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AN ETHNOGRAPHIC
ANALYSIS OF
THE LIBYAN
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MAKING PROCESS

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Constitution-Making as a Tool for State-Building? Insights from an ethnographic analysis of the Libyan constitution-making process¹

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Abstract

Constitution-making plays an increasingly important role for conflict resolution and state-building. Both scholars and practitioners assume that legal procedures and standards of constitution-making can provide useful structures for resolving potentially violent political contest and debate, and thereby contribute to reconciliation and consensus finding. This paper revisits these assumptions by offering an empirical perspective on the Libyan constitution-making process.

After a synopsis of current approaches to constitution-making, this paper turns to a detailed description of the Libyan constitution-making process. It provides an overview of the actors engaged in the constitution-making process and the ways in which law, including constitutional law-making, is actually used and put to work in a post-conflict scenario. In Libya, the constitution-making process did not bring the desired security and stability, but instead was marked by the same socio-political rifts that dominated Libya's overall transition. The final constitutional draft is highly contested and is unlikely to serve as the basis for a new Libyan state.

While acknowledging that each constitution-making process needs to be understood in its own terms, the conclusion reassesses the role that constitution-making may play in post-conflict scenarios more broadly. The Libyan constitution-making process shows that when societal conflict is great and the political landscape is deeply divided, a constitution-making process is unlikely to serve as a catalyst for peace or national unity. On the contrary, given the importance attributed to the constitution for the long-term distribution of political power, constitution-making risks becoming a high-stakes arena of political conflict. This paper highlights the pitfalls of seeking constitutional settlement in post-conflict environments and casts doubt on the technocratic vision that states can be *built* in a rational and orderly fashion.

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1. Introduction

It is often claimed that “[w]e live in an era of constitution-making” (Hart 2003: 1). Since the end of the Cold War, constitution-making has become a key element of post-conflict reconstruction and development programmes and a “central aspect of democratic transitions, peacebuilding and state-building” (UNDP 2014). Inherent in large parts of today’s policy approaches and academic literature is the idea that political conflict can be mitigated by channelling political discourse through formal institutions and legal procedures and standards, thereby contributing to consolidating peace and strengthening democracy in a state. However, constitution-making processes in politically unstable countries often do not bring about the desired stability and security (Brandt et al. 2011: 2). As scholarly research in constitution-making has remained largely normative, there is still little detailed knowledge about why this is the case. This paper nuances some of the assumptions made about the benefits of constitution-making for state-building on the basis of an in-depth empirical analysis of the Libyan constitution-making process. Building on fieldwork conducted between 2014 and 2016, it offers insights into the wide range of actors who had an impact in the constitution-making process and the various ways in which constitutional law-making is actually used and put to work in a post-conflict scenario.

After a brief overview of current constitution-making approaches, this paper traces the development and the failure up until now of the Libyan constitution-making process and describes how different actors used different aspects of law to meet a variety of political, social, moral, and economic needs. Formal legal procedures were consistently penetrated by informal patrimonial or interpersonal societal structures. Like most constitution-making processes, Libyan constitution-making was deeply entrenched in the country’s complex political and social structures, both past and present. The Libyan constitution-making process did not unite Libya’s multiple factions, but rather reflected and possibly fuelled Libya’s political conflicts.

The conclusion of this paper is used to question whether constitution-making is always an appropriate tool for state-building, particularly in post-conflict contexts and in deeply divided societies. This investigation leads to deeper questions about the relationship between constitutions and the state and the more elusive question of how legitimate social order is constituted in a state. By highlighting the dynamic, provisional, contingent, and indeterminate dimensions of post-conflict political ordering, this paper concludes that it seems more pertinent to read comparable situations as long-term processes of state *formation* rather than as short-term *state-building* processes.

2. Current Constitution-Making Practice

Both in academia and in practice, there is a widely held belief that constitution-making has the potential to contribute to both the short-term goals of conflict resolution and peace-making and the long-term goals of peace-building and strengthening of the state institutions (Benomar 2003; Samuels 2006; Sartori 1997). As Yeh and Chang note, this is a fairly recent development. Originally, a constitution was seen as “an end-result, a codified document of social and political consensus” and it was “not the vocation of law or constitution to stabilise social order and to form political consensus” (Yeh and Chang 2006: 7). While peace-making, state-building, and constitution-making were separate processes historically, today they are often merged. Jamal

Benomar, for instance, holds that the “design of a constitution and its constitution-making process can play an important role in the political and governance transition” by delivering “a reduction of violence or more rights-respecting fundamental documents” (Benomar 2003: 3). Some authors assume that constitution-making after conflict is an opportunity to “create a common vision of the future of a state and a road map on how to get there” (Samuels 2006: 3).

In fact, the making of a constitution is itself governed by ‘road maps’. Constitution-making is informed by standards and good practice guidelines which are gradually developed and elaborated through practical experiences (the state-building efforts of inter-governmental organisations or international non-governmental organisations) and through academic scholarship (Böckenförde, Hedling, and Wahiu 2011; ConstitutionNet 2014). Current international policy approaches to constitutional assistance are rooted in the UN’s experiences of supporting broader state-building processes in, *inter alia*, Cambodia, East Timor, Bosnia-Herzegovina, Afghanistan, and Somalia.

