

The Interaction Between Transitional Justice and Constitution-Making in a Conflict Setting: Reconciliation in Libya

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ABSTRACT

When studying constitution-making and transitional justice and assessing their success, scholars have generally separated these two processes from each other and analyzed them individually. I believe that this obscures how complementary constitution-making and transitional justice processes are: they unfold in the same context (fragile, and conflict-affected), are part of the same transitional process, and share similar agendas. If their synergy is optimized, they may work in tandem towards conflict resolution and reconciliation. At the same time, their interconnection also means that negative developments in one are likely to have negative consequences on the other. This article explores the impact of constitution-making and transitional justice on reconciliation in Libya by looking at the interaction between the two processes amidst an ongoing civil war and in the absence of stable and unified governmental structures. Upon demonstrating how poor, negative developments in both the constitution-making and transitional justice processes spiraled and aggravated divisions in an unstable and divided Libya, this article ponders whether holding back on transitional justice measures and constitution-making may, in the midst of a civil war, be more appropriate than adopting measures that fuel conflict.

Keywords: *Constitution-making, transitional justice, context, reconciliation, interaction, synergy, legitimacy, divisions.*

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INTRODUCTION

Years after Muammar Gaddafi was overthrown, many Libyans have continued to be the victims of widespread, systematic, and gross human rights violations, and to this day, still demand justice and the establishment of the rule of law. After suffering under Gaddafi's rule, Libyans came together in an uprising in February 2011 and liberated Libya. This, however, came at a cost: many were victims of abuses during the revolution and at the hands of militias over the past 12 years. The sense of national unity that was felt during the uprising revealed itself to be fragile and temporary. Despite successive attempts at building peace post-2011, tensions continued to grow among the population and in the political arena, up to the point that Libya's government split into two opposing parliaments and associated governments, in 2014: the General National Congress (GNC) and the House of Representatives (HoR). Open-armed confrontation took place between the two entities and their affiliated armed forces until a ceasefire was reached in 2015, when representatives of both entities and of civil society met in Skhirat, Morocco, to engage in peace talks. The talks resulted in the 2015 Libyan Political Agreement (LPA), which set a roadmap for peacebuilding and created the Presidency Council, tasked with building a united Libyan "Government of National Accord (GNA)."¹ Due to deep regional, social, and political divisions, the newly created GNA proved unable to consolidate its authority and implement the LPA. In parallel, the HoR struggled to approve a final constitution and failed to submit it to a popular referendum, effectively freezing the constitution-making process.² Libya's authorities were then divided into three governments, "none of which [was] able to govern."³ Fighting resumed shortly after the LPA was signed, along with human rights violations. In November 2020, when Libya entered the Libyan Political Dialogue Forum (LPDF), hopes were high for the then 9 year-long, on-and-off civil war to come to an end. In March 2021, the Government of National Unity (GNU) was created, again meant to unify Libya's governmental forces and attempt to build national cohesion. However, a year later, Libya was "once again stuck in a standoff between two rival executives" with "conflicting roadmaps for finding a way out of the crisis."⁴ In this tense, divided climate and apparent political deadlock, few measures are being taken at the national level to move forward with the peacebuilding process, particularly concerning constitution-making (CM) and transitional justice (TJ), leaving Libyans with unresolved grievances, a deteriorating human rights situation,⁵ and a divided state.

This article looks into the interaction between Libya's CM and TJ processes and its impact on reconciliation, amidst ongoing conflict and institutional instability. CM is a forward-looking process at the core of political reconstructions, whereby a society substantively revises its constitution or drafts a new one to establish a new structure for a stable state,

¹ [Towards National Reconciliation in Libya](#), IRF Project Report (New York: UN Peacebuilding Support Office, 2016), 3.

² Nedra Cherif, "[Libya's Constitution: between Conflict and Compromise](#)," Middle East Directions 2 (Fiesole: Robert Schuman Centre for Advanced Studies, European University Institute, 2021), 1.

³ Richard Hall, "[Libya now has three governments, none of which can actually govern](#)," *The World*, March 31, 2016.

⁴ [Reuniting Libya, Divided Once More](#), Watch List 2022 – Spring Update (Brussels: Crisis Group, 2022).

⁵ [Reuniting Libya](#).

based on good governance and the rule of law, “[reflecting] fears from the past to be repeated.”⁶ In Libya, which existed without a constitution under Gaddafi, CM has been paralyzed for the past five years, as the final draft constitution developed by the Constitution Drafting Assembly (CDA) in 2017 was never adopted. In the past few years, and following the momentum created by the LPDF, CM has returned to the center of politicians’ and scholars’ attention.⁷ Another element of the peacebuilding process that has been pursued in Libya post-2011 is TJ. According to Kofi Annan, UN Secretary-General in 2004, TJ is a range of “processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁸ TJ is primarily a backward-looking process addressing and aimed at making up for wrongs committed in the past through truth, accountability, reparation and non-recurrence. In Libya, TJ has taken different forms over the years and has generally been criticized by scholars⁹ as seemingly detrimental to national reconciliation. By reconciliation, I mean the “[management of] individual and collective identities to remove the negation of the other as a central component of one’s own identity,” following Kelman’s definition.¹⁰

Libya today remains divided on three levels: the institutional, the socio-political, and the interpersonal. This article analyzes the impact of TJ and CM, as a tandem, on national reconciliation in Libya. To date, only a few scholars have studied the interaction between TJ and CM, in general. Johnson argues that TJ must be prioritized in a reconciliation process, as it is “critical to ensuring broad-based societal support for the emerging constitutional system.”¹¹ On the other hand, Hamad, amongst others, has argued that in order to optimize TJ, it should be implemented in a comprehensive way, taking into account obstacles to justice such as, amongst others, weak institutional and constitutional structures.¹² Overall, however, studies on CM and TJ have focused on one process at a time, obscuring the fact that they very much interact and shape one another.

The interaction between TJ and CM in Libya has also been overlooked or only briefly looked at.¹³ This article explores the level of synergy between these two processes in Libya and questions the timeliness of their interaction

⁶ Claude Klein and András Sajó, “Constitution-Making: Process and Substance,” *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012).

⁷ See for instance Darin E.W. Johnson, “Conflict Constitution-Making in Libya and Yemen,” *University of Pennsylvania Journal of International Law* 39, no. 2 (2018): 293-354; Zaid Al-Ali, *Libya’s Final Draft Constitution: A Contextual Analysis* (Stockholm: International IDEA, 2020); Simona Ross, “Lost in Transition: Constitutional Legitimacy in Libya,” *JCL MENA* 2 (2022): 4-27.

⁸ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (New York: United Nations, 2004), 8.

⁹ Roman David and Houda Mzioudet, *Personnel Change or Personal Change? Rethinking Libya’s Political Isolation Law*, Paper Series 4 (Doha: Brookings Doha Center, 2014); Mahmoud Hamad, “A Law of Diminishing Returns: Transitional Justice in Post-Revolutionary Libya,” *Arab Centre for Research and Policy Studies* 3, no. 1 (2020): 23-37.

¹⁰ Herbert Kelman, “Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups,” *Landscapes of Violence* 1, no. 4 (2001).

¹¹ Johnson, “Conflict Constitution-Making,” 350.

¹² Hamad, “A Law of Diminishing Returns,” 30.

¹³ With the exception of Pietro Sullo, “Transitional Justice in the Libyan Constitutional Transition,” *Diritti umani e diritto internazionale* 3 (2020): 709-731.

in a context of ongoing national conflict. Neither process has been considered successful in reconciling Libyans so far. Could one make sense of these failures by drawing a link between them and analyzing the impact they have had on one another? How did the context in which they have unfolded impact their common trajectory? To what extent could their interaction positively impact national reconciliation in a context where there is ongoing conflict, little semblance of reconciliation and several competing governments in Libya?

In this article, I argue that, in a context of deep divisions and instability, CM and TJ were mutually harnessed by self-interested actors wishing to further their power in post-Gaddafi Libya, which consequentially played against justice and reconciliation. To do so, after setting out a brief theoretical framework (I), I analyze the different ways in which TJ and CM have interacted and impacted one another in Libya (II) and discuss how these interactions have impacted national reconciliation in the country (III). I then weigh this analysis against the context in which CM and TJ have been implemented, and question their timeliness in a conflict-ridden, multifaceted environment (IV). I conclude by arguing that CM and TJ measures, if better adapted to the current Libyan setting, may fare better in fostering reconciliation.

I. BASES FOR AN ANALYSIS: THEORETICAL FRAMEWORK AND CONTEXT

Within fragile and conflict affected states (FCAS), social cohesion, that is, convergence across groups, tends to be weak. According to Alexandre et al., social cohesion is indeed often weakened by perceptions of injustice (unfair treatment in the past or present).¹⁴ These create ‘us-vs-them’ mentalities, which harden identity boundaries, prompting groups to coalesce inward, in turn making it difficult for certain groups to trust each other and/or the state.¹⁵ In turn, when groups “see their interests mesh with those of others, they become more connected to other groups and ultimately have more incentive to collaborate.”¹⁶ This convergence across groups needs to last in the long-term: short-term cohesion like that observed during revolutions is unlikely to last.¹⁷ This suggests that, in FCAS, conflict resolution should include processes aimed at “addressing the factors that have fed conflict in the past,”¹⁸ at providing justice and re-establishing the rule of law and a culture of human rights. TJ and CM have both been identified as such processes, capable of fostering long-term trust, within society and in good governance.¹⁹

In this article, both TJ and CM are understood as located within a broader process of conflict transformation, rather than as isolated practical legal endeavors. They are part of a political transition process “which [attempts] to (re)construct

¹⁴ Sullo, “Transitional Justice,” 67.

