a model. *Civilized Dialogue* 6683: 58 (**[In Arabic]**).
- Amirah-Fernández, H. (2013) Libya and the problematic political isolation law. Real instituto elcano, http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari20-:2013-amirah-fernandez-libia-ley-aislamiento-politico, accessed 22 May 2021.
- Amnesty International. 2012. *Militias threaten hopes for new Libya*. London, UK: Amnesty International Publications.
- Antar, A.B. 2014. The dilemma of transitional justice in the countries of the Arab Spring. *Journal of Security and Development* 6: 1–25.
- Arthur, P. 2009. How 'transitions' reshaped human rights: A conceptual history of transitional justice. *Human Rights Quarterly* 31 (2): 321–367.
- Baczynska, G. and Guarascio, F. (2019) France blocks EU call to stop Haftar's offensive in Libya. Reuters, 10 April, <https://www.reuters.com/article/us-libya-security-eu-tajani-idUSKCN1RM1DO>, accessed 1 April 2021.
- BBC NEWS. (2011) Libya: Muammar Gaddafi subject to ICC arrest warrant. BBC News, 27 June, <https://www.bbc.com/news/world-africa-13927208>, accessed [accessed 12 Jun 2021].



- BBC NEWS. (2014) Russia and China Veto UN Move to Refer Syria to ICC. BBC New, 22 May, <https://www.bbc.com/news/world-middle-east-27514256>.
- Brookings Institution (2017) Peace or justice in the Arab World? <https://www.brookings.edu/events/peace-or-justice-in-the-arab-world/>, accessed 12 Jun 2021.
- Buckley-Zistel, S., T. Koloma Beck, C. Braun, and F. Mieth. 2014. *Transitional justice theories*. Abingdon: Routledge.
- Calhoun, N. 2004. *Dilemmas of transnational justice in eastern Europe's democratic transition*. New York: Palgrave Macmillan.
- Ceccorulli, M., and F. Cotichchia. 2015. Multidimensional threats and military engagement: The case of the Italian intervention in Libya. *Mediterranean Politics* 20 (3): 303.
- Centre for Humanitarian Dialogue. (2018) The Libyan National Conference Process Final Report, 9 Nov, <https://reliefweb.int/report/libya/libyan-national-conference-process-final-report-november-2018-enar>, accessed 1 April 2021.
- Chmaytelli M. (2011) Libya rebels reject cease-fire that doesn't Oust Qaddafi, Bloomberg, <https://www.bloomberg.com/news/articles/2011-04-10/nato-warplanes-destroy-tanks-supply-routes-in-libya-s-ajdabiya-misrata>, accessed 12 May 2021.
- Daou, M. 2017. *By supporting marshal Haftar, Russia marks its territory in Libya*. France24, <https://www.france24.com/en/20170124-supporting-marshar-haftar-russia-marks-its-territory-libya>
- David, R. 2011. *Lustration and transitional justice: Personnel systems in the czech republic, Hungary, and Poland*. Philadelphia: University of Pennsylvania Press.
- David, R. and Mziouet, H. (2014) Personnel change or personal change? Rethinking Libya's Political Isolation Law. Brookings Doha Center-Stanford Paper. Brookings Institution.
- Diver, A., and J. Miller, eds. 2016. *Justifiability of human rights law in domestic jurisdiction*. Cham: Springer.
- Duthie, R., and P. Seils. 2017. *Justice mosaics: How contexts shape transitional justice in fractured societies*. New York: ICTJ.
- Encarnación, O.G. 2014. *Democracy without justice in Spain: The politics of forgetting*. Philadelphia: University of Pennsylvania Press.
- Eriksson, A. 2009. A bottom-up approach to transformative justice in Northern Ireland. *International Journal of Transitional Justice* 3: 301–320.
- Fasanotti, F. 2017. Libya: A nation suspended between past and future. *Studia Diplomatica* 68 (4): 95–104.
- Ferchichi, W., M. Belkacem, and M. Tashani. 2015. *Guidebook of transitional justice in Libya*. Tunis: Arab Institute for Human Rights.
- Finmore, M., and K. Sikkink. 1998. International norm dynamics and political change. *International Organization* 52 (4): 887–917.
- Fisher, K.J., and R. Stewart. 2014. *Transitional justice and the Arab spring*. Abingdon: Routledge.
- Fletcher, L.E., and H.M. Weinstein. 2015. Writing transitional justice: An empirical evaluation of transitional justice scholarship in academic journals. *Journal of Human Rights Practice* 7 (2): 177–198.
- Fletcher, L.E., H.M. Weinstein, and J. Rowen. 2009. Context, timing, and the dynamics of transitional justice: A historical perspective. *Human Rights Quarterly* 31 (1): 163–220.
