

Combatting Torture in Libya: Reality and Legislation

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After the end of the armed struggle in Libya and the declaration of liberation, those following the situation expected the new Libyan authority to take more effective measures to fight torture and other forms of ill-treatment in detention places across the country, and which fall outside the supervision and monitoring of the authorities, and to bring those responsible to justice. However this situation has been complicated because of the weakness of the state and the fragility of its apparatuses in the face of the de facto authority: armed militias that lack experience and professionalism in dealing with detainees.

From the start of the Libyan revolution, the National Transitional Council (NTC) tried to follow-up on the situation of detention and arrest in the areas it controlled, which included the eastern region, the city of Misrata and the Nafusa Mountains. The NTC established a committee on detainee affairs specialized in documenting and keeping track of detainees as well as following-up on their affairs, supervising detention centers and prisons, applying international standards in its work. Most violations occurred during the arrest and initial detention of the victim; once the detainee was placed in the detention center, they were treated reasonably well due to the follow-up of concerned committees and the visits of international institutions and organizations. However, after liberation was completed and the geographic scope expanded, the work of this committee became more difficult and complicated; the number of armed militias grew and detention centers spread like cancer, used to hold individuals captured during the armed

struggle, individuals affiliated with the former regime, or sometimes individuals who committed crimes before criminal prisons were opened. Violations of rights and torture of detainees started to glaringly increase, especially since the authorities supervising the detention centers did not possess the practical or technical expertise to perform their duties. Their main concern was to prove the crime by any means possible even through the use of torture in its various and cruel forms, such as removing fingernails, electric shocks to sensitive body parts, and other torture methods.

There are numerous reasons for this. Some go back to the culture of tyranny inherited from the former regime, while others relate to insufficient knowledge of investigation methods and obtaining information. Other reasons relate to post-liberation revenge, especially with former political prisoners supervising some detention centers and seeking revenge for the torture and insults they endured while incarcerated in the past. However, the most dangerous reason may be the absence of supervision and accountability, combined with overlapping jurisdictions and chaos.

After the interim transitional government came to power, the Ministry of Justice attempted to take control of some of the prisons from the rebels and supervise them directly through the judicial police apparatus within the ministry. Indeed, the ministry was handed prisons in Misrata, Tripoli, Tajoura and other regions. However, the real and de facto supervision remained in the hands of the previous parties, as the armed militias merely repositioned themselves to operate under the authority of the Ministry of Justice. Nonetheless, the same non-specialists persons continued to supervise and work in the prisons.

Furthermore, the judicial police apparatus concerned with and specialized in supervising the prisons is not operating at its full capacity. Despite the fact that it has more than 13,000 members, only 1,500 members of the apparatus or slightly more are actually working. The reasons for this are numerous: some members continue to receive their salaries even when they are absent from work, while others have joined armed militias and are receiving higher



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pay, leading them to leave their judicial police positions but continue to draw their salaries. Other members blame the absence of security and fear of retribution from families of prisoners or detainees.

After Mr. Salah Marghani was appointed head of the Ministry of Justice, a competent lawyer and remarkable figure in the judiciary, the legal community was optimistic especially after Marghani declared his future vision of Libya as a state of law, justice and respect for human rights, and where just trials are sought according to international standards and with respect for human rights. The ministry is currently trying to regain its supervision over prisons and detention centers and to close unofficial detention centers. It is also strenuously attempting to impose its control over prisons.



This is a brief overview of the reality in Libya. If we were to tackle the legislative aspect of this subject, we would find that the Libyan legislator overlooks crimes of torture despite the fact that Libya has ratified the Convention against Torture adopted by the UN General Assembly by Resolution 39/46 and came into force in 1987. This Convention is of great importance and represents the recognition of the world's countries of inherent rights derived from the dignity of human beings as well as their recognition that no one should be subjected to torture, inhumane or degrading treatment, or cruel punishment.

Unfortunately, Libya has not ratified the Optional Protocol to this convention, which aims to eradicate the epidemic of torture by establishing a prevention mechanism based on regular visits made by independent international and national bodies to places where individuals are denied their liberty. The objective of this system is to stop torture

and other types of cruel, inhumane or degrading treatment and punishment. Without the ratification of the Optional Protocol, the establishment of a preventive independent national mechanism becomes an elective matter for the state and not mandatory.

Furthermore, Libya's domestic legislation has neglected legal texts regarding torture and has not given them full priority in terms of providing torture victims with guarantees and necessary protection. Only three crimes are mentioned in Libyan legislation: Article 435 of the Libyan Penal Code regarding the torture of detainees. The article states that any public servant who orders the torture of accused individuals or commits tortures themselves are sentenced to a three to ten years in prison. Even though this text regards the crime of torture as a serious crime and categorises it as an offence, with a minimum sentence of three years in prison and a maximum sentence of 10 years in prison, simply prescribing severe punishment for torture does not hide the flaws in this text. The law does not define torture in a comprehensive manner as defined in Article 1 of the Convention against Torture, which defines the types of torture to include the infliction of physical or mental pain, intimidation, coercion, cruel and degrading treatment as well as discrimination or failure to report torture. The Libyan text was limited and fulfills neither the ambitions of activists fighting against torture nor those of the victims, especially since the text was issued as part of the 1953 penal code.

