

# Lost in Transition: Constitutional Legitimacy in Libya

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## ABSTRACT

At present Libya faces a dual legitimacy vacuum with its constitutional framework defined by a myriad of legal instruments that lack legitimacy, which in turn serve as the governing basis for institutions that consequently lack constitutional legitimacy. Reconciling these legal instruments under a single, coherent constitutional framework that enjoys legitimacy in the eyes of the people has proven challenging due to the diverging aspirations of different segments of Libya's society concerning the nature of the state. The roots of these divisions can be found in Libya's constitutional history, defined by short democratic and undemocratic constitutional periods, and in the formation of the modern state through the unification of the three historic regions, namely Cyrenaica, Fezzan, and Tripolitania. Throughout its history, Libyans were denied the opportunity to engage in a process of consensus-building on a common vision of the state. The adoption of clear transitional arrangements may provide Libyans with the dual objective of providing a single, coherent constitutional framework, while also granting them more time to forge consensus on a vision of the state that can be reflected in a permanent constitution enjoying constitutional legitimacy.

Keywords: *Libya; constitutional legitimacy; political transition; constitutional history; consensus-building; interim constitution; transitional arrangements; peace agreements*

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## INTRODUCTION

Libya has recently embarked on a renewed effort to foster peace and to conclude the transitional process. Since the 2011 uprising against long-ruling dictator Muammar Qaddafi, Libyans have led and engaged in numerous initiatives aimed at forging a sustainable political settlement and at reaching consensus on a permanent constitution. These efforts have resulted in the drafting and adoption of multiple legal instruments that served in one form or another as an interim constitutional basis for the state of Libya. However, all of these constitutional frameworks have in common that they lack legitimacy in the eyes of the Libyan people. In the present political context, it is unclear which of the many legal instruments serve as the guiding framework for Libya's governance arrangements, allowing the myriad conflict parties to promote the legal interpretations that best suit their interests. Determining the legal position of any new constitutional settlement within the existing web of overlapping legal instruments will represent an added challenge to a successful outcome of the ongoing political dialogue process. For any constitutional framework to be perceived as legitimate by a broad segment of society, it has to account for the competing aspirations of Libya's many constituencies. To realize constitutional legitimacy in the true sense of the *pouvoir constituant* principle, the constitutional framework must reflect the will of the people.

Ensuring that Libya's permanent constitution has legitimacy became ever more critical as Libyan parties announced that presidential and parliamentary elections will be held in December 2021. However, in the absence of a constitutional basis to underpin the elections, a preliminary agreement was reached in January 2021, according to which the constitutional proposal approved by the country's constitutional assembly in 2017 would be put to a popular referendum. Despite having been drafted by an elected and comparatively representative body and being based on long deliberations and compromises, the constitutional draft in its current design lacks broad buy-in. Another layer of complexity was added by the fact that the necessary procedural requirements for the facilitation of a referendum ahead of elections were not met and deliberations on an alternative constitutional basis for elections have commenced, which are defined by continued disagreement over core constitutional issues. For Libyans to build genuine consensus on common values and shared beliefs that ought to be reflected in a permanent constitution, they will require more time. The adoption of various legal mechanisms, including interim constitutional arrangements or a 'low-threshold' constitutional amendment procedure, could achieve the dual objective of providing a constitutional basis for the upcoming elections, while also offering a longer-term horizon for finalizing Libya's permanent constitution in a manner that genuinely embodies the people's will and identity. The constitutional basis that is being deliberated might represent such a transitional mechanism. Whatever legal instrument is adopted to serve as the constitutional basis for the elections and avenues taken to approve a permanent constitution, these mechanisms have to account for the centrality of legitimacy as a key pillar for both peace-making and constitution-building. As one observer notes, "[w]ithout a [permanent]

constitution, legitimacy in Libya will always be questioned, and therefore wars will continue because today's conflicts are based on contested legitimacies.”<sup>1</sup>

Agreement on an election date and on the roadmap for the transitional period was reached within the framework of the Libyan Political Dialogue Forum (LPDF) launched in October 2020<sup>2</sup> – the third major United Nations-led initiative to bring peace to a country that has been embroiled in conflict since 2014 and experienced instability for almost a decade. Inspired by the aspirations of the Arab Spring that swept across the region in 2011 and that brought down authoritarian regimes in neighboring Egypt and Tunisia, Libyans took to the streets *en masse* in mid-February 2011 to call for an end to the Qaddafi regime. With the support of a UN-sanctioned North Atlantic Treaty Organization (NATO) intervention, the opposition announced the liberation of the country in October 2011. Earlier that year, on 3 August 2011, the National Transitional Council, which had formed the opposition and declared itself the *de facto* government during the transitional period, issued a Constitutional Declaration, which was to remain in effect until the adoption of a permanent constitution to be ratified by a popular referendum.

The 2011 Constitutional Declaration also laid out the steps for the next stages of the transition, most notably the election of a new parliament—the General National Congress, which in turn was to appoint a constitutional assembly tasked with drafting a permanent constitution. However, under pressure from a group of eastern stakeholders called ‘federalists’ who demanded a return to the 1951 Constitution, the National Transitional Council proceeded to amend the Declaration’s framework for the constitution-making process. First, the provision regarding the composition of the constitutional assembly was changed to provide that the body would be composed of an equal number of representatives from the three historical regions of Tripolitania in the West, Cyrenaica in the East, and Fezzan in the South. A second constitutional amendment stipulated that the constitutional assembly would be directly elected by the people, as opposed to their selection by members of the Congress. The changes were intended to increase the constitution’s legitimacy.

Despite successful elections to the Constitution Drafting Assembly in February 2014, which have been broadly described as fair and featured a comparatively high voter turnout—albeit marred in some controversy due to the boycott by some minority groups and significant insecurity in some voter districts<sup>3</sup>—the Assembly’s work was disrupted with the emergence of conflict only months later. Disputes over the outcome of the elections to the House of Representatives that was meant to succeed the General National Congress, which were characterized by a very low voter turnout and insecurity, triggered an escalation of violence and effectively split the country into two. UN-mediated peace talks aimed at ending the conflict culminated in the signing of the Libyan Peace

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<sup>1</sup> American Bar Association (ABA), *In Search of lost legitimacy: The Constitutional Process in Libya* 45 (2020).

<sup>2</sup> UNSMIL, *The Libyan Political Dialogue Forum* (2020).

<sup>3</sup> Carter Centre, *The 2014 constitutional drafting assembly elections in Libya* (2014).

Agreement in December 2015. The Agreement provided for a unity government and outlined mechanisms for joint decision-making between the House of Representatives as the legitimate legislature and the High Council of State—composed of remnants of the General National Congress, which was to serve as a ‘consultative’ legislative body. It also prescribed a revised pathway for the drafting and adoption of a permanent constitution. As discussed in greater detail below, the Agreement was to derive legitimacy and legal recognition through an amendment of the 2011 Constitutional Declaration by the House of Representatives—an endorsement it never received. Despite remaining in place and continuing to serve as the constitutional basis governing the internationally recognized unity government and guiding the political process, the Agreement failed to bring peace and divisions between the main conflict parties continue to represent a major obstacle to the adoption of a permanent constitution.