For example, UNDP’s *Guidance note on constitution-making support* consolidates some of the principles that emerged from such practice and seeks to offer a “stronger knowledge platform to guide UNDP country offices on good-practice constitutional assistance approaches” based on the organisation’s experience in supporting constitution-making around the world and on “the principles on constitution-making laid down by the United Nations Secretary-General” (UNDP 2014: 3).³

In academia, the Centre for Constitutional Transitions at the University of California, Berkeley, among other research institutions, is dedicated to the generation and mobilisation of “knowledge in support of constitutional building” (Centre for Constitutional Transitions n.d.). The Comparative Constitutions Project (CCP) serves as another example. The CCP was born out of the experience of constitution-making processes in countries like Iraq and Afghanistan that suggested that “political scientists and legal scholars are not adequately equipped to advise constitutional assemblies about how to craft documents that solve important problems of governance”. To remedy this gap, CCP researchers assembled “a cross-national historical dataset of written constitutions, to service a set of research questions regarding the origins and consequences of constitutional law and, not at all incidentally, the design of constitutions in developing and transitioning democracies” (CCP 2015).

Such efforts support the gradual consolidation of best practices of constitution-making on the international level. This development and the concurrence of constitution-making and peace-building and state-building processes also mean that constitution-making is increasingly subject to the influence of standards and principles stemming from international law (Turner and Houghton 2015; Sripathi 2013). Even if still elusive, these standards include norms and principles relating to international human rights, democracy, and the rule of law, as well as procedural standards such as inclusivity, participation, representation, and transparency.⁴

The concretisation of international standards does not mean that states are legally bound to implement such norms in their constitutional frameworks. Nevertheless, they set normative standards which influence domestic constitutions around the world, and against which states will be measured (Elkins, Ginsburg and Simmons 2013; Peters 2009; Petersmann 2002; Thürer 2005). Constitution-making standards and principles may influence domestic constitution-making processes in various ways and for manifold reasons. Standards and principles may be actively

³ UNDP’s *Guidance Note* refers to UN Secretary General Ban Ki-Moon’s ‘United Nations assistance to constitution-making processes’ which lays down a basic framework for UN engagement in constitution-making processes, including a blueprint for constitution-making timelines, see UN 2009.

⁴ Such principles and standards form what some have called the ‘new constitutionalism’, see e.g. Mandel 1998.

promoted by international actors such as intergovernmental agencies, international non-governmental organisations, academics and research centres, and ‘global *pro bono* law firms’ (Daase 2014). External actors typically influence domestic constitution-making processes in the form of ‘technical assistance’ to the drafters of the constitution. As noted above, the work that foreign actors carry out in the service of constitution-making often falls under broader organisational mandates comprised of terms such as ‘democracy promotion’, ‘peace-building’, and ‘transitional justice’ during a time when drafting a constitution is regarded as a necessary response to post-conflict reconstruction (Seidel 2017). However, constitution-making standards and practices do not necessarily need to be the outcome of direct international involvement. Scholars have illuminated some of the complex ways in which constitutional norms might be diffused. For example, constitution-making is generally influenced by comparative efforts, as constitution drafters explore procedures used for the enactment of new constitutions in other countries as well as the substantive normative content of foreign constitutions to address issues of constitutional design (Lollini and Palermo 2009). Adding more empirical detail, Goderis and Versteeg claim that motivations for adopting a comparative approach may derive from factors such as: coercion, e.g. when former colonisers and aid donors push for the adoption of specific constitutional arrangements; competition, when states strategically imitate foreign constitutional provisions to attract investment; learning, when states share pre-existing constitutional similarities; or acculturation, when states emulate foreign rules because they are believed to foster international acceptance and legitimacy (Goderis and Versteeg 2013: 1).

Irrespective of the way in which constitutional norms are disseminated, what we can see is that the elaboration of models and standards for constitution-making, the embeddedness of constitution-making in peace-building and state-building processes, and the role of international law as a normative framework for constitutional reform have contributed to the increasing ‘legalisation’ or ‘positivisation’ of such processes (Dann and Al-Ali 2006: 427). Today, as Lollini and Palermo note, constitutions are generally not seen as the outcome of a “single act of political will, but a more complex series of constitutional facts and acts, including political, judicial and international conditionality, and in the end it becomes a legally-driven process and procedure” (Lollini and Palermo 2009: 302). The fact that Lollini and Palermo use the term ‘procedure’ is indicative of a trend to legally define ‘mere’ processes by more (and increasingly sophisticated) legal rules and guarantees. In the light of these scholarly accounts, “making constitutions appears as a process that follows certain rules (and) or rites which have been progressively established” (Klein and Sajó 2012: 421).

This trend to legalise, formalise, and rationalise constitution-making processes through normative standards and ‘best practices’ can be referred to as the *legal-procedural approach to constitution-making*. The proponents of this approach hope that by encouraging actors, including ‘the people’, who are involved through public participation mechanisms, to engage in the constitution-making process through a set of pre-ordained democratic procedures, it will be possible to tame potentially violent political discourse. Since the promoted principles are believed to be apolitical, neutral, and universal, it is assumed that actors will be able to consent to such procedures. Echoing Habermas’ concept of ‘constitutional patriotism’, it is hoped that in divided societies, an ‘apolitical’ legal procedure of democratic opinion- and will-formation will serve to amplify commonality as part of national unification (Habermas 1998: 241).