- Fraihat, I. 2016. *Unfinished revolutions: Yemen, Libya, and Tunisia after the arAb spring*. New Haven: Yale University Press.
- Gready, P., and S. Robins. 2014. From transitional to transformative justice: A new agenda for practice. *International Journal of Transitional Justice* 8: 339–361.
- Gready, P., and S. Robins. 2019. *From Transitional to Transformative Justice*. Cambridge: Cambridge University Press.
- Hajjal, A. 2018. The conflict of Sunni-Sunni regional influence in Libya. *Political Trends* 3: 129–135.
- Hazan, P. 2006. Measuring the impact of punishment and forgiveness: A framework for evaluating transitional justice. *International Review of the Red Cross* 88 (8): 19–47.
- Hill, T.M. (2020) Four things to know about Libya's conflict and foreign interference. U.S. Institute of Peace, <https://www.usip.org/publications/2020/07/four-things-know-about-libyas-conflict-and-foreign-interference>
- Human Rights Watch. (2013) World Report 2013: Libya; Events of 2012, <https://www.hrw.org/world-report/2013/country-chapters/libya#>, accessed 2 May 2021.
- International Center for Transitional Justice 2020. What is transitional justice? <http://www.ictj.org/about/transitional-justice>.



- International Criminal Court. (2011) Gaddafi case and International Criminal Court. Available at <https://www.icc-cpi.int/libya/gaddafi>.
- Jeb, B. and S. Raghavan. 2011. *Yemen's president saleh agrees to step down in return for immunity*. Washington Post. https://www.washingtonpost.com/world/yemens-president-saleh-agrees-to-step-down-in-return-for-immunity/2011/04/23/AFu59SWE_story.html, accessed 10 May 2021.
- Kausch, K. (2019) Three layers of conflict: The impact of external powers on local conflict resolution in Libya. Rowaq Arabi, <https://rowaq.cihrs.org/three-layers-of-conflict-the-impact-of-external-powers-on-local-conflict-resolution-in-libya/?lang=en>.
- Kersten, M. 2016a. *Justice in conflict: The effects of the international criminal court's interventions on ending wars and building peace*. Oxford: Oxford University Press.
- Kersten, M. 2016b. *Transitional justice without a peaceful transition: The case of post-Gaddafi Libya in building sustainable peace: Timing and sequencing of post-conflict reconstruction and peacebuilding*. Oxford: Oxford University Press.
- Kim, H.J., and K. Sikkink. 2010. Explaining the deterrence effect of human rights prosecutions for transitional countries. *International Studies Quarterly* 54 (4): 939–963.
- Kora, A. (2010) Transitional justice: a new discipline in human rights. *Mass Violence and Resistance*, 18 January, <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/transition-al-justice-new-discipline-human-rights-0.html#:~:text=%C2%ABTransitional%20Justice%20is%20a%20response,for%20peace%2C%20reconciliation%20and%20democracy>.
- Lamont, C.K. 2016. Contested governance: Understanding justice interventions in post-Gadhafi Libya. *Journal of Intervention & Statebuilding* 10 (3): 382–399. <https://doi.org/10.1080/17502977.2016.1199479>.
- Laplante, L.J., and K. Theidon. 2006. Transitional justice in times of conflict: Colombia's Ley De Justicia y Paz. *Michigan Journal of International Law* 28 (1): 50–106.
- Mahony, C., L. Payne, A.G. Reiter, T.D. Olsen and L. Bernal-Bermudez. 2017. *Conflict prevention and guarantees of non-recurrence*. p. 6.
- Mani, R. 2007. *Does power trump morality? Reconciliation or transitional justice? In atrocities and international accountability: Beyond transitional justice*. New York: United Nations University Press.
- Megerisi, T. (2019) Libya's global civil war, The European Council on Foreign Relations. Available at https://www.ecfr.eu/publications/summary/libyas_global_civil_war1, accessed 22 March 2021.
- Mihr, A. 2013. Transitional justice and the quality of democracy: From democratic institution-building to reconciliation. *International Journal of Conflict and Violence* 7: 298–313.
- Nagy, R. 2008. Transitional justice as global project: Critical reflections. *Third World Quarterly* 29 (2): 275–289.
- National Transitional Council. (2012) Law No. 38 of 2012 on Some Procedures Concerning the Transitional Phase.
- Orentlicher, D.F. 1991. Settling accounts: The duty to prosecute human rights violations of a prior regime. *The Yale Law Journal* 100 (8): 2548.
- Peskin, V., and M.P. Boduszynski. 2016. The rise and fall of the ICC in Libya and the politics of international surrogate enforcer ship. *International Journal of Transitional Justice* 10 (2): 272–291.