Since its formation, the Constitution Drafting Assembly has produced as many as seven constitutional drafts. Most were put to deliberations among all Assembly members and some were even printed for circulation among civil society groups and the public. These include the constitutional drafts of December 2014, October 2015, and March 2016, each of which failed to win the required support from a two-thirds plus one majority of Assembly members. Eventually, in July 2017 a constitutional draft was approved by the required number of Assembly members. It is this 2017 Constitutional Proposal that was supposed to be put to a referendum ahead of the 2021 elections. The Libyan Political Dialogue Forum also devised and agreed upon an additional legal instrument to guide the transition by complementing the existing legal framework. In accordance with this political roadmap, a Legal Committee was established to oversee the adoption of a constitutional basis for the upcoming elections. The Committee, together with two delegations from the House of Representatives and the High Council of State, as foreseen by the Libyan Political Agreement, agreed at a meeting in Hurghada, Egypt, on 20 January 2021, that a ratified 2017 Proposal should serve as the required constitutional basis.<sup>4</sup> According to one interpretation of the roadmap, however, the two legislative bodies have missed a deadline to implement the Agreement.<sup>5</sup> Thus, the Legal Committee met again in Tunis, Tunisia, from 7 to 9 April 2021, to agree on a proposal for a constitutional basis to be submitted for deliberation among all Forum delegates.<sup>6</sup> In a context where Libya’s myriad legal instruments and the institutions emanating from them lack legitimacy, it is unclear which entity has the legitimate authority to devise a constitutional basis for elections. Elections in turn are paramount to overcome this challenge and to usher in legitimate state institutions, which in turn can lead a constitution-making process that may result in the adoption of a permanent constitution enjoying broad-based legitimacy.

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<sup>4</sup> UNSMIL, UNSMIL Welcomes the Meeting of the Constitutional Committee in Hurghada (20 January 2021).

<sup>5</sup> The Libya Observer, Legal Committee of LPDF to meet next Tuesday in Tunis (19 February 2021).

<sup>6</sup> UNSMIL, LPDF Legal Committee Concludes a Three-Day Meeting and Agrees on a Proposal for a Constitutional Basis to be Submitted to LPDF (10 April 2021).

In this article, I seek to provide an overview of the overlapping web of constitutional instruments, each of which lack legitimacy and underpin state institutions that in turn lack constitutional legitimacy. I argue that the multiplicity of legal instruments and absence of constitutional legitimacy is rooted in the divergent aspirations between Libyans concerning the structure and identity of the state. These divisions can be traced back to the country's relatively young constitutional history, which was defined by short and undemocratic constitutional periods and by the formation of the state through the unification of the three historical regions. Libyans have been denied the space and time to build consensus on a common vision of a state that can be reflected in a legitimate constitution. I propose that the adoption of clear and legitimate transitional arrangements can provide a single, coherent constitutional framework, while also creating a platform to devise a truly legitimate permanent constitution.

## I. CONCEPTUALIZING CONSTITUTIONAL LEGITIMACY

Assessing the state of constitutional legitimacy in Libya requires closer examination of the concept of constitutional legitimacy—both in the sense that any constitutional instrument ought to garner popular legitimacy, and accordingly, that the institutions emanating from it ought to enjoy constitutional legitimacy. While there is consensus among constitutional scholars on the centrality of legitimacy as a core element of constitutionalism, there is a degree of divergence in what is perceived as the key pillars underpinning constitutional legitimacy. Drawing a distinction between international and internal legitimacy, Al-Ali proposes that a constitution cannot achieve internal legitimacy if it is (a) “undemocratic”; (b) “out of date” by failing to reflect the social and political reality of the time; and (c) “has been manipulated by specific actors such that the text has been applied in a manner not encapsulating the interests of the general population.”<sup>7</sup> Wolfrum affirms the latter point arguing that a legitimate constitution needs to “reflect the aspirations of the population as a whole.”<sup>8</sup> In a similar vein, An-Na'im posits that constitutional legitimacy has to be measured by a constitution's performance in achieving its main purpose, which according to him is to strike a balance between majority rule and the protection of individual and minority rights.<sup>9</sup> Particularly with regards to the rights of minorities—but also regarding the interests of society more broadly—none of the constitutional instruments in Libya appear to enjoy constitutional legitimacy. For instance, some constitutional analysts maintain that while the legal challenges that were raised against the voting procedure adopted by the Constitution Drafting Assembly to approve the 2017

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<sup>7</sup> Zaid Al-Ali, *The Arab Spring Constitutions: For Whose Benefit?*, In: Tom Ginsburg & Aziz Z. Huq (Eds.) *Assessing Constitutional Performance*. Comparative Constitutional Law And Policy. 471 (2016).

<sup>8</sup> Rüdiger Wolfrum, *Legitimacy of Constitution-Making Processes: Reflections from the Perspective of International Law*, In: Rainer Grote & Tilmann J. Roeder. *Constitutionalism, Human Rights, And Islam After The Arab Spring* 49 (2016).

<sup>9</sup> Abdullahi A. An-Na'im, *The Legitimacy of Constitution-Making Processes in the Arab World*, In: Grote & Roeder (Supra note 8) 29 (2016).

Constitutional Proposal were resolved, questions remain about the lack of buy-in from Assembly members representing minorities. The internal rules and regulations of the Assembly stipulate that a successful vote requires support for the draft from minority representatives,<sup>10</sup> as informed by Constitutional Amendment No. 7 enacted by the General National Congress, which stipulates that decisions pertaining to cultural affairs and minority rights are to be based on consensus.<sup>11</sup>

Focusing on the procedural and substantive aspects of constitutional legitimacy, Wolfrum stresses the importance of national ownership and rejects any attempts at interfering in the constitution-making process as undue influence. Drawing attention to the relevant international law, he references Article 2(7) of the UN Charter asserting that “constitution-making is traditionally the hallmark of state sovereignty and the ultimate expression of national self-determination.”<sup>12</sup> Moreover, Article 25 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to public participation in political affairs. The Human Rights Committee, in its General Comment on Article 25, explicitly notes that “citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process.”<sup>13</sup> This underscores the significance of the constitutional principle of *pouvoir constituant*, recognizing the people as the only entity entitled with the power to award legitimacy to the constitution.<sup>14</sup> As Tushnet notes, “the constituent power is the body of the people from whom the constitution’s authority emanates,” which also entails “a reference to real people whose consent is the basis of a constitution’s legal legitimacy.”<sup>15</sup> Constitutional legitimacy in this sense derives from “both appropriate constitutional content as well as its well-informed popular acceptance.”<sup>16</sup>

The notion of constitution-making as an act of national self-determination in recognition of state sovereignty stands in stark contrast to the persistent practice of external involvement in what should be an inherently domestic exercise. This is particularly the case in post-conflict and transitional settings such as the Libyan one. In this regard, Bell affirms that “contemporary post-conflict constitution-making often involves international actors and organizations in a critical role, posing challenges for articulating the constitution’s legitimacy in terms of its ‘we the people’ origins.”<sup>17</sup> In fact, Wallis argues that “constitutions have tended to be made by political elites and/or international state builders with little public participation, partly because liberal theorists understand the principle of popular sovereignty in hypothetical terms, as what individuals would agree to if they were acting

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<sup>10</sup> ABA (Supra note 1).