This has prompted the Libyan Judges Organization on the occasion of the International Day against Torture in June 2012, and on the occasion of a workshop held with the World Organization against Torture and aiming at fighting against torture and other forms of ill-treatment, to issue recommendations to the legislative authority to address local legislative problems. The most important of these recommendations are:

1. The absolute prevention and prohibition of torture in all its aspects and forms no matter what the circumstances and justifications could be.
2. The new constitution must include the principles of human rights, and international conventions and treaties against torture.
3. The coming constitution shall include a clause stating that criminal and civil proceedings resulting from torture may not be dropped due

to the passage of time.

4. The amendment of Libya's current domestic laws to be consistent with all international instruments ratified by the Libyan state.
5. Demand that Libyan authorities must join and ratify the Optional Protocol to the Convention against Torture.
6. Pressure the legislative authority to include texts criminalising acts of torture within the penal code, whether these acts concern individuals who ordered the torture, those who inflicted it, or those who failed to report it and was present during by virtue of their official role.
7. Allow civil society institutions specialised in human rights to visit detention centers and observe the circumstances of the detainees and the conditions of their detention.
8. Take necessary measures to support victims of torture.
9. Organise training and rehabilitation sessions for law enforcement officers and the parties supervising detention centers as well as employees of the legal system, forensic doctors, medical staff and all those working with detainees.

In this context, the Ministry of Justice almost a month ago, and as a reflection of the minister's nature as an advocate of human rights, presented a draft law aiming at criminalising torture, enforced disappearance and discrimination to the General National Congress (the legislative authority). The draft law is composed of nine articles and, in Article 2, imposes the sentence of five years in prison whoever inflicts or orders the infliction of physical or mental harm on a detainee. The significance of this draft law is that it prescribes punishment for both those who inflict the torture and those who order it, whereas the previous text only punishes the original perpetrator.

The punishment of those who keep silent regarding torture despite being able to stop it is also considered a major advance in local legislation and a good attempt to provide all the guarantees needed to stop impunity for those who participate, contribute in, or order acts of torture or even those who remain silent regarding the torture of an individual. The draft law also defines crimes of torture, enforced disappearance and discrimination as felony with a minimum sentence of five years. This sentence increases with the nature of the damage inflicted on the victim. For example, it increases to eight

years if the act results in significant harm and to ten years if the harm inflicted is severe. If the victim dies during the act, the perpetrator is sentenced to life sentence.

The draft law goes even further and also prohibits granting amnesty for crimes of torture no matter the reason. It also imposes in Article 6 further sanctions on anyone who is convicted for torture. These sanctions consist of denying this individual his or her civil and political rights for a period twice the length of the imposed sentence. This individual is also prohibited from occupying any civil service job for life.

Article 8 of the draft law imposes the same punishment on every political or executive official, military leader, or those acting in their place, if one of their subordinates commits the crime and it is revealed that the supervising individual did not take necessary measures to prevent the crime or to expose it, or did not take necessary measures to present the crime to authorities concerned with discipline, investigation and legal proceedings.

If passed, this draft law would be a significant milestone in the process of criminalising torture, strengthening the control and pursuit of those committing the crime, and bringing them to trial as a way to instill the principle of 'no impunity' and preserve the rights of victims. Equally noteworthy is the punishment prescribed for revolutionaries who abuse their affiliation with the revolution and use it to justify committing such crimes (Article 4).

On the other hand, there are some flaws in the draft law. It does not explicitly state that courts are not bound to discard any statement resulting from torture or coercion and to consider such a statement void under the law. It also neglects to mention that criminal and civil proceedings resulting from torture may not be dropped due to the passage of time, and does not impose punishment on inhumane, degrading or cruel treatment nor does it prohibit cruel punishments.

Following from this quick overview of the local legislative situation in Libya concerning the criminalisation of torture and its sanctioning, I believe that the principles and mechanisms of human rights should be viewed as a comprehensive whole. There is also a need to spread these principles and root them in society without focusing on one part and leaving out others. This can be done by including education about human rights in all media and awareness-raising programs in addition to including the study of human rights

in all educational and school and curriculums from primary education to university level.

In this sense, there is an opportunity for us to put pressure on the Constituent Assembly tasked with drafting the constitution and convince it, after the assembly is established, of the need to include in the coming Libyan constitution provisions requiring the state to abide by the standards of the Universal Declaration of Human Rights and international treaties ratified by the state. The international treaties must have supremacy over domestic law and national law must be adjusted and brought into conformity with international human rights law, especially since the general atmosphere in Libya may accept such legislative developments as a result of the environment of freedom and the human rights demands of the February Revolution. However, the situation requires more than conformity with previous international treaties; it also requires seeking to join and ratify other international treaties that increase freedom and provide guarantees to the rights of individuals, minorities, women and children. Yet these steps may be premature due to the transitional nature of the authorities ruling Libya (the General National Congress) and the heavy tasks it has. Indeed, it is almost impossible to consider such developments now because the public is focused on demanding the establishment of the Constituent Assembly and drafting the constitution.

Finally, we must not forget the importance for the Libyan State to recognise the jurisdiction of the Committee against Torture according to Article 22 of the Convention against Torture in relation to receiving individual complaints, as well as the need to cooperate with special procedures of the UN Human Rights Council, especially with the Special Rapporteur against Torture. Furthermore, we must not forget the need to impose sanctions that correspond to the gravity of the crime of torture, all the while working on including the criminalisation of "crimes against humanity" in the penal code. It is also important to ratify the statute of the International Criminal Court. Finally, the State must seek to provide the appropriate mechanisms of offering torture victims compensation, as well as psychological, social, and health rehabilitation.