¹⁵ Sullo, 4.

¹⁶ Marc Alexandre et. al., *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations*, New Frontiers of Social Policy 74272 (Washington DC: World Bank, 2013).

¹⁷ Alexandre et. al., *Societal Dynamics and Fragility*, 4.

¹⁸ Lakhdar Brahimi, “Foreword”, *Constitution-Making and Reform: Options for the Process*, eds., Michele Brandt, Jill Cottrell, Yash Ghai, and Anthony Regan (Interpeace, 2011).

¹⁹ See for instance Brandt et. al., *Constitution-Making and Reform*, 2.

the state to reconfigure how power is held and exercised so as to include previously excluded actors and groups²⁰ and foster national reconciliation. In this context, both TJ and CM should be thought of as deeply political processes; their success is thus contextual. Locating CM within a specific political context allows for an understanding of how similar parameters in the design of CM processes may lead to different outcomes in each country they are implemented in.²¹ The directions CM processes take depend on “contextual nuances of politics”²²: power struggles, institutional relationships, external actors’ actions, and international norms. This holds too for TJ. Indeed, CM and TJ do not take place in a vacuum: they may be politicized, or, as Hart argues in reference to CM, they can be understood as “a forum for negotiation or a continuing conversation amid conflict and division.”²³ TJ and CM are part of the same context, and in a way, they are each other’s context: they are, in other words, co-dependent. This has been theorized by a handful of authors, including Halmai, Skapska, Cats-Baril and Teitel among others.²⁴ According to Cats-Baril, “transitional justice and constitution-building may provide the legal and political underpinnings for one another. ... [Each] can provide protection and momentum for the other but, again, this is more likely to occur if these potentialities are understood and planned for.”²⁵ As such, depending on who leads CM and TJ and on how coordinated they are, they can either reinforce or undermine one another and, ultimately, allow for or imperil long-term institutional reforms and reconciliation. This will largely depend on the context in which they are implemented.

According to Calhoun, who developed a “democratic transitions typology,” the way a newborn state deals with its past, and therefore how CM and TJ unfold and interact, depends on how a transition happens and on the distribution of power during said transition.²⁶ Following this typology, Libya can be said to have entered a “rupture transition” in 2011. Gaddafi’s authoritarian regime was suddenly and violently challenged to the point it was not only weakened but it completely collapsed, allowing the opposition to take complete power over the state. In rupture transitions, as the old regime does not negotiate or keep a degree of control over the transition, there is an opportunity for complete reconstruction of the state based on accountability and transformation of the type of governance.²⁷ However, the clear victory of the opposition opens the door to potential abuse of power: interim authorities may for instance implement

²⁰ Amanda Cats-Baril, *Moving Beyond Transitions to Transformation: Interactions between Transitional Justice and Constitution-Building*, International IDEA Policy Paper 22 (Stockholm: International IDEA, 2019), 18.

²¹ See for instance Amal Jamal and Anna Kensicki, “A Theory of Critical Junctures for Democratization: A Comparative Examination of Constitution-Making in Egypt and Tunisia,” *The Law & Ethics of Human Rights* 10, no. 1 (2016): 186-187.

²² Jamal and Kensicki, “A Theory of Critical Junctures,” 188.

²³ Vivien Hart, “Constitution-making and the Transformation of Conflict,” *Peace Change* 26, no. 2 (2011): 153 (2001).

²⁴ Gábor Halmai, “Transitional Justice, Transitional Constitutionalism and Constitutional Culture,” *Comparative Constitutional Theory*, eds. Gary Jacobsohn and Miguel Schor (Cheltenham: Edward Elgar Publishing, 2017), 372-392; Gábor Halmai, “[The Role of Constitutionalism in Transitional Justice Processes in Central Europe](#)” (2019); Cats-Baril, *Moving Beyond Transitions*, 20; Grazyna Skapska, “Institutional Innovations and Moral Foundations of Constitutionalism in East Central Europe: Coping with the Past Human Rights Violations,” *Constitutionalism and Political Reconstruction*, ed. Saïd Amir Arjomand (Leiden: Brill Academic Pub, 2007), 237-259; Ruti G. Teitel, *Globalizing Transitional Justice: Contemporary Essays* (Oxford: Oxford University Press, 2014), 181-208.

²⁵ Cats-Baril, *Moving Beyond Transitions*, 12.

²⁶ Halmai, *The Role of Constitutionalism in Transitional Justice Processes*, 4.

²⁷ Halmai, 3.

revenge and selective justice in view of shielding the new socio-political elite. CM and TJ in deeply divided societies experiencing a rupture transition may therefore prove challenging and might aggravate polarization instead of reducing it.

Having said this, the context in which Libya found itself immediately after the revolution and over the past 12 years is more complex than that of a rupture transition as experienced by fairly unitary states, such as Tunisia for example. Indeed, Libya is deeply divided: amongst geographical lines (East, West, South), within society (tribes), and across ideological lines (e.g: federalists, Islamists). These divides quickly materialized post-revolution, when two, nay three opposing governments formed (GNC, HoR, GNA), militias refused to disarm, and minorities boycotted national politics. Divides amplified along the years and have played against national unity. Today, Libya is still divided, down to its institutions, and can barely be said to operate as a state (at least not a unitary one). In this context, how have CM and TJ, in interaction with one another, concretely impacted socio-political and interpersonal reconciliation? Developments in TJ can create ideal conditions for the success of a CM process, and the constitutionalization of TJ measures can reinforce TJ goals. Have developments in TJ and CM in Libya facilitated one another's work and fostered trust between Libyans? Or, instead, have the dynamics in which TJ and CM unfolded negatively shaped these two processes, which have, in turn, through their interactions, reinforced tensions? Given the current political context in Libya, can one realistically expect a level of coordination between TJ and CM allowing for widespread reconciliation to be achieved?

II. INTERACTIONS BETWEEN CONSTITUTION-MAKING AND TRANSITIONAL JUSTICE: AN ANALYSIS

In this section, I analyze the degree of synergy between CM and TJ in Libya. I demonstrate that, in a conflictual setting (a country ridden with divisions and instabilities), CM and TJ's potential positive impact on one another was impeded by poor developments in both processes, which were the product of divisions and conflict-politics.

A. BEAUTIFUL TRANSFORMATION, WHERE ARE YOU?

Following the overthrowing of Gaddafi, Libya found itself in “an environment where there was no political settlement, very little public trust, the absence of any form of constitutional democracy on which to build, and ongoing violent conflict.”²⁸ As Libya entered a rupture transition, the National Transitional Council (NTC), a self-appointed interim government formed in Eastern Libya during the revolution, had the opportunity to rectify past mistakes and embark on a path to democracy and good governance, strengthening the rule of law to reassert the credibility of the state.²⁹ One way for a state to transform and become democratic, as well as be perceived as such and legitimize itself,

²⁸ Charmaine Rodrigues, “Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-cooker of Transitions in Conflict-affected States?,” *Global Constitutionalism* 6, no. 1 (2017): 33, 58.

²⁹ Karim Mezran and Duncan Pickard, *Negotiating Libya's Constitution*, Issue Brief (Washington, DC: Atlantic Council, 2014), 1.

is to adopt constitutional documents informed by, acknowledging, and providing responses to its undemocratic past. In a way, as Sullo contends, a post-conflict constitution is an “autobiography of the state,” which “may keep alive the memory of a violent past while providing a bridge to overcome the legacy of the violence experienced.”³⁰ Some have thus argued that CM can only be transformative and bring about stability and good governance if there exists a political will to deal with an undemocratic past. This may be measured in governments’ initiatives to constitutionalize TJ measures that contribute to non-recurrence: “one way of building a new order is to draw a boundary between the old and the new, and to declare various aspects of the old regime illegitimate, and of the new regime legitimate.”³¹ Post-conflict justice shapes the state and becomes a “precondition for a constitutional project” based on a “normative future”³² and a solid “human rights culture.”³³ Indeed, as Teitel argues, “dealing with a State’s past grievances reflects on its democratic potential for the future.”³⁴ In Libya, a state with no constitution under Gaddafi’s rule, the overthrowing of the authoritarian leader’s regime offered an opportunity to create a constitutional framework. According to the International Commission of Jurists (ICJ), by “using clear and unambiguous language and providing for strong protections for [human rights and freedoms],” a new Libyan Constitution had “the potential to contribute significantly to a fair and just accountability process for past violations”³⁵ and legitimize the newborn state. Including TJ instruments in Libya’s conflict resolution process would indeed be “an appropriate strategy to reach political reconciliation and build public confidence in the new political regimes.”³⁶ In a context of rupture transition and ongoing conflict where building trust in a new government is challenging, have Libya’s interim governments been able to implement a strong constitutional framework for dealing with the past, and eschew Libya’s past culture of human rights violations?