3. A Constitution-Making Process for a ‘Stateless’ Society

3.1. *Building a Constitution from an Institutional ‘Tabula Rasa’*

An image that has long dominated the perception of Libya is its ‘statelessness’ – in the Weberian sense of the term (Davis 1987: 40; Slavín 2012). Geographically, Libya has been referred to as an “agglomeration of fringes of other areas” and as a “residual category” (Davis 1987: 25). Libya is a primary example of what is generally referred to as an “imagined community” of “colonial or external creation” (Baldinetti 2010: 6). It was created within its current state boundaries after the Second World War in 1949 by the United Nations General Assembly (UNGA 1949). A constitution was set up under the guidance of the UN, establishing the framework for a fragile federal political unity under a constitutional monarch. Idris I. of the Sanusi order became the king of Libya and ruled the country from 1951. During his rule, he gradually transformed the federal monarchical system into a centralised system dominated by tribal patronage networks. Favouritism to loyal tribes increased societal division and the perception of inequality, which provided fertile ground for the coup d’état led by Colonel Qadhafi in 1969.

After taking power, Muammar Qadhafi abolished the 1951 constitution and implemented a political system known as the Jamahiriya (Republic of the Masses), which was guided by a fundamental version of direct participatory democracy. To this end, he introduced revolutionary committees and councils on the local, regional, and national level through which people were supposed to oversee both the administrative and legislative functions of the state (Hüsken 2012: 4). Such legislative and executive powers had no constitutional basis (institutions were only defined for a short period between 1969 and 1977 by the Provisional Constitutional Declaration of 11 December 1969) and often fluctuated along multiple poles of formal and informal authority. Qadhafi secured his power by employing a strategy of divide and rule, both institutionally and socially. Similar to his predecessor Idris, he exploited conflicts among Libya’s tribes and regions, while at the same time recurring to favouritism towards certain families, tribes, regions, and towns, thereby deepening the country’s divides and harming national cohesion. The state’s authority was entangled in “overlapping and contradictory networks with no common ordering principles or chain of authority beyond Qadhafi’s presence at the top of every heap” (Pickard and Boduszynski 2013: 87). Libya remained ‘stateless’ in the Western sense of the term, i.e. without authoritative formal institutions or a constitution: “the only encompassing ‘institution’ was the colonel himself and his clutch of advisors” (Pickard and Boduszynski 2013: 87).

In 2011, inspired by revolutions of the Arab Spring in neighbouring countries, uprisings against the government began in Libya as well. The first protests on 15 February 2011 were sparked by the arrest of human rights lawyer Fathi Terbil in Benghazi and the death of two protesters in the eastern city of al Bayda (Bartu 2015: 33). While concerns about the regime’s human rights abuses and the slow pace of political reform may have been part of what motivated protesters to take the streets, the reasons for the eruption of nation-wide uprisings are more complex (Lier 2018). The revolution was by and large driven by young men who either survived on badly paid public-sector jobs and government handouts, or who were unemployed (Lacher 2011; Stocker 2011). Increasingly frustrated with the limited opportunities that Qadhafi’s state-led economy had to offer and disillusioned with his political ideology, they started to organise protests in various towns and cities across the country. In the course of the conflict, other parts of Libyan society joined in: tribes, predominantly from the east, which had been marginalised under Qadhafi’s rule (Wehrey

2012; Kane 2015); exiled opposition groups and Islamist groups who had suffered persecution and human rights abuses (Pargeter 2008; Mattes 2012); and some Libyan minority groups, who had been subject to assimilation and repression (Murray 2015: 309; Lacher 2011: 145). The regime's brutal quelling of the initial protests fuelled revolutionary momentum and sparked the defection of several key military officials, causing the rapid disintegration of the army into local units closely connected to their garrison towns (Lacher 2011: 141). Ironically, the tribal and localised political structure of Libya's 'statelessness' and the lack of institutions capable of managing the crisis became a key reason why "spontaneous civil unrest developed into a full-blown civil war" (Lacher 2011: 141). After eight months of conflict, rebel groups – assisted by controversial international military support – had defeated large parts of Qadhafi's loyal forces.⁵ The revolution (and Muammar Qadhafi's 42-year reign) came to an end with Qadhafi's violent death west of Sirte on 20 October and the proclamation of Libya's liberation on 23 October 2011.

While united in the goal of toppling Qadhafi, the uprisings were not driven by a homogenous entity, but were composed of diverse groups with varying senses of ownership of the revolution. The fragmented, decentralised, and unorganised nature of the uprisings had a bearing on the course of the transition. Tensions and rifts between these groups came to characterise the transitional phase, as well as the constitution-making process.

3.2 A Plan for Transition

Shortly after the eruption of protests in Benghazi in February 2011, the National Transitional Council (NTC) was established by a group of lawyers, academics, former government officials, and defected diplomats. This self-appointed opposition government served as the political face of the revolution. In a 'Founding Statement' issued within days of the first protests, the council declared itself the "sole representative of all Libya with its different social and political strata and all its geographical sections" seeking to steer Libya into a post-Qadhafi era (National Transitional Council 2011a).