- Posner, E. and Vermeule, A. (2003) *Transitional justice as ordinary justice*, Working paper, University of Chicago Law School.
- Reiter, A.G., T.D. Olsen, and L.A. Payne. 2013. Transitional justice and civil war: Exploring new pathways, challenging old guideposts. *Transitional Justice Review* 1 (1): 137–169.
- Security Council Resolution 1315. 2000. *Deciding to establish a special court for Sierra Leone*. <http://www.un.org/Docs/scres/2000/res1315e.pdf>, accessed 13 June.
- Rumer, E. 2019. *Russia in the middle east: Jack of all trades, master of none*. Washington, DC: Carnegie Endowment for International Peace.
- Saini, F. F and Fishman, B. (2018). How France and Italy's Rivalry Is Hurting Libya. *Foreign Affairs*, 31 October, <https://www.foreignaffairs.com/articles/france/2018-10-31/how-france-and-italys-rivalry-hurting-libya>
- Salem, P., and A. Kadlec. 2012. *Libya's troubled transition*. Washington, DC: Carnegie Endowment for International Peace.
- Sands, F. (2011) The ICC arrest warrants will make Colonel Gaddafi Dig in His Heels. *The Guardian*, 4 May, <https://www.theguardian.com/commentisfree/2011/may/04/icc-arrest-warrants-libya-gaddafi>
- Sayigh, Y. 2015. *Crumbling states: Security sector reform in Libya and Yemen*. Washington, DC: Carnegie Endowment for International Peace.



- Shaaban, A. H. (2019) What beyond transitional justice. Rai Alyoum. 14 June Available at <https://www.raialyoum.com/index.php/%D9%85%D8%A7>.
- Shariqa, E. (2013) Reconstructing Libya: Stability through national reconciliation. Doha: Brookings Doha Center.
- Showaia, K. 2014. Transitional justice in Libya: Between current challenges and future prospects. *Macquarie Law Journal* 13: 61–79.
- Sikkink, K. 2011. *The justice cascade: How human rights prosecutions are changing world politics*. New York: W.W. Norton.
- Sissons, M. and Al-Saiedi. A. (2013) Lessons of De-Baathification in Iraq. Report of international center for transitional justice.
- Smith, R. (2013) Libya's political isolation law: Confusion and charade, Available at <https://www.opendemocracy.net/en/libyas-political-isolation-law-confusion-and-charade/>.
- Snyder, J., and L. Vinjamuri. 2004. Trials and errors: Principle and pragmatism in strategies of international justice. *International Security* 28 (3): 5–44. <https://doi.org/10.1162/016228803773100066>.
- Sriram, L. 2004. *Confronting past human rights violations: Justice vs peace in times of transition*. London: Frank Cass Publishers.
- Tashani, M. (2011) Transitional justice chaos in Libya: The controversial case of Saif Al-Islam Gaddafi. *Legal Agenda*: 18–9.
- Tashani, M. 2016. Transitional justice chaos in Libya: the controversial case of Saif Al-Islam Gaddafi. *Legal Agenda* 6: 18–9.
- United Nations support mission in Libya. (2017) Report on the trial of 37 former members of the Qadhafi regime (CASE 630/2012).
- Varvelli, A. & Lovotti, C. (2019). Starting from resources: A model for conflict resolution in Libya. Italian Institute for International Political Studies. Available at <https://www.ispionline.it/en/publication/starting-resources-model-conflict-resolution-libya-23451> accessed 1 January 2021).
- Waal, De A. (2012) How to End Mass Atrocities. New York Times, 10 March, <https://www.nytimes.com/2012/03/10/opinion/how-to-end-mass-atrocities.html> (accessed 12 April 2021)
- Wehrey, F. 2014. *Libya's civil war: Reconciling politics, rebuilding security*. Washington, DC: Carnegie Endowment for International Peace.
- Wehrey, F. (2019) The conflict in Libya. Available art <https://carnegiendowment.org/2019/05/15/conflict-in-libya-pub-79160> (accessed 12 May 2021).
- Wierda, M. 2015. *Confronting Qadhafi's legacy transitional justice in libya in the libyan revolution and its aftermath*. Oxford: Oxford University Press.
- Wierda, M., and M. Boduszynski. 2014. Accounting for the past or avenging in the present? transitional justice and Libya's political isolation law. *Georgetown Journal of International Affairs* 15 (1): 112–120.
- Willcoxon, G. F. 2017. Contention, violence and stalemate in post-war Libya. *Mediterranean Politics* 22 (1): 91–114. <https://doi.org/10.1080/13629395.2016.1230950>

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