In August 2011, the NTC adopted a Constitutional Declaration (CD), which stood as the interim constitutional document ruling the transition until a permanent constitution would be drafted by a special body: the CDA.³⁷ The CD begins by looking back at the revolution of the February 17, 2011, and recognizes that wrongs have been committed in the past.³⁸ It notably calls for “stability, tranquility and justice” and the creation of a society where “injustice, tyranny, despotism, exploitation or dictatorship” have no place.³⁹ The document thus seemingly advocates for the establishment of a system based on values and principles that were not upheld in the past.

³⁰ Sullo, “Transitional Justice,” 729.

³¹ Skapska, “Institutional Innovations and Moral Foundations of Constitutionalism,” 243.

³² Teitel, *Globalizing Transitional Justice*, 69.

³³ Winluck Wahiu, “[Building a Culture of Human Rights](#),” *A Practical Guide to Constitution Building*, eds. Markus Böckenförde, Nora Hedling, and Winluck Wahiu (Stockholm: International IDEA, 2011), 11.

³⁴ Teitel, *Globalizing Transitional Justice*, 70.

³⁵ [Impunity No More: A Roadmap to Strengthening Transitional Justice in Libya](#) (Geneva: ICJ, 2020), 78.

³⁶ Moataz El Fegier, [Truth and Reconciliation? Transitional Justice in Egypt, Libya and Tunisia](#), Policy Brief 177 (Madrid: FRIDE, 2014), 1.

³⁷ Mezran and Pickard, *Negotiating Libya’s Constitution*, 2.

³⁸ Constitutional Declaration of Libya, August 3, 2011, Preamble.

³⁹ Constitutional Declaration of Libya, Preamble.

However, the remainder of the CD fails to provide a comprehensive framework for dealing with the past. Firstly, whilst the preamble refers to the Gaddafi era and announces that the new government condemns the actions of the authoritarian leader and his regime, it at the same time fails to mention the crimes committed by revolutionaries: the past it is willing to address seems to only involve a certain period (this will be analyzed further below). Moreover, the term “transitional justice” was absent from the CD. Although some articles mention citizens’ rights and judicial guarantees, no specific mentions are made of past abuses, of potential reparations, accountability, or extended guarantees of non-recurrence. Additionally, articles on human rights are succinct and vague (see Articles 6, 7, 8, 11),⁴⁰ leaving room for potential manipulation. Human rights in the CD are either only briefly mentioned or limited by ordinary legislation. Limitation clauses are not in themselves rare; they exist in almost all constitutions,⁴¹ but they must both “(i) [allow] specific limitations on rights; and (ii) [place] limits on such limitations, thereby protecting the right against excessive restrictions.”⁴² The CD, however, limits certain rights quite loosely (e.g.: Article 15 provides for freedom of association and the right to form political parties, unless they are “in conflict with *public order* or *public morals* or *threatening in other ways the state or the integrity of the national territory*”⁴³), which constitutes an abuse of limitation, in the words of Ahmed and Bulmer.⁴⁴ Finally, the Libyan CD fails to declare certain rights as non-derogable, which leaves room for governments to potentially violate them in the future.

Issues with the CD were therefore multiple. However, in the context in which it was created, it stood little chances to be consensual and legitimize a new government. In fact, from its inception, the document was questioned by many: it was drafted and adopted without proper consultation of the population, whilst conflict was raging, under pressure from diverse groups, divided and motivated by self-interest (e.g.: federalists, Islamists), by a self-appointed government whose leaders mainly came from the East of Libya, and in a territorially divided state. As such, despite the argument that “interim constitutions ... can foster legitimacy [and] can have a mutually reinforcing relationship with transitional justice mechanisms,”⁴⁵ one could hardly expect, in this context, the CD to fulfil these goals.

Foreign states (notably during Libya’s 2015 UNHRC Universal Periodic Review (UPR)) did call on Libyan authorities to revise their constitutional framework for dealing with the past and incorporate constitutional provisions for human rights and guarantees of non-recurrence. Nevertheless, subsequent interim constitutional documents were just as limited, due to persisting instabilities in Libya. Significant improvements in the provisions on TJ did appear in the 2014 Constitutional Proposals (CP), drafted by the CDA, with a promising Chapter 5 dedicated to transitional measures, addressing in rather comprehensive ways all four pillars of TJ.

⁴⁰ Constitutional Declaration of Libya, Articles 6, 7, 8, and 11.

⁴¹ Dawood Ahmed and Elliot Bulmer, *Limitation Clauses*, Constitution-Building Primer 11 (Stockholm: International IDEA, 2014), 5.

⁴² Ahmed and Bulmer, *Limitation Clauses*, 2.

⁴³ Constitutional Declaration of Libya, Article 15. Emphasis added.

⁴⁴ Ahmed and Bulmer, *Limitation Clauses*, 7.

⁴⁵ Caitlin Goss, “Interim Constitutions and the Invisible Constitution,” eds. Rosalind Dixon and Adrienne Stone, *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018), 167.

Chapter 6 of the CP further provided a detailed list of guarantees of non-recurrence.⁴⁶ In 2015, UPR member-states recommended Libya to continue in this direction and end impunity through drawing up an agenda for TJ,⁴⁷ strengthening accountability mechanisms,⁴⁸ investigating crimes and bringing perpetrators to justice,⁴⁹ revealing the fate of those forcibly disappeared,⁵⁰ providing redress and reparations to victims (of all crimes, including torture and sexual and gender-based violence), as well as expanding on its human rights framework and aligning with international standards of international human rights and humanitarian law.⁵¹ Nevertheless, Chapter 5 disappeared from the 2017 final draft constitution, as well as all guarantees of non-recurrence and rights guaranteed in the CP, such as the rights to knowledge or compensation. These were replaced by an expeditious Article 180 on Transitional Provisions which merely states that “the state shall apply TJ measures,”⁵² contains succinct mentions of truth, accountability, and compensation, and delegates the implementation of TJ and a reconciliation body to ordinary legislation.

The conditions in which the CP were drafted were, again, far from conducive to the crafting of consensual constitutional material, aligned with international standards. Indeed, the GNC, which replaced the NTC, progressively lost legitimacy. After the GNC refused to step down following the election of the HoR (which it oversaw), the creation of a second government led by the HoR further divided Libya along geographical and ideological lines. In this context, the CDA was to operate as a non-political body of independent figures, but ended up reflecting tribal and regional affiliations, which contributed to undermine its own legitimacy too.⁵³

Libyan interim governments have thus failed to strengthen Libya’s constitutional framework for TJ in constitutional drafts, while disregarding the recommendations they received on the international stage. In the conditions in which they had to operate, however, this does not come as a complete surprise. As I demonstrate in Section II, this had negative consequences on institutional reconciliation.

B. A SPOKE IN THE FOUR WHEELS OF TRANSITIONAL JUSTICE

These developments also had rippling effects on TJ. According to ICJ, “the Constitution could ... play a key role in the TJ process by enshrining a duty on the state to implement appropriate measures that are in line with international standards on the right to truth, justice, reparations and guarantees of non-recurrence.”⁵⁴ In Libya,

⁴⁶ See CDA 2014 Committee Proposals on constitution chapters, Chapter 5: Transitional Measures Roadmap; Chapter 6: Rights and Liberties, translation provided by DCAF Libya.

⁴⁷ See UN Human Rights Council, Rep. of the Working Group on the UPR: Libya on its Thirtieth Session, UN Doc. A/HRC/30/16, §137.169 [Netherlands] (2015).

⁴⁸ E.g., *id.* §137.154 [Germany].

⁴⁹ E.g., *id.* §137.160 [Czech Republic]; §137.125 [Latvia]; §137.126 [Ireland]; §137.151 [UK], §137.159 [Estonia]; §137.71 [Niger].

⁵⁰ E.g., *id.* §137.120 [Lebanon]; §137.17 [Chile].

⁵¹ E.g., *id.* §137.68-72 or §137.165-169.

⁵² Proposal of a Consolidated Draft Constitution (Final Draft), 2017, Article 180 (Libya).

⁵³ Cherif, “Libya’s Constitution,” 2.

⁵⁴ *Impunity No More*.

in contrast, the limited constitutionalization of TJ stood as an obstacle to the implementation of a fair and effective TJ process: it rather gave way to a weak TJ, prone to being manipulated.

1. Weakened transitional justice

Firstly, constitutionalizing TJ could have removed barriers to the implementation of accountability in Libya, as a first step towards ending impunity. As Cats-Baril demonstrates, for instance, the 2014 Tunisian Constitution removed legal obstacles to pursuing justice post-revolution. Article 148.9 reads that “the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of *res judicata* and the prescription of a crime or a punishment are considered inadmissible.”⁵⁵ This article was intended to make it possible for Tunisians to seek accountability for crimes and violations they suffered in the past. In contrast, Libyan interim constitutional documents make no mention of either previous amnesties or potential future amnesties and how the retroactivity of laws would be justified to deal with crimes perpetrated in the past.