In this initial phase of the uprising, the NTC heavily depended on the help of the international community to achieve its goal of ending Qadhafi's rule. Defected high-ranking diplomats played a decisive role in convincing the international community to support their cause (Bartu 2015). The NTC also issued various statements, which were "clearly written for [the NTC's] external audience" and "designed to project as favourable an image as possible to the outside world" (Bartu 2015: 39). For example, the NTC presented its 'Vision of a Democratic Libya' at the first formal international conference in London on 29 March 2011. The document comprised an eight-point plan for the transformation of country into a 'free and democratic society'. In the first point of this plan the NTC declared that it recognised

“(...) without reservation [its] obligation to: 1. Draft a national constitution that clearly defines its nature, essence and purpose and establishes legal, political, civil, legislative, executive and judicial institutions. The constitution will also clarify the rights and obligations of citizens in a transparent manner, thus separating and balancing the three branches of legislative, executive and judicial powers.” (National Transitional Council 2011b)

⁵ See for a detailed analysis Engelbrekt, Mohlin and Wagnsson 2013; for a critical take on the NATO intervention see Campbell 2013.

Indeed, the constitution-making process was seen by many national and international actors as the key process of Libya's transition (UNSC 2011; Labott 2011; al-Baker 2011). It was hoped that the constitution-making process, and ultimately the resulting constitution, would establish a legal framework within which the construction and reconstruction of the Libyan state could be peacefully negotiated.

Notwithstanding the clout of the NTC representatives, their bold statements glossed over the revolutionary movement's fragmented nature and the NTC's actual lack of control over the myriads of armed groups that had formed erratically during the revolution on a local or regional level, united only by the aim to topple Qadhafi. Soon significant division started to simmer over *how* a new Libyan state should be built.

First tensions surfaced within the NTC during the debates over the Constitutional Declaration, which was supposed to govern the country's transitional phase. Debates about how to approach the transitional phase divided the NTC into two camps: some liberal-leaning NTC politicians, such as Mahmoud Jibril, felt that Libyans had too little democratic experience to rush into elections and preferred the NTC to oversee the transitional process until a new constitution was drafted. Islamist-leaning members opposed the idea of prolonging the NTC's tenure, arguing that the self-appointed NTC had no democratic legitimacy, and thus pushed for the election of a legislature immediately after the end of the revolution (Bartu 2014: 9).⁶ Behind these arguments lay more concrete political interests. Jibril was aware that the Islamists were far better organised than the scattered liberal camp and was concerned that they could potentially secure a large number of votes during early elections. Islamist factions in turn wanted to prevent liberal-leaning NTC leaders, such as Jibril and Abd al-Jalil, from using a prolonged NTC tenure to consolidate their political power (Bartu 2015: 52).

After fierce internal debates, the Islamist camp prevailed. The final version of the Constitutional Declaration contained the roadmap for the election of a parliament, the establishment of a government, and the launch of a constitution-making process (National Transitional Council 2011c: Art. 30). The Constitutional Declaration endowed the newly elected parliament, the General National Congress (GNC), with the task of selecting the members of the Constitution-Drafting Assembly (CDA). According to the timeframe set out in the Constitutional Declaration, the transitional period was to have ended in December 2013 with the adoption of a new constitution.

The controversy about how to govern Libya's transition was indicative of a change of trajectory in Libya's legal discourse. With the impending defeat of the Qadhafi regime, Libya was less dependent on international support, and political debates became more embedded in Libya's internal discourse. While the Constitutional Declaration, officially issued on 3 August 2011 after Qadhafi's death, largely maintained the liberal undertone of the NTC's earlier 'Vision of a Democratic Libya', religious norms and regional, tribal, and local power structures and preferences

⁶ Note that the categorisation of 'liberal' and 'Islamist' actors is a reductive account of a much more complex political landscape. The term 'liberal' in the egalitarian, individualist, and market-oriented sense of the word only applies to a limited number political actors. Equally, 'Islamist groups' are not a monolithic bloc. Different strands of Islamism exist in Libya, ranging from moderate factions, such as the Muslim Brotherhood, to more radical Salafist and jihadist ideologies, such as Isis. Here the term refers to the moderate strand of Islamist factions. See e.g. Lacher 2017: 140, Lacher 2013: 10.

gradually started to be voiced.⁷ Internal power struggles came to the fore in the wrangle over Article 30 of the Constitutional Declaration, which set out the procedural and institutional arrangements for the transitional phase. These were early signs that a national vision for rebuilding the state might prove to be more difficult to achieve than initially hoped.

4. Legal Politics before the Election of the CDA

4.1. The Federalist Challenge

Originally, Article 30 of the Constitution Declaration did not specify the composition of the constitutional assembly. It merely stated that an elected parliament, the GNC, would “opt for a Constitutional Power in order to formulate the constitutional draft for the State”. The draft constitution would then be adopted via a public referendum, ending Libya’s transition to a democratic constitutional state. Federal leaders in the eastern region of Cyrenaica were unsatisfied with the proposed proportional system of seat allocation, as they feared the parliament would be dominated by Libya’s more populous west. Such fears were rooted in the region’s historical experience of marginalisation under Qadhafi, who had systematically neglected Cyrenaica.⁸ Protests erupted in March 2012 and a group consisting of an estimated 3,000 tribal leaders, military commanders, and political figures convened in Benghazi to declare the eastern region of Cyrenaica semi-autonomous (Kane 2015: 217). NTC politicians harshly condemned these movements, warning federalists that “national unity would be defended by force, if needed” (AFP 2012). At this very early post-revolutionary stage, revolutionary euphoria was still running high in the country, and thus the politicians’ call for national unity was supported by nation-wide anti-federalist protests proclaiming that “Libya is one” (Gluck 2012).