<sup>11</sup> Constitutional Amendment No. 7 of 11 March 2014.

<sup>12</sup> Wolfrum (Supra note 8).

<sup>13</sup> Human Rights Committee, General Comment No. 25, CCPR/C/21/Rev. 1/Add. 7, para 6.

<sup>14</sup> Wolfrum (Supra note 8). 44.

<sup>15</sup> Mark Tushnet, *Advanced Introduction To Comparative Constitutional Law* 18 (2018).

<sup>16</sup> An-Na’im (Supra note 9).

<sup>17</sup> Christine Bell, *Introduction: Bargaining on Constitutions: Political Settlements and Constitutional State-building*, 6 *Global Constitutionalism* 13, 21 (2017).

rationally, rather than as requiring their actual consent.”<sup>18</sup> Over the last decade since the revolution, external actors have played an ambivalent role in Libya’s constitution-making process. The drafting of the 2011 Constitutional Declaration and of the *final* version of the 2017 Constitutional Proposal<sup>19</sup> was primarily led by local stakeholders. In contrast, the 2015 Libyan Political Agreement, which *de facto* serves as the country’s main constitutional framework, was brokered—and to a significant extent also written—by the UN. The ongoing process of devising a constitutional basis for the elections that are scheduled for December 2021 is being led by Libyans, but under the auspices of the UN.

The case of Libya is also indicative of a trend that manifested itself with the constitution-making processes arising from the political events of the Arab Spring, where in most cases not only foreign actors but also controlling elites dictate these processes. In a rather bleak assessment, Al-Ali finds that the outcomes of the Arab Spring constitutions rarely reflected noteworthy differences in line with the degree of public input that informed the constitution drafting process. He observes that “most of the Arab Spring constitutions largely reflect the drafters’ and controlling elites’ prioritization of continuity and incremental change over the desire to establish social justice and protect fundamental freedoms.”<sup>20</sup> However, in recognition of the complex contexts of the political transitions emerging from the Arab Spring, An-Na’im emphasizes the non-linear progression of constitutional legitimacy, concluding that “[t]he path to legitimate constitutionalism includes setbacks and failures, as well as apparently successful steps that may still not be consistently maintained in practice—the progression of the process includes instances of regression.”<sup>21</sup>

Ultimately, constitutional legitimacy ought to derive from three key factors. One, the *process* of constitution-making, which has to ensure the inclusion of a broad segment of society. This has to be based on democratic practices such as the election of a constituent assembly and/or ratification through a popular referendum. Two, the *content* of the approved constitution—especially if it is to serve as the permanent constitution—has to be informed by public input and reflect the aspirations of society and the realities of the country’s unique cultural, social, and political context. This also means that the negotiations on and formulation of the constitutional text ought not to be dominated and shaped by political elites, or—even worse—external actors. And three, in line with Al-Ali’s criteria for internal legitimacy, the governance arrangements provided for by the constitution have to be based on a democratic state system rather than an authoritarian regime of the kind experienced in Libya during the Qaddafi era.

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<sup>18</sup> Joanne Wallis, *Constitution Making During State Building 3* (2016).

<sup>19</sup> Earlier versions, specifically the March 2016 draft, featured significant external engagement.

<sup>20</sup> Al-Ali (Supra note 7) 384.

<sup>21</sup> An-Na’im (Supra note 9) 31.



## II. ABSENCE OF CONSTITUTIONAL LEGITIMACY IN LIBYA

Constitutionalism in Libya is characterized by a dual legitimacy vacuum both from a constitutional and institutional perspective. A web of overlapping legal instruments is based on a number of constitutional instruments adopted since the 2011 revolution, including; the 2011 Constitutional Declaration and its many amendments, the 2015 Libyan Political Agreement, and the 2020 Libyan Political Dialogue Forum Roadmap, each of which in turn outline a process for the adoption of a constitution, presumably through the ratification of the 2017 Constitutional Proposal or an amended version. At the heart of this constitutional fragmentation are the divergent aspirations of different segments of society, most notably concerning the degree of centralization and decentralization of the country's governance system, which have rendered agreement on a single constitutional framework elusive.

### DUAL LEGITIMACY VACUUM

In Libya, the challenges posed by an absence of constitutional legitimacy are two-fold. First, the various legal instruments that serve as constitutional foundations in some form or another lack legitimacy as they fail to reflect the will of the people, which is further complicated by the fact that there are no defined shared norms and beliefs among Libyans. In addition to the multiplicity of legal instruments, the mandates of the institutions governed by these instruments have for the most part expired. This has created a situation where all of Libya's legal instruments to varying degrees lack constitutional legitimacy. And arguably none of the institutions emanating from these instruments have ever held or do presently hold legitimate authority. Constitutions ultimately have a legitimizing function in providing "a solution to the problem of legitimation and limitation of political power."<sup>22</sup> If, as in the case of Libya, constitutional instruments fail to legitimize governing institutions, they shall be unable to serve their core function. As Maghur points out, Libya's contemporary governance system is defined by a multitude of institutions (GNA, HoR, HCS, LPDF) deriving authority from numerous, ambiguous, and at times contradictory legal bases governing them. And of these legal instruments most have been devised by controlling elites with varying degrees of external engagement and in the absence of national ownership.<sup>23</sup>

Further weakening the legitimacy of Libya's constitutional instruments and the institutions emanating from them, are the ubiquitous number of legal challenges raised against the legality of these instruments, their amendments, and their institutions. The multiplicity of overlapping legal instruments has allowed for creative interpretations of the legal text and encourages parties to leverage legal uncertainties and court challenges to stall the political

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<sup>22</sup> Dieter Grimm, *Constitutionalism: Past, Present, And Future* 61 (2016).

<sup>23</sup> Azza Maghur, *The Next Presidential Council and The Powers of The New Regime in Libya: A Complex System for a Brief Span*, Al Marsad. (1 February 2021).

transition and resist the implementation of provisions that fail to advance, or worse, contradict their interests. The challenge of determining the validity and interpretation of various legal instruments and of addressing unresolved legal cases has been compounded by the fact that the Constitutional Chamber of the Supreme Court, which holds jurisdiction over constitutional issues, was suspended in 2014.<sup>24</sup>

In the absence of a legitimate constitutional basis that can chart a pathway for the transitional period or of legitimate institutions with the authority to devise such a legal framework, it is difficult to envisage how a future governing authority and the constitutional basis underpinning it can enjoy constitutional legitimacy. To untangle this web of legal instruments it is worth examining the main transitional arrangements introduced since 2011, which together serve in some form or another as constitutional bases for Libya's institutions, in greater detail.

## CONSTITUTIONAL INSTRUMENTS SINCE THE REVOLUTION

### 2011 Constitutional Declaration

The 2011 Constitutional Declaration does not hold legitimacy in the sense of representing an expression of the will of the people. Without any kind of popular consultations, the Declaration was issued by the National Transitional Council shortly after its formation and amidst the turmoil of the 2011 civil war. The Council itself was not an elected body and was dominated by political and military elites from the East. Yet, in its early days, the Declaration enjoyed significant public buy-in, likely because it clearly outlined a transitional process that would result in the adoption of a permanent constitution through ratification by popular referendum.