The limited constitutionalization of TJ also affected truth-seeking efforts in Libya. As Cats-Baril argues, “[c]onstitution-building can further the realization of the right to truth in two ways: (a) it can provide constitutional status and protection to the independence of truth-seeking bodies, including by establishing those bodies and/or expanding the mandate of existing bodies; and (b) it can give recognition to a narrative of the past.”⁵⁶ Truth-seeking bodies work towards both the truth and the non-recurrence objectives of TJ and facilitate reparations and accountability by uncovering information about the past. They are believed to be an “appropriate strategy to reach political reconciliation.”⁵⁷ Similarly to Cats-Baril, Waldorf argues that “[w]ithout being tied to a broader constitutional structure, truth commissions are vulnerable to institutional drift, where they remain formally in place but their impact lessens — intentionally or unintentionally — over time.”⁵⁸ Some countries also constitutionalized TJ mechanisms oriented specifically towards non-recurrence, such as permanent human rights commissions (e.g. South African Human Rights Commission),⁵⁹ giving them legitimacy, protection and indisputable power.

In contrast, Libya’s CD makes no mention to either commission. Instead, ordinary laws No. 5/2011 and No. 29/2013 (TJL) respectively established a National Council for Civil Liberties and Human Rights (NCCLHR)⁶⁰ and a Fact-Finding and Reconciliation Commission (FFRC).⁶¹ There is no publicly available information on the internet about the NCCLHR reports, nor any mention of the council in the media, suggesting it is either no longer active or not deemed relevant.

⁵⁵ Cats-Baril, *Moving Beyond Transitions*, 78.

⁵⁶ Cats-Baril, 23.

⁵⁷ El Fegjery, *Truth and Reconciliation?*, 1.

⁵⁸ Cats-Baril, *Moving Beyond Transitions*, 23.

⁵⁹ Constitution of South Africa (1996), Article 184.

⁶⁰ Submitted to the UPR of Libya, State of Libya, Twenty-Second Session, 1 (2015). National Council for Civil Liberties and Human Rights.

⁶¹ Law No. 29 of 2013 (Libyan Transitional Justice Law), unofficial translation provided by UNSMIL, Chap. 2.

The FFRC was meant to be appointed directly by the GNC to investigate crimes perpetrated during the Gaddafi era and beyond,⁶² but the TJL gave no deadline for the setting up of the commission, which was stillborn. The LPA addressed this issue, stating that members of the board of the commission should be appointed within 90 days of the signing of the agreement. This, however, never happened. As such, the failure to enshrine these two institutions in constitutional documents greatly affected their functioning; it did not provide a strong enough framework for the implementation of these entities' mandates. In times of conflict and instabilities, obstacles to their work became more numerous and they were deprioritized. In subsequent draft constitutions, the CDA included articles on setting the mandate for a Human Rights National Council. However, these provisions were vague, failed to align with international law,⁶³ and delegated the creation and mandate of these bodies to ordinary legislation, setting them once again to be weaker, potentially manipulated, or even never created.

These shortcomings reverberated on reparation, another pillar of TJ. Uncovering the truth about the past can indeed prompt public apologies from new governments, as symbolic reparation. Based on their findings, truth commissions may also recommend reparations programs to right the wrongs of the past.⁶⁴ In Libya, CM generally failed to support reparation: reparations were not mentioned in the CD, and only twice, briefly, in the final draft (Article 64 on Deprivation of Freedom, and Article 180 on TJ). Thereby, interim governments did not offer constitutional recognition and symbolic reparation to victims. As a result, most victims of the previous regime, of the Revolution, and of the past 12 years of conflict are still awaiting any kind of remedy for their sufferings. Reparations programs in Libya have taken the form of various ordinary laws whose interaction has not been regulated, and which have overall been insufficient⁶⁵ and discriminatory, have lacked transparency and public participation,⁶⁶ and have focused excessively on financial reparations.⁶⁷

2. Selective transitional justice

The above analysis indicates that, if not anchored in a constitution, or in the absence of a profound “constitutional culture,” TJ is likely to fail:⁶⁸ it is left vulnerable and susceptible to suffer the ebbs and flows of conflict and politics.

⁶² Id. at Chap. 2, art. 8, §4.

⁶³ Such as, for instance, with the Principles Relating to the Status of National Institutions (Paris Principles), G.A. Res. 48/134 (Dec. 20, 1993).

⁶⁴ *Transitional Justice in Post-conflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children* (New York: ICTJ) 72.

⁶⁵ *Impunity No More*, 24.

⁶⁶ Mohamed Elmessiry and Sonya Merkova, *'Justice is the Only Way Forward': Perceptions of Justice in Libya Ten Years On* (London: Lawyers for Justice in Libya, 2022).

⁶⁷ According to ICJ, *Impunity No More*, 25, “Law No. 10 of 2012 provided for the disbursement of a sum of money to each Libyan family, or to unmarried family members, on the first anniversary of the 17 February Revolution. Law No. 50 of 2012 provided a compensation scheme for political opponents detained under the Gadhafi regime. Law No. 4 of 2013 provided for the disbursement of a monthly allowance to persons with permanent disability injured (i) while fighting during the 2011 armed conflict against the Gadhafi regime or (ii) as civilian victims of the regime’s attacks. Law No. 31 of 2013 provided benefits to families of persons killed in the Abu Salim prison massacre. Law No. 1 of 2014 provided for a monthly allowance for families of persons that died or went missing in connection to the 17 February Revolution and the ensuing conflict.”

⁶⁸ Halmai, “Transitional Justice,” 24.

Indeed, in Libya's context of deep divisions, different groups seeking to advance their self-interests seized this opportunity and applied pressure on interim governments to implement revenge justice. In fact, constitutionalizing TJ may indeed be a double-edged sword: in certain contexts, it may be used to offer constitutional protection and legitimacy to TJ instruments geared towards selective justice as lawfare, which is what happened in Libya.

Amid continued bloodshed, TJ in Libya had to deal with "ambiguous lines of responsibility, where victims have sometimes also become perpetrators,"⁶⁹ and figure out how martyrs and ex-Gaddafi sympathizers should be held accountable. In interim constitutional documents, this dilemma was ignored, and the NTC instead embedded an approach to justice that created a strict separation between "martyrs" and the former regime. The CD indeed pledges its "faithfulness to the martyrs of this blessed revolution who sacrificed their lives to enjoy freedom, live with dignity on the nation's soil and retrieve all the rights looted by Gaddafi and his collapsed regime."⁷⁰ Such a sharp distinction between alleged victims and perpetrators does not reflect the situation in Libya, as the line separating victims from perpetrators is more porous: human rights violations have been perpetrated by all sides alike, during, but also after the revolution.⁷¹ Furthermore, some within Gaddafi's regime rebelled against the authoritarian leader during the uprising. This type of narrative has been observed before, such as in the amended version of the Rwandan Constitution.⁷² According to Cats-Baril, post-conflict constitutions may thus "politically manipulate the TJ discourse," which may deepen divisions rather than open up the space for long-term reconciliation and conflict resolution.⁷³ In Libya, this victors' narrative facilitated *selective* TJ, which benefitted revolutionaries and specific groups, such as Islamists.

Two TJ laws enacted in 2012 (Law No. 38/2012 and Law No. 17/2012) were built on this politically fabricated perpetrator/victim, former regime/revolutionaries dichotomy. After these two laws generated a backlash, the GNC issued the TJL, which has a broader temporary frame (1969 until the end of the transitional period). The first chapter of the TJL states that it applies to crimes committed during the revolution, notably "1. Positions and acts that led to a breach in the social fabric; 2. Acts which were necessary to reinforce the revolution, and which were accompanied by some behavior that did not adhere to its principles." However, the wording of the TJL is vague and suggests it still aims at providing justice for crimes committed under the former regime, or "under the guise of the state," "during the former era."⁷⁴ For example, the TJL states that Libya should "[i]ssue laws and constitutional texts revealing the just character of the 17 February Revolution and the injustice of the former regime" (Article 5).⁷⁵ However, there are no explicit references to crimes committed by others.

⁶⁹ Sullo, "Transitional Justice," 176.

⁷⁰ Constitutional Declaration of Libya, Preamble.

⁷¹ See Rep. Independent Fact-Finding Mission on Libya, Human Rights Council Forty-Ninth session, UN Doc. A/HRC/49/4 (2022).

⁷² Cats-Baril, *Moving Beyond Transitions*, 26; Constitution of Rwanda (2003, rev. 2015), Preamble.

⁷³ Cats-Baril, 65.

⁷⁴ See Law No. 29, for example Chap. 1, art. 1, art. 4; Chap. 4, art. 26.

⁷⁵ Id. Chap. 1, art. 5.

Law No. 6/2015⁷⁶ reinforced this victors' justice system, granting "general amnesty to all Libyans for crimes committed from 15 February 2011 until 7 September 2015."⁷⁷ It opened the door to abuses and blanket amnesties, as Saif Al-Islam Gaddafi's case demonstrated.⁷⁸ Although amnesty provisions may be "explicitly tied to a greater interest in national unity and reconciliation" (e.g. South Africa's 1993 interim constitution),⁷⁹ amnesties in Libya have been associated with the shielding from accountability of some human rights abusers. The way in which the CD was written allowed for such an amnesty law to exist. Law No.13/2013, named the Political Isolation Law (PIL), is another "victors' justice law," adopted by the parliament under pressure from militias.⁸⁰ It enabled the vetting of ex-members of Gaddafi's administration from public administration for 10 years. The PIL received ad hoc constitutional legitimacy through constitutional amendment No. 5/2013, which modified Article 6 (equality before the law) of the CD and specified that "[t]he isolation of some persons and banning ... from sovereign offices and leadership posts in the state's higher departments for a temporary period of time pursuant to a law issued to such effect, and which does not prejudice the right of the persons concerned to appeal, shall not be deemed a violation of the provisions of this declaration."⁸¹ The screening of public administration post-conflict and exclusion of perpetrators of serious human rights violations from key roles within a new regime is often necessary and can be legitimate. However, in Libya, this vague amendment has been used to pursue a revenge type of justice.⁸² The PIL affected other TJ instruments, such as the (stillborn) FFRC, as it limited who could be part of its board.