The initiative for self-administration and the federalists’ protests did exercise enough political pressure on the NTC that it felt compelled to react.⁹ In the first of a series of amendments of Article 30, Amendment No. 1 of 2012 clarified that the CDA would be structured “along the lines of the sixty-member commission that was formed to prepare the constitution of the independence of Libya in the year 1951”.¹⁰ The GNC was now required to select a body consisting of 60 delegates from outside the GNC, with 20 representatives from each of the three major regions in Libya – Tripolitania, Cyrenaica, and Fezzan (National Transitional Council 2012a).

⁷ For example, references to Islam became more prominent after the revolution had been won. When Mustafa abd al-Jalil declared Libya’s ‘liberation’, he also made sure to stress that Libya was “an Islamic country (...). We take the Islamic religion as the core of our new government. The constitution will be based on our Islamic religion” (Nossiter and Kareem 2011). He further announced that Islamic *Shari’a* law would be “the basic source of legislation, and so any law which contradicts Islamic principles is void” (Madi 2011). This commitment to Islamic law was cemented in Article 1 of the Constitutional Declaration, which defined *Shari’a* as the principal source of legislation. The commitment to *Shari’a* subsequently permeated several subsequent legislative acts of the NTC, such as the abolishment of Qadhafi’s ban on polygamy and the establishment of the Dar al-Iftaa, an independent religious body tasked with giving religious advice and opinions in the form of *fatwas*.

⁸ Federalists further based their claims on Cyrenaica’s particular history and identity: Eastern tribes had been brought together under the leadership of the Senussi family in the nineteenth century; they had fought against Italian Fascist rule under the leadership of the Libyan national hero Omar Mukhtar. Qadhafi’s coup was a direct overthrow of eastern, Sanusi power and the 2011 revolution had started in Benghazi. See Kane 2015. At a later stage of the transition new federal movements emerged that were more economically driven. They were about the control of Libya’s oil resources, which are predominantly to be found in Cyrenaica. See Galtier 2013.

⁹ In a first attempt to calm federalist tensions in eastern Libya, Prime Minister Abd al-Rahim al-Kib announced that the NTC would open offices in Benghazi and Sebha and that a law on administrative decentralisation would be prepared to “avert the policy of federalism to run the state’s affairs” (Financial Times Agency 2012, as cited by Kane 2015: 219).

¹⁰ The reference to the 1951 Committee of Sixty as the CDA’s historical predecessor had an important symbolic significance as the 1951 constitution had become a central unifying narrative during the revolution. See e.g. Urdike Toler 2014.

Cyrenaican federalists were still not satisfied with these adjustments. They were aware that the GNC's composition would also impact the set-up of the CDA, as the Constitutional Declaration still endowed the GNC with the task of selecting the members of the so-called 'Committee of the 60'. In the run-up to the first parliamentary elections in 42 years, federalist leaders called on Libyans to boycott the elections of the new parliament, engaged protests (some of which turned violent), and forced oil sites to shut down (Sapa-AFP 2012; Mezran and Pickard 2014: 6). Facing a boycott of the parliamentary elections in the east and the threat of a rupture of Libya's economic lifeline, the NTC took the controversial decision to amend Article 30 again two days before the elections, ruling that the CDA should be directly elected by the people rather than selected by the GNC (National Transitional Council 2012b).

4.2. Political Exclusion

Despite these early political tensions there was still widespread enthusiasm for the forthcoming elections of the new parliament and, more generally, for rebuilding the country. However, GNC elections in July 2012 resulted in a highly fragmented and heterogeneous legislature. The manifold fault lines that ran through the parliament's parties and wings led to highly unstable and short-lived political alliances within the GNC which often coalesced around a particular policy issue and ceased to exist as soon as the short-term goals had been realised (Lacher 2013; Gaub 2014: 103). This caused prolonged and protracted debates and negotiations and severely delayed the timeframe laid out in the roadmap, including the election of the CDA.

Further, the conditions for the constitution-making process and the set-up of the CDA were affected by the GNC's legislative processes. In May 2013, the GNC adopted the controversial Political Isolation Law under considerable pressure from a revolutionary camp in the GNC, which included Islamist-leaning members and representatives of towns with close ties to revolutionary militias that had taken up arms against Qadhafi (Wehrey 2014: 14; Wierda 2015; Jawad 2013). The Political Isolation Law was a lustration law that represented a far-reaching attempt to prevent former members of the Qadhafi regime from holding public office during the country's transition. While those in favour of the Political Isolation Law argued that it was designed to make sure that Libya's institutions and the constitution would be 'built with clean hands', others deemed it to be the result of political manoeuvring (Fick 2013). Indeed, the law seemed to be particularly useful for Islamist political factions, as it primarily affected popular liberal-leaning politicians who had held high-ranking official positions at some point during the Qadhafi era. The fact that deputies had been forced to pass the law after Islamist-leaning militias had stormed and surrounded the parliament further corroborated this impression.