An argument could also be made that the principle of *pouvoir constituant* implies that “revolutions—if undertaken by the population at large or at least clearly endorsed by the latter—have, as a matter of principle, the legitimacy to end a previous and to establish a new constitutional regime.”<sup>25</sup> In fact, the 2011 Constitutional Declaration justifies its legitimacy and the legitimacy of the institutions emanating from it on the basis of the 2011 revolution. The Declaration's preamble explicitly states that its legality is “[b]ased on the *legitimacy* of this revolution, and in response to the desire of the Libyan people and their aspirations for achieving democracy and promoting the principles of political pluralism and statehood based on institutions (...).” Article 17 of the Declaration reads that the National Transitional Council is the “highest authority of the Libyan state” and that “[i]t shall be the sole *legitimate* representative of the Libyan people which draws its *legitimacy* from the revolution of February 17th.”

As will be discussed in more detail below, the 2011 Constitutional Declaration was envisaged to serve as a transitional arrangement—a mandate it has outlived a decade after its issuance. Thus, when discussing the

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<sup>24</sup> ABA (Supra note 1).

<sup>25</sup> Wolfrum (Supra note 8) 44. *Referencing* Bruce Ackermann, *We The People: Foundations* (1991).

Declaration, it is also worth mentioning the February Committee, which was established amid public discontent over the failure of the General National Congress to “complete its constitutional mandate.”<sup>26</sup> Born out of Constitutional Amendment No. 6 adopted on 5 February 2014 and composed of Libyan lawyers and constitutional experts, the Committee was tasked with charting a framework to conclude the transitional period and with formulating a constitutional basis for presidential and parliamentary elections to replace the Congress. The February Committee Proposal was, however, deemed invalid by a Supreme Court decision on Constitutional Amendment No. 7 based on procedural issues.<sup>27</sup>

Today, it is unclear what exactly the legal hierarchy between the 2011 Constitutional Declaration and the 2015 Libyan Political Agreement looks like. Most constitutional analysts contend that the Declaration remains the *de jure* constitutional basis in Libya.

### 2015 Libyan Political Agreement

The Libyan Political Agreement is foremost a peace agreement between the main political adversaries and their aligned armed groups that emerged in the civil conflict commencing in 2014. However, given its extensive provisions outlining Libya’s governance arrangements, it effectively provides a constitutional framework for what should have been an interim period of two years and that foresaw the adoption of a permanent constitution. Agreed to by a small number of political and military elites and with the role of the UN in the drafting process reaching beyond what might be termed ‘assistance,’ the Agreement lacks any form of legitimacy. In fact, it is anathema to the ideals of constitutionalism. Theorizing about the legitimacy of constitution-making processes, An-Nai’m concludes that while external actors may provide technical assistance in the constitution-making process, particularly in post-conflict settings in the Arab world, it is ultimately local actors who have to lead and mediate contestations over power relations.<sup>28</sup>

The Libyan Political Agreement was never fully integrated into the legal framework as foreseen in Annex 4, which stipulates that the 2011 Constitutional Declaration should be amended in accordance with the Agreement and that “[a]ny provision or article in the Declaration (...) that contravenes the Agreement shall be cancelled.”<sup>29</sup> While Constitutional Amendment No. 11 incorporated a part of the Agreement, it faces legal challenges on procedural grounds and Article 12 of the Agreement foresees that it ought to be adopted in its entirety. Nor has the unity government—the Government of National Accord—received endorsement from the House of Representatives. And by one interpretation, the Agreement expired in December 2017, with the passage of a

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<sup>26</sup> ABA (Supra note 1) 23.

<sup>27</sup> Ibid.

<sup>28</sup> An-Nai’m (Supra note 9).

<sup>29</sup> Libya Political Agreement Annex 4: Art 1 & 2 (2015).

period of two years since its signing.<sup>30</sup> Despite this lack of legal authority, the international community has *de facto* awarded the Agreement legitimacy by recognizing the unity government as the legitimate state authority and by using its provisions as a frame of reference for the transitional process. At the same time, the UN and Libyan leaders, notably the unity government, argue that the two-year timeline before the expiration of its mandate has not yet begun as the Agreement only enters into force following its incorporation into the Declaration. Paradoxically, this argument is also often raised by the House of Representatives and aligned Field Marshall Khalifa Haftar—an eastern-based warlord and major power-broker—, when seeking to challenge the legitimacy of the UN-recognized unity government or the legal framework of the Agreement itself.

### 2020 Libyan Political Dialogue Forum Roadmap

The legitimacy of decisions and legal instruments agreed upon within the framework of the ongoing LPDF has been questioned by some observers. The (initially) 75-member Forum is composed of an equal number of delegates from the House of Representatives and the High Council of State respectively and of a number of delegates representing women’s groups, minorities, and civil society more broadly, handpicked by the UN. It claims to derive its legitimacy from both domestic and international sources. The ‘Roadmap For the Preparatory Phase of a Comprehensive Solution’ bases its legitimacy on: (a) “United Nations Security Council Resolution 2510 (2020), which adopts the conclusions of the Berlin Conference” calling for the formation of a transitional government; and (b) the 2015 Libyan Political Agreement, specifically Article 64, and the 2011 Constitutional Declaration. Concretely, Article 7(3) on the Legal Framework of the Roadmap stipulates that “[t]he outcomes of the LPDF combined shall be considered an added agreement to the Libyan Political Agreement signed in 2015 as incorporated in the constitutional framework.”<sup>31</sup> However, neither of the sources supposedly legitimizing the LPDF process stand on solid grounds. With regards to international law, while UN Security resolutions adopted under Chapter VII authorities are understood to be binding, UNSCR 2510 (2020) was not passed under such authorities. As for Article 64 of the Agreement, which provides that the Libyan Political Dialogue—a forum of Libyan dignitaries and political representatives—may reconvene to deliberate on breaches of the Agreement, it is questionable whether the LPDF, which is composed of a different set of delegates, can be viewed as a continuation of the Libyan Political Dialogue. Additionally, this rests the legitimacy of the LPDF on the legality of the Agreement, which is itself questionable.<sup>32</sup>

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<sup>30</sup> Interview, Naureen Haque, American Bar Association, (15 January 2021).

<sup>31</sup> Roadmap: For The Preparatory Phase Of a Comprehensive Solution Art 7 (2020).

<sup>32</sup> Haque (Supra note 31).