Finally, TJ legislation on reparations reflects the selective justice narrative contained in the CD. Most of these laws glorify the revolution and only provide for reparations for victims of Gaddafi's ex-regime or for losses generated by the armed conflict against it. As ICJ noted,⁸³ Law No. 10/2012 provided financial compensation to Libyan families or unmarried family members on the first anniversary of the *17 February Revolution*. Law No. 50/2012 set a compensation scheme for political opponents detained *under the Gaddafi regime*, which sparked controversy as some believed it was intended to financially strengthen political Islamism.⁸⁴ Law No. 4/2013 provided for the disbursement of a monthly allowance to persons with permanent disability injured (i) *while fighting during the 2011 armed conflict against the Gaddafi regime* or (ii) as civilian victims of *the regime's attacks*. Law No. 1/2014 provided for a monthly allowance for *families of martyrs* or people who went missing in connection to the *17 February Revolution* and the ensuing conflict.⁸⁵

⁷⁶ Law No. 6 of 2015 (Libyan General Amnesty Law).

⁷⁷ [Libya: Alleged Perpetrators of Crimes under International Law Must Play No Part in Elections](#) (Brussels: ICJ, 2021).

⁷⁸ See [Libya: Alleged Perpetrators of Crimes](#); [Libya: Surrender Saif al-Islam Gaddafi to ICC](#) (Beirut: HRW, 2017).

⁷⁹ Cats-Baril, *Moving Beyond Transitions*, 72.

⁸⁰ David and Mzioudet, *Personnel Change or Personal Change?*, 1.

⁸¹ See Constitutional Declaration of Libya, Article 6 (as amended in September 2013).

⁸² David and Mzioudet, *Personnel Change or Personal Change?*, 9.

⁸³ *Impunity No More*, 25.

⁸⁴ Jazia Gebril and Mohammed El-Tobuli, "Compensation for Unlawful Detention under Gaddafi's Regime," *Searching for Justice in Post-Gaddafi Libya*, eds. Jan Michel Otto, Jessica Carlisle, and Suliman Ibrahim (Leiden: Van Vollenhoven Institute, Leiden University, 2013), 138.

⁸⁵ *Impunity No More*, 25. Emphasis added.

Article 2 of this law excluded “any person who is proven to have opposed the 17 February Revolution at any time and in any form,”⁸⁶ which renders it subject to interpretation and abuse.

As such, in Libya, the constitutionalization of a non-neutral narrative on justice has seemingly facilitated and legitimized the establishment of a *selective* TJ system. Because of instabilities in the country immediately after the revolution, justice was constitutionalized with biased intentions, which negatively impacted TJ.

C. WHEN IT BACKFIRES: FROM SELECTIVE JUSTICE TO SELECTIVE CONSTITUTION-MAKING

Finally, these developments in TJ have backfired on the CM process. Firstly, according to Cats-Baril, “where a truth-seeking process as part of TJ precedes constitution-building, it can help to identify past wrongdoing and sets an agenda for change, including identifying recommendations for institutional reforms to be implemented during constitutional reform.”⁸⁷ In fact, uncovering the truth about past violations may be critical in the writing of a new constitution, as TJ bodies can “form blueprints for institutional reform ... [diagnosing] institutional failures and [prescribing] institutional reforms”⁸⁸ in view of guaranteeing non-recurrence. Unveiling the truth may help identify victims too, along with potentially serving as a basis for criminal prosecutions, facilitating reparations and restoring their rights. It is thus critical that CM bodies and truth commissions operate together. In Libya, interim governments’ inability to set up a truth commission or a strategy dedicated to truth-seeking has meant that there were no findings to inform and support constitutional reforms. It took the international community’s initiative to implement a fact-finding mission (FFM, UN Security Council Resolution 43/39) in 2020 to begin the truth-seeking process and document human rights violations that have taken place in Libya since 2016. In the three reports it has published so far, the FFM has highlighted widespread and systematic violations of human rights in Libya, which have hampered Libya’s transition to the rule of law.⁸⁹ However, the impact of the FFM on the CM process has so far been limited.⁹⁰ In its recommendations, the FFM has not clearly stated it suggests constitutional or institutional reforms. According to civil society, the FFM has also altogether not been given enough resources or time to conduct a comprehensive investigation on human rights violations in Libya. In a dangerous, unstable context where it is already difficult for fact-finding missions to function smoothly and succeed, the non-constitutionalization of such mechanisms constitutes yet another obstacle to truth-seeking initiatives in Libya, which may in the future negatively impact the CM process.

⁸⁶ Law No. 1 of 2014 (Assistance to Families of February 17 Revolution Martyrs and Missing Persons).

⁸⁷ Cats-Baril, *Moving Beyond Transitions*, 8.

⁸⁸ Cats-Baril, 22.

⁸⁹ *Reports of the Independent Fact-Finding Mission on Libya* (UN Human Rights Council Independent Fact-Finding Mission on Libya), available at: <https://www.ohchr.org/en/hr-bodies/hrc/libya/index>.

⁹⁰ *Report of the Independent Fact-Finding Mission on Libya* (UN Human Rights Council Independent Fact-Finding Mission on Libya, 2021).

Selective TJ also had an impact on the original design of the CM process. The CDA was established in 2014 in an unstable environment, after the splitting of Libya's authorities into two competing entities.⁹¹ On top of having to operate amidst civil conflict and polarization, in part triggered by post-conflict victors' policies, the composition and work of the CDA were directly impacted by TJ legislation. Although it was revoked in 2015 by the HoR,⁹² the PIL impacted the composition of the CDA (elected in February 2014). According to Cherif, due to the PIL, 8 candidates for the CDA elections were originally banned from running, even when they had not been convicted for human rights violations. After they appealed, three of them remained banned.⁹³ More generally, selective and polarizing TJ perpetuated tensions and created an even more antagonizing environment, unfit for constructive debate and reaching a consensus over a final, satisfying constitutional draft.

Additionally, as established above, the framework on human rights and minorities' rights was limited in the CD and similarly deprioritized in subsequent TJ legislation, which repeatedly failing to clearly establish minorities as victims of human rights violations and discrimination and guarantee that their rights would be recovered. This had negative consequences on the workings of the CDA. The Tebu, Amazigh and Tuareg minorities initially boycotted the CM process, refusing to run for CDA elections as they believed they were both given too few seats and too little assurance that their voices would count in decision-making. Tebu and Tuareg representatives eventually filled their seats after an amendment of the CD.⁹⁴ However, the Amazigh minority maintained its boycott of the process, as they considered the amended provision unsatisfactory.⁹⁵ As constitutional drafts were written without the direct⁹⁶ participation of Libya's largest minority group (the Amazigh represent over 10% of Libya's overall population), there is a likelihood that Amazigh Libyans might reject the constitution in the future. Back in 2014, Khairi Hamisi, a member of the Amazigh Supreme Council (ASC), the body that led the Amazigh boycott of the CDA elections, threatened that if Amazigh rights and culture were not officially recognized in the draft constitution, the Amazigh community would consider boycotting parliamentary elections and a constitutional referendum.⁹⁷ According to Hafez Ben Sassi, Mayor of Zuwara, a Libyan city principally populated by Amazigh,⁹⁸ "[the] constitution is the most important problem. [Amazigh] recognition is crucial."⁹⁹ In June 2021, the ASC reiterated its rejection of Libya's final draft constitution and of a constitutional referendum and declared it would reject

⁹¹ Cherif, "Libya's Constitution," 2.

⁹² See "Libya's Tobruk Parliament Revokes Law Banning Gaddafi-era Officials," *Middle East Eye*, February 13, 2015.

⁹³ Cherif, "Libya's Constitution," 2.

⁹⁴ Libya Constitutional Declaration, 7th amendment, enact. by GNC (March 11, 2014), available at: https://constitutionnet.org/sites/default/files/constitutional_declaration_amendment-no-7-2014.20140311.eng_.pdf.

⁹⁵ Johnson, "Conflict Constitution-Making," 309.

⁹⁶ Amazigh representatives, organized in the Amazigh Supreme Council (directly elected by Amazigh Libyans), were indirectly involved in the work of the CDA as they were consulted throughout the constitution-making process, see Johnson, 7.

⁹⁷ Jamie Prentis, "Amazigh Awakening: Libya's Largest Minority Wants Recognition," *Al-Monitor*, March 1, 2018.

⁹⁸ Zuwara is a coastal city of Libya, whose population is mostly Amazigh. The Amazigh minority in Libya is mainly located in the West of Libya, from Zuwara to the Nafusa Mountains.

⁹⁹ Prentis, "Amazigh Awakening," 97.