The law had an impact on the power relations in the GNC, as several parliamentarians subsequently had to resign and were replaced by pro-revolutionary and Islamist-leaning deputies. It also affected the set-up of the CDA, as it effectively excluded those who had been officially involved with the previous regime. Far from promoting unity, the law increased tensions and deepened divisions within the parliament and the wider political landscape by creating a new class of disaffected citizens, thereby significantly souring the political climate in the country (Bartu 2014; Wierda 2015).

4.3. Minorities

The CDA's electoral law presented a more direct opportunity for influencing the set-up of the CDA. The drafting of the law largely took place behind closed doors – possibly to forestall controversial debates. However, this left very little room for different interest groups to voice their opinion during the process. After the law was adopted by the GNC in July 2013, fervent criticism was voiced by minority groups, in particular by the Tebu and the Amazigh. These groups had suffered under the previous regime's ideology of 'Arab nationalism' epitomised by his slogan *nahna kull libiyun [we are all Libyans]*. Minorities were either integrated into this vision, assimilated, or marginalised.¹¹ Hence, these minority groups had a vital interest in securing language and cultural rights and citizenship rights, and in having a say regarding the national symbols of the Libyan state, such as its name and its flag.

According to the Electoral Law, Libya's three main minority groups, Amazigh, Tebu, and Tuareg, were each allocated two seats, despite considerable differences in their population size.¹² Minorities claimed that the law did not allow for adequate representation and meaningful participation in the proceedings of the assembly and started demanding that this be guaranteed in the voting procedure of the CDA. They insisted that issues of particular importance to minority groups should be decided by consensus rather than by the 2/3+1 majority provided for in the Constitutional Declaration (National Transitional Council 2011c). Amazigh minority groups went even further in demanding certain rights to be guaranteed before the negotiations within the CDA had started. In August 2013, a group of Amazigh activists "forced their way into the Parliament building in Tripoli, (...) smashing windows and destroying furniture", demanding guarantees that their language, Tamazight, would be officially recognised in the constitution (Reuters 2013). Since the demands remained unanswered, the Amazigh minority boycotted the elections from the beginning – as did the Tebu and Tuareg minorities in the days leading up to the CDA election. While the Tebu and the Tuareg eventually participated in the constitution-drafting process, the Amazigh remained unrepresented in the CDA.

The marginalisation of minorities, especially Tebu and Tuareg, was problematic for the process of state-building. As a result of the transnationality and trans-border connectivity of these minorities, particularly in the southern region of the Fezzan, much of the Libyan southern borders remain under their control (Lacher 2014). Thus, the minorities' boycott of the constitution-making process presented a potential threat for the stability of Libyan southern borders.

5. The Effect of a Fragmented Political Environment on the CDA

Meanwhile, many Libyans had become increasingly disillusioned with the political process and had lost trust in their political institutions (Mezran 2014). In the eyes of many Libyans, the GNC had failed to manage the transitional process effectively due to the parliament's increasing factionalisation and political infighting (Chivvis and Martini 2014: 41–42). Many Libyans shared

¹¹ The relationship between these minorities and the Qadhafi regime was complex and would require a separate analysis. Tuareg tribes, who inhabit vast Saharan areas stretching from southwestern Libya to southern Algeria, Niger, Mali, and Burkina Faso, were glorified as 'Arabs of the South' and were gradually integrated into the regime's structures. The Amazigh were officially seen as a 'colonial invention' and were denied cultural and language rights. The Tebu, who are dispersed among four states (Chad, Libya, Niger, and Sudan), were neglected and often denied Libyan citizenship because they could not prove that they descended from grandparents who had lived within the 1951 borders of Libya (Kohl 2014).

¹² The Amazigh minority population is about twenty times the size of the Tebu, for example.

the view that the GNC's activities had "come to be characterised by patronage rather than political decision making on issues of national importance" (Carter Center 2014: 5).

Additionally, competing interests between a plethora of militia groups led to a rapid deterioration of the security situation (Lacher and Cole 2014). Against the backdrop of an increasingly volatile security situation, a failing parliament, and emerging ideological conflicts, some Libyans felt that the country was experiencing a gradual deterioration of the national idea:

"We were all one, you know. I was here in Tripoli, I didn't move during the revolution. I witnessed everything here. And when I was watching TV, I was crying for Benghazi, I was crying for Misrata. I felt that this is my country, these are my people. I wasn't talking about different cities, I was talking about my country. We were one at that time. But now I don't think we are." (Aribe 2014)¹³

Towards the end of 2013, the country was steering into a governance crisis. The CDA was not yet elected and the parliament's mandate was about to end in early 2014 with no plan in place for the time after the end of its tenure.

5.1. CDA Elections

To prevent the looming institutional vacuum, preparations for the election of the CDA were sped up. After new delays, elections were hastily organised for February 2014. However, the emerging 'democracy fatigue' among Libyan citizens and the lack of trust in formal institutions that had built up during the transition had an impact on the CDA's election. The net participation of eligible voters for the CDA is believed to have been below 14 per cent, which amounts to less than 10 per cent of the total population (Eljarh 2014a).