2017 Constitutional Proposal

While not representing one of the adopted legal instruments making up Libya's fragmented constitutional framework, examining the 2017 Constitutional Proposal, which was set to be put to a popular referendum for ratification as the country's permanent constitution, is imperative when discussing constitutional legitimacy in Libya. Approved by a two-thirds plus one majority of the Constitution Drafting Assembly as per the 2011 Constitutional Declaration, the Proposal has attained the legally required support to secure internal approval and to be 'handed over' to the Libyan people to determine its fate in a referendum. In an effort to achieve constitutional legitimacy, ratification of a new constitution through a popular referendum is a positive step to ensure internal legitimacy.<sup>33</sup>

From an institutional perspective, the Constitution Drafting Assembly itself enjoys considerable legitimacy. According to a number of surveys, the Assembly is the only institution assigned legitimacy by Libyans from across the country. While the Assembly derives significant legitimacy from its relatively successful election, it is critical to note that insecurity in a number of voter districts meant that a second round of elections had to be held to fill some of the outstanding seats, while two seats had to be assigned to candidates nominated by the electoral commission.<sup>34</sup> The elections were also boycotted by minority groups contending that the composition formula awarding only six seats for minority groups did not grant sufficient representation for minorities. In particular, the Amazigh objected already to the electoral law and demanded that decisions on critical issues had to be reached by consensus as their low representation meant that they could easily be overruled.<sup>35</sup> They eventually refused to partake in the elections, which meant that the body only comprised fifty-eight members.<sup>36</sup> In addition to their dismay over what they perceived as a low quota for minorities, their boycott was driven by their rejection of the 2011 Constitutional Declaration, which they thought should have paid more attention to linguistic demands in a break with the Qaddafi era.<sup>37</sup> Similarly, the Assembly enjoyed little credibility among the Tebu and Tuareg, whose representatives at times boycotted the drafting process. Moreover, only 64 out of 649 of the registered candidates were women and only six seats in the Assembly were assigned for women, falling well short of the 33 seats advocated for by women's groups.<sup>38</sup> Even so, overall, the Assembly is relatively representative of a cross-section of Libya's society.

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<sup>33</sup> Tushnet (Supra note 16).

<sup>34</sup> ABA (Supra note 1).

<sup>35</sup> Carter Center (Supra note 3).

<sup>36</sup> International Commission of Jurists (ICJ), *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws* (2015).

<sup>37</sup> Leonid Issaev & Andrey Zakharov, *Decentralization in Libya after the Arab Spring*, 27 *Middle East Policy*, (2020).

<sup>38</sup> Carter Center (Supra note 3).

It is difficult to ignore the fact, however, that while the Constitution Drafting Assembly itself does enjoy a relatively high level of legitimacy as compared to Libya's other institutions, this is not necessarily the case for the constitution-drafting process or its outcome. Given the tight timeline provided for by the Libyan Political Agreement, and in light of the challenging political and security context, consultations with international experts, civil society organizations, or Libyans more broadly were limited. For the most part, the political process and the technical exercise of negotiating and drafting a constitution were held in parallel, and power-holders were largely excluded from the constitution-making process. The legitimacy of the process is also brought into question by the fact that some Assembly members have launched legal challenges against the draft by contesting the legality of the voting procedure.<sup>39</sup>

Nonetheless, as Al-Ali rightly notes, “[t]he fact that a relatively representative body successfully negotiated a constitution in such circumstances necessarily grants the final outcome a certain amount of *legitimacy* that should be considered in any discussion of the country's future.”<sup>40</sup> From a regional comparative perspective, the deliberations of the Constitution Drafting Assembly were also relatively open and transparent while the voting requirement of its internal rules and regulations for approval of the draft is considerably high.<sup>41</sup> In practice, constitution-making processes are awarded legitimacy by adopting one of two approaches either by holding direct elections for a constituent body, *or* by ratifying a constitutional proposal that has been drafted by a nominated constitutional committee through a popular referendum.<sup>42</sup> It is rare that both mechanisms are combined, as is the case in Libya, suggesting that the constitution-making process itself ought to enjoy some legitimacy.

## DIVERGING ASPIRATIONS

A fundamental incompatibility of constitutional issues that different segments of Libya's society aspire to is a major driver of the country's protracted instability and conflict, rendering agreement on a single legitimate constitutional framework elusive. For instance, the 2017 Constitutional Proposal faces significant opposition from some members of the Constitution Drafting Assembly, powerful eastern tribes and elites, federalists, monarchists, minorities, and women's groups.<sup>43</sup> If the premise of constitutional legitimacy is based on a reflection of the will of the people, it is important to also recognize that it is difficult to establish what the will of the general public is if there are strongly divergent opinions on the most fundamental constitutional issues.<sup>44</sup>

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<sup>39</sup> ABA (Supra note 1).

<sup>40</sup> Zaid Al-Ali, *Libya's final draft constitution: A contextual Analysis*, International Idea, 6 (December 2020).

<sup>41</sup> *Ibid.*

<sup>42</sup> Undppa & Berghof Foundation, *Constitutions And Peace Processes: A Primer* (2020).

<sup>43</sup> Al-Ali (Supra note 41); ABA (Supra note 1).

<sup>44</sup> Al-Ali (Supra note 7).

The constitutional debate over the last decade has brought to light a number of key issues that Libyans have fundamentally divergent views on, including the exact role of religion in the state and minority and women's rights. But by far the most divisive issue that lies at the heart of the constitutional deadlock and the ongoing conflict is the degree of centralization and decentralization of governance structures, and shaped by it, the distribution of political power and state resources. Thus, Schnelzer notes that “[r]egional or more centralised government has been a constant factor of negotiation in Libya’s constitutional history, [and that] [t]he distribution of resources and the provision of government services have played a role as both the reason for changes to the administrative system and as a tool of the political leadership to prevent or suppress opposition.”<sup>45</sup> Country-wide consultations conducted by the Center for Humanitarian Dialogue underscored that Libyans’ primary concern is that “Libya’s unity and national sovereignty must be preserved, while recognizing local and cultural differences within a framework of decentralization.”<sup>46</sup> The centrality of regional factors also came to the fore when the ‘federalists’ successfully pushed for a constitutional amendment concerning the formation of the constitutional assembly. The ‘federalists’ were concerned that an assembly selected by the General National Congress would dismiss demands for greater regional autonomy, as the body was dominated by representatives hailing from Tripolitania. The proposed approach for equal regional representation also mirrored arrangements adopted for the National Assembly in 1949.<sup>47</sup>

Despite the centrality of these issues in the constitutional discourse and Libya’s political context, they have never been successfully reconciled in any of the constitutional instruments since the founding of the state. Consequently, the number of subnational governance entities has changed frequently since 1951. During the Qaddafi era, the subnational governance system and its precise subdivisions changed about twelve times.<sup>48</sup> In its skeleton nature, the 2011 Constitutional Declaration sought to avoid the divisive issue of how to draw the boundaries of the intermediary governance layer between the national and local level of government. Article 18 of the Declaration merely calls for a national level legislation and for elected local councils with municipal legislative power.<sup>49</sup> More importantly, the form of the state reflected in the 2017 Constitutional Proposal does not take account of the divergent aspirations of different groups. At the center of opposition to the Proposal is the degree of centralization and decentralization, notably the strong presidential system and weak decentralization, as well as the lack of autonomy for cultural affairs.<sup>50</sup> Moreover, if a government based on a strongly centralized system were to retain legitimacy, it ought to commit to a clear intragovernmental system for fiscal transfers to ensure a fair and

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<sup>45</sup> Nadine Schnelzer, *Libya In The Arab Spring: The Constitutional Discourse Since The Fall Of Gaddafi* 39 (2016).