“any constitutional rule” that has not been agreed upon by all ethnic components of Libya.¹⁰⁰ It emerges that the lack of TJ measures geared towards providing justice and guarantees of non-recurrence to minorities has therefore so far hindered the CM process.

In this section I have sought to demonstrate that CM and TJ are interwoven with one another and dependent on the context. I have sought to show that, in a conflictual setting, TJ and CM in Libya were highly influenced by power politics and instabilities (they are political processes), and because they are so connected, they facilitated one another’s negative developments. While the non-conciliatory nature of CM and TJ in Libya has largely been due to the context in which they were implemented, it has been accentuated and facilitated by their co-dependency.

III. ON DIVISION

This final section explores how the interactions between TJ and CM discussed above have concretely impacted reconciliation in a conflict-ridden Libya. I conclude by stressing that it is because divisions and instabilities were so high when TJ and CM were implemented that these processes conjointly and incrementally contributed to deepening divisions in Libya, thereby highlighting the challenges of pursuing CM and TJ in contexts of ongoing conflict.

A. INSTITUTIONAL RELATIONSHIPS: FROM THE OLD TO THE NEW ... OR THE OLD RENEWED?

In the lead-up to the February 2011 uprising and over the past 12 years, Libyans have used multiple channels to voice their rejection of past methods of governance and spell out what they want for Libya’s future when it comes to justice, human rights and respect for the rule of law. For instance, at a conference titled “Truth and Reconciliation: the Way Forward,” which was held in Tripoli in 2012, civil society representatives stressed the importance of addressing the root causes of the conflict and of addressing “why the old regime was allowed to function in a way that violated the fundamental human rights of the people.”¹⁰¹ They called for the reconciliation process to be “victim-centered” and to be based on truth-seeking, focusing on three distinct phases: the Gaddafi era, the Revolution to liberation, and post-liberation. Similarly, in 2018, Altai Consulting carried out a survey on national reconciliation in Libya that showed that, when asked about what should occur to construct the future of Libya, 76% of the respondents chose “Establishing the truth about crimes committed after the revolution,” 63% chose “Establishing the truth about crimes committed before the revolution,” and 60% chose “Ending impunity of militias.”¹⁰² This further indicates that a majority of Libyans value accountability for all human rights crimes.

¹⁰⁰Sami Zaptia, “Amazigh Throw Spanner in Consensual, Constitutionally Based 24 December Elections,” *Libya Herald*, June 18, 2021.

¹⁰¹“[Recommendations of the Conference on ‘Truth and Reconciliation’](#)” (The Conference on Truth and Reconciliation: The Way Forward, UNSMIL, Tripoli, December 12, 2012).

¹⁰²[National Reconciliation in Libya: A Baseline Survey](#) (Altai Consulting for UNDP, 2018), 25.

Libyans have also expressed that, for reconciliation initiatives to be legitimate, there needs to be, amongst other things, a focus on reparations. As such, “justice had a holistic meaning” for respondents, who called for a remedy for human rights abuses, for the ending of discriminations and impunity, the adoption of a constitution guaranteeing the rights and freedoms of all, restoring the rule of law and upholding human rights.

Had they considered Libyans’ demands or demonstrated that they have learned or are willing to learn from the past, interim governments could have laid the foundations for institutional relationships based on trust. Indeed, as argued by Cats-Baril, initiatives taken towards the provision of accountability, reparations and truth-seeking, along with institutional reforms, are all guarantees of non-recurrence, which are “necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions.”¹⁰³ Neutral and efficient TJ, supported by a strong constitutional framework, could have “[provided] concrete remedies to victims [and promoted] reconciliation.”¹⁰⁴ Instead, in Libya, which was already in a “transitional [situation], where there is likely to be a trust deficit between the State and the people,”¹⁰⁵ the poor constitutionalization of TJ and the adoption of selective TJ legislation stained the “autobiography of the state” with relics of the authoritarian past, reflecting poorly on new authorities. According to Sharqieh, TJ in Libya “provides no real, objective yardstick to ensure that new public servants are upright and honest — that is, it does nothing to those who are corrupt but had no prior relationship with the regime. In other words, the PIL could just as easily result in new corrupt faces replacing old ones.”¹⁰⁶ Libya’s interim governments have thus failed to demonstrate they stand in contrast with “the arbitrariness of the authoritarian regime,”¹⁰⁷ undermining their legitimacy.

In fact, Libyans have expressed their mistrust towards authorities in multiple ways. Firstly, Libyans’ participation in various elections has declined over the years. In 2012, nearly 3 million Libyans turned out for the GNC elections. Two years later, at the parliamentary elections set to elect members of the HoR, only 630,000 Libyans voted, representing less than a half of Libya’s registered voters (1.5 million),¹⁰⁸ and 18% of Libya’s potential voters.¹⁰⁹ Similarly, only slightly over 1 million Libyans registered for the CDA elections of 2014 during the two first phases of registration,¹¹⁰ and only 50% of them turned out on election day.¹¹¹ This demonstrates “just how disillusioned Libyans have become with their nation’s politics.”¹¹² According to Mustafa Fetouri, indeed, “the majority of Libyans

¹⁰³Cats-Baril, *Moving Beyond Transitions*, 32.

¹⁰⁴Cats-Baril, 29.

¹⁰⁵Cats-Baril, 34.

¹⁰⁶Ibrahim Sharqieh, *Reconstructing Libya: Stability through National Reconciliation*, Analysis Paper 9 (Doha: Brookings Doha Center, 2013), 14.

¹⁰⁷Happy David Pradhan, “A Critical Analysis of Transitional Justice and Rule of Law in Post-Authoritarian Democracies,” in *2019 International Conference on Law Reform* (Batu: INCLAR), 225, 228.

¹⁰⁸“Libya begins election amid violence,” *Al-Jazeera*, June 25, 2014.

¹⁰⁹“Libyans mourn rights activist amid turmoil,” *Al-Jazeera*, June 26, 2014.

¹¹⁰*The 2014 Constitutional Drafting Assembly Elections in Libya*, Final Report (Atlanta: Carter Center, 2014) at 17.

¹¹¹*The 2014 Constitutional Drafting Assembly Elections*, 31.

¹¹²Mohamed Fetouri, “Poor election turnout sign of Libya’s despair,” *Al-Monitor*, June 30, 2014.

did not see the point of voting for another transitional legislature many think will only be like its predecessor. ... [This means] a failure of the political elite as well as the government to gain the nation's trust, reflect the people's will and be truly representative of the public's interest."¹¹³ The population's distrust in their state also manifests itself in Libyans seeking justice from other channels: a report from Altai Consulting shows that, in the "absence of viable alternatives," some victims in Libya are prone to turning to local and non-official mechanisms of justice (traditional tribal justice), "even though [they] rarely address the root causes of a conflict."¹¹⁴ The lack of trust in government-administered TJ is also visible in the fact that, as found by Lawyers For Justice in Libya (LFJL), most Libyans would be more comfortable with seeing justice being delivered by hybrid courts, composed of both Libyan judges and international actors.¹¹⁵

B. SOCIO-POLITICAL AND INTERPERSONAL DIVIDES

Beyond legitimizing a newborn state and promoting institutional reconciliation, CM and TJ can promote interpersonal and socio-political reconciliation.¹¹⁶ According to Abioye, Abubaker or Wallis, CM may be a great tool for the creation of a sense of oneness and social unity/community cohesion.¹¹⁷ For instance, the way in which a constitution-drafting body is appointed or elected and its composition and inclusiveness may provide "an opportunity for building personal connections and trust across political divides."¹¹⁸ Similarly, by addressing root causes of a conflict and past abuses, prompting appropriate actions to deal with them, redressing victims' rights and ensuring non-recurrence, TJ may lead to forgiveness, the inclusion of previously marginalized groups, and facilitate co-existence between victims and perpetrators.¹¹⁹ TJ and CM may thus promote long-term, stable peace, based on bottom-up and top-down reconciliation.

1. Socio-political divides

The approach to justice that was adopted post-2011 seemingly deepened lines of division and aggravated mistrust within Libya's socio-political landscape. In fact, implementing revenge, selective justice has resulted in the creation of a governance system based on exclusion and the concentration of power in the hands of a selection of people. Such selective TJ increases perceptions of injustices among populations, hardens group boundaries and fuels grievances, leading to a breakdown in social cohesion in society.¹²⁰ According to Bartu and Wierda for instance, "[f]ar from promoting unity, the [PIL] increased tensions and deepened divisions within the

¹¹³Fetouri, "Poor election turnout".

¹¹⁴*National Reconciliation in Libya*, 58.

¹¹⁵Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 27.

¹¹⁶Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (Stockholm: International IDEA, 2006), 13.

¹¹⁷See Funmi Abioye, "Constitution-Making, Legitimacy and the Rule of Law: A Comparative Analysis," *The Comparative and International Law Journal of Southern Africa* 44, no. 1 (2011): 59-79; Habiba Abubaker, "Empirical Research on Constitutional Drafting Processes Following War or Internal Disturbances in Iraq, Tunisia, Kosovo and Sudan," *Max Planck Yearbook of United Nations Law Online* 23, no. 1 (2020): 314-339.

¹¹⁸Tereza Jermanová, "From Mistrust to Understanding: Inclusive Constitution-Making Design and Agreement in Tunisia," *Political Research Quarterly* 74, no. 3 (2020).