Despite the low voter turnout, some Libyan politicians and activists remained cautiously optimistic that a constitution-making process could reignite a sense of national belonging. Ahmed Gebreel, a Libyan diplomat and subsequently adviser to the CDA, argued that the low voter turnout merely showed how "frustrated the people are. But it does not really affect [the CDA's] work that much." He continued to explain that Libya needed

"(...) a constitution more than any time before at this stage. We need something to hold us together, something to determine everyone's responsibilities and rights at this very critical stage. Because now every group, every region in the country, every city is trying to say that they have more rights than others because of their contribution to the revolution or because they have been suffering during Qadhafi's time, or that they are really suppressed. We need the constitution to show everyone's rights and responsibilities to end these discussions." (Gebreel 2014)

Similarly, Elham Saudi, founder and director of the NGO Lawyers for Justice in Libya, expressed her hopes that the constitution-drafting process might "result in some kind of national dialogue in its own right that might resolve some of our concerns" (Chatham House 2014). Indeed, the issues that lie at the core of the conflict, namely the decentralisation of the country, the re-organisation of

¹³ This research is based on semi-structured interviews conducted with a range of experts, officials, and local civil society organisations involved in the Libyan constitution-making process as well as with the members of the CDA. Interviews were conducted in Libya and the region, and via Skype between April 2014 and December 2017.

the security apparatus, the need to find a system of effective government, and the fair distribution of resources, are fundamentally constitutional issues. On a broader level, the constitution should also address questions of national unity and identity.

5.2. Civil War and the Splitting of the Government

Shortly after the CDA was inaugurated in April 2014, new divisions emerged. Khalifa Haftar, an ex-Qadhafi general who defected in 1990 and returned to Libya during the 2011 revolution, formed an alliance (codenamed ‘Operation Dignity’) with eastern military units and tribal or regional-based armed groups and launched an attack against Islamist forces in Benghazi in early May 2014. Two days later, the operation spread to Tripoli, when Haftar-loyal militias from the city of Zintan stormed the parliament building in Tripoli and declared the GNC suspended, claiming that the body no longer represented the Libyan people and had become illegitimate (Mezzofiore 2014). The GNC was forced to organise the election of a new parliament, the House of Representatives (HoR). Elections for the HoR in June 2014 resulted in a landslide electoral defeat of Islamist factions. Consequently, Islamist politicians, supported by militias from the town of Misrata, launched a military campaign that was dubbed ‘Libya Dawn’ and aimed to counter Haftar’s Operation Dignity. The country slipped into civil war, and in the course of the conflict former GNC members re-established the GNC in Tripoli. The country was now divided between two parliaments: a core group of the elected HoR convened in the eastern town of Tobruk and remnants of the GNC in Tripoli. With Operation Dawn opposing Operation Dignity and the split of the parliaments, the two dominant sides in Libya’s current civil war were largely set.¹⁴

5.3. CDA Continues Work in Isolation from National Politics

After the split of the institutions, the CDA remained the only elected and undivided institution of Libya’s political transition. Despite having been elected by only a small percentage of the population, the CDA still enjoyed widespread public support and was seen by many as a “last glimpse of hope” (Eljarh 2014c, Eljarh 2014b). This was connected in part with the composition of the body. Members of the GNC, the interim government, and official security or military authorities were not permitted to stand as candidates (General National Congress 2013: Art. 9). The CDA offered a fresh institution whose members had been largely uninvolved in the political turmoil of the other institutions. Also, since its inauguration the CDA has worked in near total isolation in the city of al Bayda in eastern Libya. The remoteness of the town meant that it was possible for the CDA to deliberate largely uninfluenced by political factions and armed militias. Furthermore, the CDA took the decision to abstain from any direct involvement in the political process. Thus, for the most part, the body has maintained its political independence and for a while was the only largely uncontested and elected institution in the country.

However, the CDA’s isolation also had its downsides. For one, the CDA struggled to include wider segments of the Libyan people in the constitution-making process. The process became less accessible for Libyan civil society and largely disconnected from the Libyan citizens: an outreach tour conducted in summer 2014 was described by one observer as more of a ‘carnavalesque performance’ than a substantive contribution to the process (Hammady 2014); the remoteness of

¹⁴ This said, it is important to keep in mind that beneath this “meta-narrative of Islamists versus liberals or Misrata versus Zintan, the Dawn-Dignity fighting reflected long-standing feuds between rival towns, clans, and patronage networks” (Wehrey 2014: 23). In the course of the conflict Libya’s many powerful ‘city-states’ and tribes started to create loose and ever-shifting ties of allegiance with one or the other.

the town and the deteriorating security situation meant that few civil society organisations made their way to al Bayda to discuss their views with assembly members (Democracy Reporting International 2016); and online outreach has been deemed by international observers to have been largely unsystematic and uncoordinated and it remained unclear how public input was channelled into the proceedings (Hammady 2017). Finally, the CDA's rules of procedure called for holding constitutional negotiations in secret, thus largely excluding the public from these debates (Libyan Constitution Drafting Assembly 2014: Arts. 14 and 57). Eventually, Libyan civil society activists, including women's groups and youth groups, started to criticise the CDA's lack of communication and expressed concerns that their comments and demands were not being seriously considered (Democracy Reporting International 2016). Against the backdrop of a failing transition and a civil war which threatened to tear the country apart, some Libyans started to dismiss the CDA as irrelevant to their everyday concerns (Hammady and Meyer-Resende 2015). The extremely slow progress of the constitution-drafting process fuelled scepticism about the viability of the proceedings.