<sup>46</sup> Centre for Humanitarian Dialogue, *The Libyan National Conference Process Final Report*, 9 (November 2018).

<sup>47</sup> Dirk J. Vandewalle, *A History Of Modern Libya* (2012).

<sup>48</sup> Markus Boeckenfoerde, Mansour M. Elbabour, & Tarek Megeris, *Decentralisation in Libya, Democracy Reporting International* (2013).

<sup>49</sup> *Ibid.*

<sup>50</sup> Al-Ali (Supra note 41).



equitable distribution of Libya's wealth, which together with calls for greater political power, is the key factor driving regional divisions.<sup>51</sup> In its current form, the Proposal falls short in offering any specifics on the structure of decentralized governance, the assignment of competencies, and the distribution of state resources. Thus, people in the East and the South, in particular, have expressed concerns over the Proposal.

### III. ACHIEVING LEGITIMACY IN A FRAGMENTED SOCIETY

The roots of this divergence of aspirations can be found in Libya's constitutional past, which was defined by short constitutional periods, including periods that featured no constitution or constitutional framework at all. Reluctantly unified at the founding of the modern state of Libya, the populations of the three historical regions never engaged in a consensus-building process exercise to forge a common vision of the state. To achieve constitutional legitimacy in the true sense of *pouvoir constituant*, Libyans therefore need more time to launch a national debate on constitutional issues, agree on shared norms and beliefs, and foster their national identity. While riddled with pitfalls, including the need to accept a delay in achieving 'true' constitutional legitimacy, clear transitional arrangements may offer an avenue by providing a coherent constitutional framework for an interim period, while also granting more time for participatory constitution-making that can result in the adoption of a permanent constitution enjoying broad public buy-in and support.

#### MYTHS OF A CONSTITUTIONAL PAST

Libya barely has a history of constitutional legitimacy to speak of, where “[f]or most of the century, the inhabitants of the three provinces that became incorporated into the United Kingdom of Libya in 1951 (...) stood on the sidelines as a succession of foreign and local rulers and interests shaped their country.”<sup>52</sup> Tripolitania and Cyrenaica were first brought under one administration during the Italian colonial period between 1911 and 1943. And “[s]ince the end of Italian colonial rule, Libya's constitutional history has been characterized by short-lived constitutional periods.”<sup>53</sup> The boundaries of the modern state of Libya as they are drawn today have only emerged following World War II, “at the behest of, Great Power interests and agreed to by the local provinces who feared other alternatives.”<sup>54</sup> The first constitutional period was ushered in with the adoption of the monarchical constitution in 1951, which set up a federal system for the new state of Libya. The 1951 Constitution was “prepared by foreign officials and advisers with only minor input from locals.”<sup>55</sup> Following a UN General

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<sup>51</sup> Boeckenfoerde et. al. (Supra note 50).

<sup>52</sup> Vandewalle (Supra note 49) 1.

<sup>53</sup> Schnelzer (Supra note 47) 39.

<sup>54</sup> Vandewalle (Supra note 49) 40.

<sup>55</sup> Al-Ali (Supra note 7) 378.



Assembly vote in 1949, a UN Commissioner was appointed to ‘assist’ the local community in drawing up a constitution and to guide the country’s transition to independence. The UN selected twenty-one Libyans from the three regions to form a Preparatory Committee to decide on the constitution-making process, which in turn established the National Assembly. On 7 October 1951, the Assembly approved a permanent constitution consisting of 213 articles. The Constitution described the three regions as provinces rather than federal states or regions to promote the country’s unity, as Cyrenaica and Fezzan in particular expressed opposition to the formation of a unified state.<sup>56</sup> That the regions agreed to “[t]he very establishment of the monarchy and the proclamation of a federation were considered compromises that they had to make in order to avoid new colonial guardianship.”<sup>57</sup> The newly formed constitutional monarchy was governed by King Idris Sanusi, who derived some legitimacy from his ancestry in the Sanusiyya order.

Then in 1959, with the discovery of oil revenues, the Sanusi monarchy undertook to change the governance system again by abandoning the federal system in favor of a unitary system, which was realized in the 1963 Constitution. The rapid change in Libya’s economic outlook led to social unrest and the Sanusi leadership sought to reduce tensions by strengthening the central government.<sup>58</sup> At the time of independence, Libya was also among the poorest countries in the world, with some estimates suggesting that GDP per capita was only USD 25 a year, and the large bureaucracy of the federal system came at a huge financial burden on the young state. In the period between the abolishment of the federal system and the coup in 1969, Libya was administered by the monarchy along ten provinces.<sup>59</sup>

Following the overthrow of the monarchy in 1969, Qaddafi introduced a very brief temporary revolutionary Constitutional Proclamation inspired by the Egyptian constitution and containing merely 37 articles.<sup>60</sup> The Proclamation was to serve as an interim arrangement until the adoption of a permanent constitution. Abolishing the previous constitution, the Proclamation effectively concentrated all authority in Qaddafi’s Revolutionary Command Council. In 1977, Qaddafi issued the ‘Declaration on the Establishment of the Authority of the People,’ which was an even shorter constitutional framework merely comprising 10 Articles and stipulating that the Qur’an serves as the country’s constitutional basis.<sup>61</sup> Qaddafi complemented these legal instruments with sections from the Green Book, in which he dismissed constitutionalism altogether, and with it the need for constitutional legitimacy. The Green Book specifically declared that “[t]he natural law of any society is either

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<sup>56</sup> Ronald Bruce St John, *Libya: From Colony to Revolution* (2017).

<sup>57</sup> Issaev & Zakharov (Supra note 38) 64.

<sup>58</sup> Schnelzer (Supra note 47).

<sup>59</sup> Vandewalle (Supra note 49).

<sup>60</sup> Schnelzer (Supra note 47).

<sup>61</sup> Nathan J. Brown, *Constitutions In A Nonconstitutional World: Arab Basic Laws And Prospects For Accountable Government* (2002).

tradition (custom) or religion. Any other attempt to draft law for any society, outside these two sources, is invalid and illogical. Constitutions are not the law of society.”<sup>62</sup>

It is clear that constitutional legitimacy was practically absent in Libya under the Sanusi monarchy and the Qaddafi regime. The ‘constitutional’ system defining the Libyan state under the Qaddafi regime can be described as ‘totalitarian.’ Qaddafi also “kept most institutions underdeveloped, and other political actors weak, such that when he fell, little was left standing.”<sup>63</sup> Thus, if one applied Al-Ali’s criteria for internal legitimacy of constitutions,<sup>64</sup> the fact that the state systems were monarchical and totalitarian, and thereby ‘undemocratic,’ itself renders the constitutional frameworks and the institutions they governed illegitimate. Even so, proponents of a return to the 1951 Constitution contend that it continues to represent Libya’s legitimate legal framework as the Qaddafi coup merely suspended its validity. However, this argument has been rejected by most constitutional analysts and fails to reflect the contemporary context, particularly with regards to the democratic aspirations of all Libyans.<sup>65</sup>