¹¹⁹Paul Seils, *After the Rupture: Understanding Transitional Justice and Reconciliation*, ICTJ (New York: ICTJ, 2016).

¹²⁰Alexandre et. al., *Societal Dynamics and Fragility*, see for instance 4, 66, 77.

parliament and the wider political landscape by creating a new class of disaffected citizens, thereby significantly souring the political climate in the country.”¹²¹ According to Mzioudet and David, the PIL carried a negative, rigid message about human nature, “assuming that all people somewhat associated with the Qaddafi regime are unchangeable and incapable of moral development.”¹²² The PIL is therefore unforgiving, excluding a group of people and labelling them as enemies, even when they perhaps never were.¹²³ According to Muhammad Toumi, a GNC member, “[t]here is no such thing as defection from the old regime ... it was smart reading ... they jumped from the sinking boat ... The law should not be seen as targeting individuals, but rather the way of thinking and acting under the former regime.”¹²⁴ Such a discourse may derive from a place of hurt, distrust,¹²⁵ or political self-interest. In fact, the PIL led to a purging of the parliament and redistribution of power within the political arena, notably in the hands of pro-revolutionary and Islamist-leaning deputies.¹²⁶ This analysis demonstrates how, in times of conflict, TJ may be used to advance people’s and groups’ self-interests.

According to Mzioudet and David, interim constitutional documents and the TJ process (more specifically the PIL), have “the potential to aggravate the so-called “spoiler problem,” a concept coined by Stephen Stedman.”¹²⁷ After a conflict, actors who are cast away from politics may turn into spoilers of a transitional process they do not benefit from. This echoes Alexandre et al.’s theory that groups who perceive they are treated unfairly will be uncooperative and will “coalesce inwards.”¹²⁸ According to Gaub, if the PIL were still in force, 500,000 people would be purged, which represents 8% of Libya’s wage-earning population. As three quarters of jobs in Libya are in the public administration, those 8% of the population would most likely not be able to find a job, and, potentially, would fall into poverty.¹²⁹ Based on Gaub’s analysis, Sullo argued that because Libya is “a patriarchal society where on average five persons depend on each wage-earner,” 2,500,000 Libyans might be indirectly affected by such a law (one third of Libya’s population).¹³⁰ The PIL could “destroy governing structures,” excluding those with experience, such as, for example, almost half of Libya’s former members of the judiciary.¹³¹ Such TJ legislation gives no chance to ex-Gaddafi regime members to either take accountability for their crimes or to simply join Libya’s new administration if they have not committed any crime. It furthers divisions in the political landscape through exclusion and the creation of spoilers.

¹²¹Felix-Anselm Van Lier, “Constitution-Making as a Tool for State-Building? Insights from An Ethnographic Analysis of the Libyan Constitution-Making Process,” Working Paper No. 192, *Max Planck Institute for Social Anthropology Working Papers* (2018): 3.

¹²²David and Mzioudet, *Personnel Change or Personal Change?*, 9.

¹²³David and Mzioudet.

¹²⁴Sharqieh, *Reconstructing Libya*, 11.

¹²⁵According to Sharqieh, *Reconstructing Libya*, 12, “revolutionaries, victims of torture, and the families of the victims of the Abu Salim prison massacre stood among the strongest advocates for the passage and enforcement of the PIL.”

¹²⁶Van Lier, “Constitution-Making as a Tool for State-Building?,” 9.

¹²⁷David and Mzioudet, *Personnel Change or Personal Change?*, 9.

¹²⁸Alexandre et. al., *Societal Dynamics and Fragility*, 4.

¹²⁹Sullo, “Transitional Justice,” 729.

¹³⁰Sullo, 728-729.

¹³¹Sharqieh, *Reconstructing Libya*, 13-14.

As mentioned above, CM and TJ alienated, to some extent, minorities in Libya, reinforcing institutional but also socio-political divides. The drafting process within the CDA was confined within the elite Arab majority and excluded fair representations of minorities, inevitably creating tensions. Although the CDA managed to reach consensus on a draft, “[its] debates were shaped by and deeply embedded in the country’s complex political and social divisions and structures, both past and present, which prevented it from offering a viable and widely accepted vision for a future Libyan State.”¹³² As argued by Bannon, “[n]o constitution-drafting procedure can fully mitigate ethnic tensions. ... It is nevertheless important that the constitution-writing process avoid giving one ethnic group or coalition the ability (or the appearance of the ability) to give itself monopoly power or to disempower another ethnic group.”¹³³ This may, again, lead to a spoiler problem and the reignition of conflict.

Interactions between CM and TJ seemingly created “cast-away communities” and a “pool of potential spoilers” of conflict resolution rather than lead to socio-political reconciliation. According to Libyan law professor Al-Hadi Bu Hamra, TJ laws may “split the society,” creating a force against the new state, similarly to de-Baathification laws in Iraq, which fueled sectarianism.¹³⁴ Although sectarianism is not a threat in Libya, divisive TJ laws could aggravate other “social fault lines.”¹³⁵ Divisions within the political landscape in Libya have since significantly impacted conflict resolution, as has for example been observed with short-lasting cease-fires, and, more recently, with the postponement of national elections and the renewal of tensions between rival authorities claiming power in Libya.¹³⁶

2. Spillover to society: fragile national cohesion and sense of belonging

As Mzioudet and David argue, a “reconciliatory tone at the macro-political level is likely to [spill-over and] reverberate at the individual level.” In Libya, one could observe the opposite, as the interaction between CM and TJ ultimately undermined interpersonal reconciliation.¹³⁷ Rather than promoting a sense of oneness and belonging within society,¹³⁸ selective and discriminatory TJ laws created new categories of disaffection, as mentioned above, and failed to address prior discriminations. Additionally, due to the authorities’ inability and at times unwillingness to enforce the law and hold responsible those having committed human rights violations, many perpetrators run free. This climate of impunity and the absence of the rule of law has so far created an unsafe environment for most Libyans, whether they are part of outcast groups or not, as rebels have sometimes developed a feeling of entitlement.¹³⁹ In fact, divisive legislation created a victors/vanquished, and more generally an us/them unforgiving dichotomy, affecting Libya at the micro-level. It has notably led to some holding grievances against other communities/individuals,

¹³²Ross, “Lost in Transition,” 18.

¹³³Alicia L. Bannon, “Designing a Constitution-Drafting Process: Lessons from Kenya,” *The Yale Law Journal* 116, no. 8 (2007): 1854.

¹³⁴Sharqieh, *Reconstructing Libya*, 13.

¹³⁵Sharqieh.

¹³⁶[Steering Libya Past Another Perilous Crossroads](#), Crisis Group Middle East and North Africa Briefing N°85 (Tripoli/Rome/Brussels: Crisis Group, 2022).

¹³⁷David and Mzioudet, *Personnel Change or Personal Change?*, 10.

¹³⁸Abioye, “Constitution-Making, Legitimacy,” 78.

¹³⁹Sharqieh, *Reconstructing Libya*, 18.

or feeling anger and a desire for revenge or retaliation.¹⁴⁰ According to Mzioudet and David, this approach may notably lead to the social exclusion of the people labelled as “persona non grata” (as well as, by association, their family, tribe, etc.) and discrimination on the labor market.¹⁴¹ In the absence of functioning TJ mechanisms in Libya, “malicious allegations that have fostered hatred towards certain groups” have led to human rights abuses against entire communities.¹⁴² In extreme cases, revenge has led to assassination.¹⁴³ For instance, General Abdulfattah Younes, Minister of the Interior under Gaddafi, who defected a few days after the beginning of the Revolution and became one of the leaders of the rebels, is believed to have been assassinated by Jihadists in July 2011. More generally, security forces and police stations allegedly affiliated with Gaddafi’s ex-regime have suffered many attacks post-revolution, likely perpetrated by ex-victims of Gaddafi’s regime and/or regime loyalists who took revenge on defectors.¹⁴⁴ The culture of victors has led entire towns and tribes to be generally classified as *azlam* (Gaddafi cronies) and being shamed and excluded, even when only a few in these communities were Gaddafi’s allies. Bani Walid, town of around 80,000 people, is blamed for the wrongdoings of Gaddafi’s regime, when only a handful of people from the town fought for the ex-authoritarian leader.¹⁴⁵ This is therefore keeping the country divided: as a tribal leader put it, “[t]hose of us who helped Qaddafi don’t represent our tribe. We’re reaching out to our fellow Libyans to build a new country. But if we continue to be excluded, we’ll be left with only one option: looking for those who are also excluded and building new coalitions among the marginalized. We will be forced to fight back.”¹⁴⁶

According to Skapska, “coping with past human rights violations — especially punishing the perpetrators and instigators — can contribute to the reinstatement of basic accepted values in society.”¹⁴⁷ In the absence of accountability, there has been little public deterrence for human rights crimes, which has led to violent conflict frequently erupting. As one of LFJL’s interviewees explained, “[i]f the law is not applied, then revenge becomes the only answer, and then blood will reach our knees. If there is justice, then peace will prevail, and the cycle of revenge will stop.”¹⁴⁸ Alongside trials, truth commissions hold a great potential for social reconciliation and conflict resolution. Such commissions may help identify and hold perpetrators accountable, publicly acknowledge sufferings, and allow people wrongfully accused to clear their reputation. According to the Chair of an NGO and women’s, youth and minority rights activist in the south of Libya, “[w]hat keeps Libya a country at war is the absence of truth ...