## BUILDING CONSENSUS ON A COMMON VISION OF THE STATE

As a consequence of Libya’s complex constitutional history and its relatively short constitutional periods, Libyans have not been able to deliberate on the nature of their shared values and beliefs and to forge consensus on a governance system that reflects their common identity. As Schnelzer argues, the “[l]imited constitutional experience, totalitarian system under Ghadafi and the suppression of both public discourse and the emergence of a Civil Society that would have provided the sphere for public discourse during the totalitarian period preceding the 2011 uprising renders the drafting of a constitution and consensus on issues of national importance particularly difficult.”<sup>66</sup> Others argue that the seeds for Libya’s societal fragmentation were planted early on, even before the beginning of its constitutional history, when the Ottoman Empire proved unwilling to foster a common identity across the three regions beyond their adherence to Islam.<sup>67</sup> As Vandewalle notes, “the separate histories of the three provinces, as well as the absence of incentives for greater economic interaction within essentially self-contained local economies, had added to distinct outlooks and orientations among the citizens of each territory over the centuries.”<sup>68</sup> The prevalence of oil also impacted Libyans’ notion of statehood and of a common identity. First, the revenues of Libya’s vast resources enabled rulers to avoid state-building in the

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<sup>62</sup> ICJ (Supra note 31) quoting from the Green Book, Part I, The Law of Society.

<sup>63</sup> Brookings Institutions, Empowered Decentralization: A City-Based Strategy For Rebuilding Libya 6 (February 2019).

<sup>64</sup> Al-Ali (Supra note 7).

<sup>65</sup> Issaev and Zakharov (Supra note 38).

<sup>66</sup> Schnelzer (Supra note 47) 90.

<sup>67</sup> Vandewalle (Supra note 49).

<sup>68</sup> *Ibid* 15.

formative sense while extending their authority across the country's territory.<sup>69</sup> Second, with eastern communities facing economic marginalization while most of the oil reserves are situated in the East, it is understandable that people are distrustful of the central government and that regional divisions have deepened. In the face of all of these factors Libyans still hold a sense of national identity, but the persistent instability and conflict over the last decade have manifested differences and deepened divisions.

Despite the considerable challenges posed by Libya's young and complex history and the people's divergent aspirations on the nature of the state, an argument could be made that "creating constitutional agreement in the face of fundamental disagreement as to the nature, territorial and political configuration of the state is exactly the aim of constitution-building in divided conflict societies."<sup>70</sup> In this regard An-Na'im finds that "[t]o the extent that such consensus is achieved, over a 'national settlement', which is in accordance with the principles of constitutionalism, that society has a constitution."<sup>71</sup> However, this settlement has to enjoy constitutional legitimacy in the sense of *pouvoir constituant*. To achieve this, Libyans require more time and a more stable setting that allows for a national dialogue on these issues without the negative influences of internal divisions that characterize the nature of civil conflict. A push for a swift constitution-making process does not sufficiently take account of the complex political nature of constitutional issues and the importance of building legitimacy. The sixty days originally provided for the drafting process in the 2011 Constitutional Declaration quickly proved an inadequate timeframe in the volatile and divisive context of the transitional period.<sup>72</sup> Boeckenfoerde, Elbabour, and Megeris affirm that "consensus will be reached on a system that will fit Libya's current state, but after a period of time, once the post- revolutionary dust has settled and things are normalised, another consensus may form on the question of [its governance system]."<sup>73</sup> This can be achieved either through the adoption of interim arrangements that can serve as the constitutional basis of the state until a permanent constitution has been adopted or through the incorporation of various mechanisms for amending a permanent constitution.

## OVERCOMING THE DILEMMAS OF TRANSITIONAL LEGITIMACY

Efforts to achieve constitutional legitimacy in post-conflict settings, where a break from the old constitutional order is often followed with a transitional period that ends with the adoption of a permanent constitution, face a number of dilemmas concerning the sequencing of constitution-making and the trade-offs between elite bargains and participatory constitution-making.

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<sup>69</sup> Ibid.

<sup>70</sup> Bell (Supra note 18) 28.

<sup>71</sup> An-Na'im (Supra note 9) 29.

<sup>72</sup> Undppa & Berghof Foundation (Supra note 43).

<sup>73</sup> Boeckenfoerde et. al. (Supra note 50) 8.

With regards to the sequencing of constitution-making processes in post-conflict countries, there will always be a “chicken-and-egg”-problem with regards to either putting in place legitimate institutions or legitimate law. In any context where the people seek a complete overhaul of the old system, they have to contend with transitional arrangements that are devised by non-elected figures in order to have a constitutional basis for elections that give birth to legitimate institutions. These institutions, headed by and composed of leaders who have been elected by the people as their legitimate representatives, in turn, have the authority to formulate a process for the adoption of a permanent and legitimate constitution. With the commencement of the 2011 revolution and the people’s rejection of the constitutional order of the Qaddafi regime, the National Transitional Council formed as the outcome of an agreement between elites. These unelected ‘officials’ then introduced the 2011 Constitutional Declaration without any input from the public to provide a roadmap for elections, stipulating that the newly elected body would lead the process to adopt a permanent constitution. Then again, the 2015 Libyan Political Agreement, which sought to end the conflict that interrupted the constitution-making process, justified its legitimacy as “[r]esponding to the needs of the legitimate state institutions to have clear arrangements with regards to the management of Libyan affairs until the adoption and implementation of the Libyan Constitution.”<sup>74</sup>

Related to the challenge of sequencing with regards to institutional and constitutional legitimacy, are the underlying tensions between striking elite bargains to accommodate powerful actors and ensuring the participation of the people as the sovereign. These are ultimately trade-offs between stability and democracy faced in the immediate aftermath of conflict. Drawing attention to the complexities of transitional constitution-making, Bell stresses that “[t]he most central dilemma concerns how power-balances between political/military elites can be broadened to ensure the constitution's capacity to fulfil its normative role in restraining power and delivering broader social inclusion,”<sup>75</sup> adding that “transitional constitutionalism is characterized by an attempt to navigate from a foundational elite pact, to a more normative constitutional order.”<sup>76</sup> The 2011 Constitutional Declaration represented just that. Widner cautions that in theory “[c]onstitution-building programs that exclude key players or social segments generally result in short-lived documents and rarely reduce violence.”<sup>77</sup> This point has been echoed by Tushnet, who finds that to ensure constitutional endurance, the framework must accommodate the main power holders. He observes that “[c]onstitution-makers hope that the institutions they are creating will be stable over time, [and that] [p]olitical stability requires at least acquiescence from nearly all groups that have significant power.”<sup>78</sup> Thus, even though the Constitution Drafting Assembly is a considerably

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<sup>74</sup> LPA (Supra note 30) Preamble.

<sup>75</sup> Bell (Supra note 18) 13.

<sup>76</sup> Ibid 14.

<sup>77</sup> Jennifer Widner, *Constitution Writing in Post-conflict Settings: An Overview*, 49 *William & Mary Law Review*, 1513, 1520 (2008).