¹⁴⁰Elmessiry and Merkova, *Justice is the Only Way Forward*, 13; Sharqieh, *Reconstructing Libya*, 10.

¹⁴¹David and Mzioudet, *Personnel Change or Personal Change?*, 9.

¹⁴²Elmessiry and Merkova, *Justice is the Only Way Forward*, 14.

¹⁴³Sharqieh, *Reconstructing Libya*, 13.

¹⁴⁴Author’s interview with Sufyan Omeish, civil society activist primarily in reconciliation and peacebuilding in Libya, Tripoli, January 2013, in Sharqieh, *Reconstructing Libya*, 10.

¹⁴⁵Sharqieh, 18.

¹⁴⁶Interviewee, tribal figure, Tripoli 2013, in Sharqieh, 13.

¹⁴⁷Skapska, “Institutional Innovations and Moral Foundations of Constitutionalism,” 239.

¹⁴⁸A representative of families of victims discovered in mass graves in Tarhuna, in Elmessiry and Merkova, *Justice is the Only Way Forward*, 6.

so many crimes have been committed and people don't know the truth so we keep going around in circles."¹⁴⁹ The absence of truth prevents grief and moving forward, and rather leads to further "re-victimization."¹⁵⁰ Failing to unveil the truth and adopt a commonly agreed upon narrative about the past has generally affected Libyans' sense of unity and oneness, and, therefore, national reconciliation. Finally, in different surveys, a large majority of Libyans have stressed the importance of reparations in enhancing community reconciliation (e.g. 75.3% of Altai Consulting survey respondents thought so).¹⁵¹ In LFJL's survey results, respondents cited reparations as a necessary step to provide support to victims to counter long-term harm. Non-material support (psycho-social) to victims was considered as the most urgently needed to help Libyans heal and manage their anger.¹⁵² Indeed, according to a CSO representative, almost all Libyans are traumatized by the violence of the past 11 years.¹⁵³ Yet, TJ legislation and interim constitutional documents have failed to adopt a victim-centered approach to justice and reparation or to give Libyans psychological support to heal and move forward (i.e., learn to live in harmony, build trust and mutual respect within society and forgive).

As such, lingering grievances left unaddressed by authorities that failed to implement fair and efficient TJ and CM processes have generally led to continued conflict and difficulties in forming a social compact in Libya. More generally, this section has shown that the interaction between CM and TJ in Libya, at a time of conflict, has undermined reconciliation at the institutional, socio-political and interpersonal levels.

IV. BAD TIMING?

This article has shown that, in Libya, CM and TJ were designed and implemented in a way that has resulted in them having negatively affected one another's ability to foster reconciliation at all levels. However, it has also highlighted the fact that these developments have been greatly determined by the context in which TJ and CM were implemented.

In fact, over the years, a constant atmosphere of armed conflict offered little avenues for reconciliation. The environment in which TJ and CM unfolded was not conducive to agreements, compromises, or neutrality: self-interested actors and instability constantly determined the path these processes took. Expectations for these processes to foster reconciliation and support one another in this endeavor must therefore be weighed against the context in which they unfold: if the game is rigged, how can one expect the players to win? TJ and CM are not standalone, neutral legal processes: they are political processes, therefore bound to be politicized, and the way they will be depends on the context in which they are designed and implemented. Beyond TJ having been undermined

¹⁴⁹Elmessiry and Merkova, 12.

¹⁵⁰Elmessiry and Merkova, 17.

¹⁵¹*National Reconciliation in Libya*, 44.

¹⁵²Elmessiry and Merkova, *'Justice is the Only Way Forward'*, 30.

¹⁵³Elmessiry and Merkova, 31.

by its limited constitutionalization, its path was conditioned by actors fueled by self-interest, an unstable context, the presence of opposing governments, conflicts, and other variables that altered its trajectory. The same goes for CM.

This begs the question: is it premature to even address reconciliation, constitution-making and transitional justice in Libya? In other words, are CM and TJ timely processes, appropriate and capable of success in today's Libyan context? I argue that although the conditions are not optimal for CM and TJ to be implemented in Libya, it does not mean they should be ruled out and deemed inappropriate or doomed to fail. Indeed, arguing so would amount to defending the idea that peace must precede justice. My argument is rather that, in contemporary Libya, TJ and CM measures may still be implemented, but expectations for what they should be as well as how much and when they will impact one another's ability to promote reconciliation should be adapted to context.

As such, when it comes to implementing TJ measures such as lustration, accountability or even reparations, in today's context, and given the analysis carried above, it seems as though an initial level of willingness to reconcile must first be reached, as these measures may in themselves be divisive. Institutional reforms and the reinforcement of the rule of law also requires there to be stable, unitary institutions and political parties in place to implement measures and reforms that are coherent, consensual, and therefore long lasting. This article suggests that constitutionalizing TJ is for instance not necessarily timely, as in contexts of conflict and deep division, it may turn out to be a double-edged sword. On the other hand, preemptive TJ measures may be implemented before peace is reached in Libya, in view of preparing the ground for subsequent initiatives, particularly by helping build trust.¹⁵⁴ Fact-finding missions (FFMs) and other truth-seeking/documentation efforts may not necessarily serve the CM process immediately but may do so when conditions for a CM process to be successfully implemented arise. Awareness raising, the setting up of victim and survivor support groups, reporting on TJ, research, and trainings for Libyan civil society to carry out these initiatives successfully may also all be promoted in times of conflict to benefit TJ and CM at later dates.¹⁵⁵

Additionally, adopting a new interim constitution, provided it is up to date with recent socio-political developments in Libya and draws lessons from failures of the early CM process, may be appropriate today. A new, conciliatory interim constitution, incorporating a TJ narrative aimed at reconciliation (similar to that of South Africa), could indeed allow time for trust-building¹⁵⁶ and contribute towards creating better conditions for the pursuit of a permanent CM process and of TJ. In fact, according to IDEA, interim constitutions may be thought of as bargains, or “[bridges] between an illegitimate and a more legitimate regime.” They may, as Rodrigues and Goss respectively argue, “provide space and time to undertake more comprehensive discussions regarding longer-term settlements”¹⁵⁷ and “can have a mutually reinforcing relationship with transitional justice mechanisms.”¹⁵⁸

¹⁵⁴See Christalla Yakinthou, Carolyn Buff, Lisa Clifford et al., *Advancing Transitional Justice in Conflict-Affected Contexts: A Case Study for Libya* (Washington DC: IREX, 2016).

¹⁵⁵Yakinthou et al., *Advancing Transitional Justice*.

¹⁵⁶Yakinthou et al., 40.

¹⁵⁷Rodrigues, “Letting off Steam,” 33.

¹⁵⁸Goss, “Interim Constitutions,” 167.

All in all, incremental and local pre-TJ and CM measures may therefore be more appropriate and realistic solutions to Libya's deadlock, holding less potential for an adverse impact on reconciliation than the large-scale governmental measures that have been implemented until now.

CONCLUSION

In this article, I have sought to shed light on the interconnection between CM and TJ in a context of conflict. Whilst these two processes tend to be studied and implemented separately, they evolve within the same context, share a common agenda, and are in constant interaction, which suggests that they should be approached as a duo/tandem, part and parcel of conflict or power-politics. In fact, CM and TJ may shape a conflict through fostering reconciliation, but they are also ultimately shaped by conflict and divisions, and can therefore turn into contributing factors to a conflict. They are political processes that may indeed suffer from, reflect, and ultimately amplify political instabilities. Because they are connected and shape one another, they can exponentially worsen conflict in an environment that is not conducive to reconciliation. Taking Libya as a case study for this article helped reveal that in post-revolution, conflict-affected Libya, the interaction between CM and TJ has had a negative impact on reconciliation at all levels. As noted in a Konrad Adenauer Stiftung report, "Libya's usual divides are still vivid and ... major figures on both ends of the political spectrum lack the willingness to work toward genuine national reconciliation. Those figures are still engaged in a tug-of-war that has made it near impossible for the new executive to act as an overarching authority and transcend regional divisions."¹⁵⁹ In fact, as continued bloodshed, delayed elections and the absence of a consensual constitutional framework attest, "Libya's past is [still] full of grudges waiting to be settled."¹⁶⁰ CM and TJ were implemented with biased intentions and inevitably got stuck in a negative cycle, leading to growing distrust and frustration with politics amongst Libyans and deepening divisions at the micro and macro levels. The main takeaway of this article would be that, to meaningfully assess the successes and failures of the interaction between CM and TJ in Libya, key contextual factors must be weighed in. Conducting a more informed analysis helps adopt more realistic expectations for CM, TJ and reconciliation, think of more appropriate measures, and avoid fueling conflict. CM and TJ are still timely and capable of success in Libya, but they must be conceived as highly dependent on context and on one another for their design to be appropriate and their success to be optimized.

¹⁵⁹ *Inside Libya*, Monthly Report No.11 (Tunis: KAS, 2021), 16.

¹⁶⁰ Sharqieh, *Reconstructing Libya*, 10.

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