<sup>78</sup> Tushnet (Supra note 16) 24-25.

representative body and the 2017 Constitutional Proposal represents a genuine compromise among its members, the negotiations and drafting process was exclusive of the main power-holders, which has been one of the greatest obstacles in securing support for the Proposal and its adoption. In fact, the absence of support from Libya's political and military elite risks that even if the Proposal were to come into force, they would likely object to its implementation.<sup>79</sup> A failure to account for existing power constellations also contributed to the collapse of the 2015 Libyan Political Agreement. With Haftar excluded from the Agreement's negotiations, he became its key opponent and spoiler of the peace process. The exclusion of major power-holders in constitutional settlements also weakens their legitimacy. Ghai finds that "[t]here is also the danger that an over-ambitious constitution will be honored more in breach than observance, and thus it will gradually lead to frustration and loss of legitimacy."<sup>80</sup>

### *Transitional Arrangements*

Answers to these dilemmas might be found in An-Na'im's recognition of the non-linear progression and dynamic nature of constitution-building processes and efforts to achieve constitutional legitimacy.<sup>81</sup> Recognizing these phenomena allows for a reconciliation between the adoption of transitional arrangements in the form of interim constitutions that may fall short of meeting the criteria of constitutional legitimacy, while striving for 'robust' constitutional legitimacy in a permanent constitution. Although "the process through which they were agreed and adopted and the political arrangements that they establish may limit their legitimacy," "their temporary nature does not detract from their constitutional status."<sup>82</sup> Recognizing that interim constitutions are often agreed to and drafted by elites behind closed doors and that procedural legitimacy is near absent in such cases, Wolfrum suggests in relation to the Sudanese interim constitution that "what made the situation tolerable and even legitimate was that this constitution was an interim one, meant to cover a certain period in which peace and stability should be regained."<sup>83</sup>

The two-stage approach for the adoption of a permanent constitution and the achievement of constitutional legitimacy is particularly pertinent in the context of ongoing violence or peace negotiations, where it may be more suitable to adopt interim constitutional arrangements. These in turn can serve as a foundation for the drafting of a permanent constitution at a time when tensions have ebbed and focus can be given to the more functional

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<sup>79</sup> Al-Ali (Supra note 41).

<sup>80</sup> Yash Ghai, A Journey around constitutions: Reflections on Contemporary Constitutions, 122 South African Law Journal 804, 829 (2005).

<sup>81</sup> An-Na'im (Supra note 9).

<sup>82</sup> Undppa & Berghof Foundation (Supra note 43) 24.

<sup>83</sup> Wolfrum (Supra note 8) 49.

aspects of constitutions, such as how to ensure government accountability.<sup>84</sup> In fact, Rodrigues argues for a more purpose-driven use of interim constitutions in post-conflict settings, suggesting that with the right design they can reduce the stakes of divisive issues and ensure that more time can be allocated for consensus-building on a long-term settlement.<sup>85</sup> Interim constitutions in this sense can provide linkages between different constitutional frameworks by enabling “a pact between political/military actors on the broad parameters of a political settlement (and often elections) to be reached prior to the constitution-making process, while allowing the final constitutional settlement to be based on a broader participative process.”<sup>86</sup>

Transitional arrangements can also take the form of relatively easily implementable constitutional amendments of a permanent constitution. Constitutional amendments have been identified as a key mechanism to account for changes in power constellations<sup>87</sup> and political realities. Preferences in society concerning constitutional issues also change over time.<sup>88</sup> For instance, around 2016-17, Libyans might have had a preference for stability and unity to be realized through a strong presidential system,<sup>89</sup> but these preferences do not reflect the sentiments held immediately after the revolution when people fought against the authoritarian Qaddafi regime, or, following Haftar’s attempt to capture the state through violence. The 2017 Constitutional Proposal’s clause determining that it may not be amended for a period of five years after its adoption is problematic in this sense.

While transitional arrangements are invaluable mechanisms to bridge political transitions, Libya’s transitional period has already lasted for a decade and the incredibly abstract and brief text of the 2011 Constitutional Declaration has served beyond its purpose of providing a constitutional basis for a short interim phase. As can be extracted from the Declaration, it was not foreseen that the process of adopting a permanent constitution would be drawn out over many years. And frankly, if the aim is to achieve constitutional legitimacy in both the procedural and substantive sense, it does not appear that an end of the transitional period is near. This equally underscores the need for a single coherent transitional framework outlined in an interim constitution that balances the need for the inclusion of power-holders and broader public participation, while also reflecting a genuine compromise between the diverging aspirations of different segments of Libya’s society.

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<sup>84</sup> Widner (Supra note 79).

<sup>85</sup> Charmaine Rodrigues, *Letting off steam: Interim constitutions as a safety valve to the pressure-cooker of transitions in conflict-affected states?*, 6 *Global Constitutionalism*, 33 (2017).

<sup>86</sup> Christine Bell & K. Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process*, *International Idea*, 27 (2016).

<sup>87</sup> Tushnet (Supra note 16).

<sup>88</sup> Al-Ali (Supra note 7).

<sup>89</sup> Al-Ali (Supra note 41).

## CONCLUSION

Efforts to resolve the decade-long instability and conflict and to conclude the political transition in Libya are hindered by the consequences of a dual legitimacy vacuum. That is, the constitutional framework governing Libya's institutions is based on numerous legal instruments, each lacking legitimacy, and consequently the institutions emanating from these instruments lack constitutional legitimacy. And every time a settlement process collapses, an additional layer of complexity is added with the emergence of another constitutional instrument that has to be incorporated into the existing constitutional framework. With the launch of the Libyan Political Dialogue Forum process, Libyans are leading a renewed initiative to find a way out of the transitional period and to replace the myriad of overlapping and contradictory constitutional instruments and the institutions they are governing, with a single coherent constitutional basis to underpin the December 2020 presidential and parliamentary elections, and selected leaders with elected officials holding legitimate authority.

Achieving constitutional legitimacy, however, will be challenging in the context of continuing fragmentation and the absence of a common vision of the state. The divergence of aspirations regarding the nature and identity of the state has its roots in Libya's constitutional history, which is defined by numerous short constitutional periods and ever-changing structures of a state that unified the peoples of traditionally distinct regions. Denied the opportunity to forge consensus on shared norms and beliefs and on a governance system that reflects a genuine compromise among all segments of Libya's society, Libyans now have to build on the momentum of the early successes of the ongoing political dialogue and devise a mechanism for the attainment of constitutional legitimacy. With the 2017 Constitutional Proposal falling critically short in meeting the people's aspirations, transitional arrangements in the form of an interim constitution or the incorporation of an implementable amendment procedure meet the dual objective of providing one coherent constitutional framework, while also creating space and time for consensus-building. The constitutional basis deliberated on by the Libyan Political Dialogue Forum and its Legal Committee may represent such a transitional arrangement. The agreed upon constitutional basis would also have to clearly lay out a pathway for the adoption of a permanent constitution. This may potentially involve an amendment or re-drafting process of the Proposal informed by country-wide consultations and a national dialogue aimed at reaching consensus on core issues pertaining to the nature of the state. Whatever transitional arrangement will be adopted, it would have to be complemented with mechanisms to address changing realities to avoid further stalling of the transitional process, such as dispute resolution mechanisms, a forum for continued negotiation, and clear amendment procedures. Despite further prolonging the transitional period, such arrangements will be key to achieving constitutional legitimacy and through it sustainable peace.