A second problem was that the CDA had isolated itself from the UN-led Political Dialogue that had been kicked off with a meeting in Ghadames in September 2014. Up until then, the international community had taken a rather passive approach to Libya's political transition, adopting what Ian Martin, former head of the United Nations Support Mission in Libya (UNSMIL), called a "light-footprint approach" (Martin 2015). After the outbreak of the civil war in 2014, however, the UN started to become more prominently involved in Libya's transition with the goal of solving the institutional crisis at a national level. It hoped to form a unity government, arrange an agreement between rival factions on confidence-building measures, and negotiate a comprehensive ceasefire (UNSC 2014). The outcome of these negotiations was to have a bearing on the constitution-making process, not least in that the CDA would need to work within the new parameters set by a possible agreement between Libya's current power holders. Nevertheless, CDA Chairman Ali Tarhuni and other members of the assembly repeatedly stressed that the CDA would only be successful if it continued to "distance itself from the political conflict in the country" (Libya Observer 2014). While the decision to detach constitution-making from the UN-led Political Dialogue may have secured the CDA's political independence, the uncoordinated operation of the two processes entailed risks. Some mediators warned that if the CDA produced a constitution which reached very different conclusions than the dialogue process or, indeed, "does not address or aggravate the issues (...) which are at the heart of the ongoing conflict, the constitution risk reigniting fighting" (Thornton 2016).

Thirdly, the ongoing civil war had created two (and after the UN's successful conclusion of a peace agreement in December 2015, three) governments with very limited authority. Real authority continued to be exercised by local power holders. The Constitutional Declaration provided that the constitution had to be approved via popular vote before coming into force (National Transitional Council 2011c: Art. 30). With no effective central government to rely on, even a successful constitution-drafting process would probably not have solved Libya's problems, as the constitution's implementation was at the mercy of local power holders, who were likely to block a referendum on a constitution that did not reflect their interests.

6. Controversies and Fragmentation of the CDA

After issuing a first patchwork draft constitution in December 2014, the CDA was almost completely silent for nearly a year. Despite the chairman's assertions that neither he nor the members of the assembly were paying 'attention to the political pressure', old and new societal rifts in Libya's fragmented social and political landscape started to be reflected in the assembly's proceedings (Daragahi 2015). A CDA member noted in 2015: "The conflict has a very serious effect on the negotiations in the assembly. Everyone is somehow affected by the conflict. As a result, political positions have hardened and it has become very difficult to overcome the divisions" (al-Jilani 2015). Among other divisive issues, questions of how to deal with minorities, federalism, and the CDA's role in the current transitional framework brought the constitution-making proceedings to a standstill.

6.1. Minorities' Boycott of the Proceedings

Despite initial participation, by August 2015 representatives of the two remaining minorities, the Tebu and the Tuareg, had boycotted the negotiations after what they perceived as a "violation of the constitutional declaration and the democratic principles for a multicultural state" (Khalifa 2015). The CDA's minorities felt that the CDA's Arab majority had not been responsive to their demands throughout the process. Since the boycott, the minorities have not re-joined the proceedings at the assembly.

Members of the Tebu community subsequently warned the CDA against adopting "a non-comprehensive, non-concord constitution", noting that if the CDA's Arab majority continued to pursue their policy of "Arab nationalism" there would be no constitution (Libyan Express 2016b). Some added that there was still the "option of the secession of the south from the rest of the cities of Libya" given the "legitimate right of self-determination of oppressed minorities in countries which exclude and marginalise their people" (Wahli 2015).¹⁵ Similar secessionist tendencies have also been voiced by some members of the Tuareg (Chelali 2016). While secessionist movements have not yet gained momentum and many minority members still primarily identify as Libyans, such comments underlined the fragility of Libyan statehood.¹⁶

6.2. The Divisive Question of Federalism

Soon after, the CDA was confronted with another question relating to national unity. In January 2016, shortly before the adoption of a new draft constitution, an additional eleven CDA members, primarily from the western part of Libya, started boycotting the proceedings. Previously, conflict had broken out within the assembly over the question of how to politically organise Libya's fragmented body politic. The draft constitution sought to appease hardline federalist CDA members, some of whom had "no problem if Libya would be divided", by decentralising governmental power through the establishment of three governmental centres in Tripoli, Benghazi, and Sebha (Anonymous CDA Member 2015). The boycotters refused this proposal, noting that such an approach would render effective governance impossible.¹⁷

¹⁵ Notably, this Tebu speaks of "cities of Libya" rather than the "state of Libya".

¹⁶ Ines Kohl notes that "national and ethnic and tribal affiliations are not mutually exclusive categories" (Kohl 2014: 424).

¹⁷ An underlying issue of these debates is the question of the fair distribution of Libya's oil revenues, as 80% of the oil reserves are located in Libya's east.

Regardless of the protest, Chairman Ali Tarhuni pushed for the adoption of the contested draft and the CDA adopted it on the 3 February 2016 – without, however, reaching the necessary quorum for a final draft. Tarhuni’s support of the contested draft fuelled lingering resentment about the assembly’s leadership among CDA members, who claimed that Tarhuni was trying to force a finalisation of the constitution for his own political gain. Seeking to impeach Tarhuni, the boycotting members filed a claim at the local administrative court in al Bayda, which dismissed Tarhuni as the CDA’s chairman in mid-February 2016 (Libya Observer 2016a).¹⁸

6.3. Controversial International Involvement and the Stalling of the Proceedings

Meanwhile, UN mediators managed to forge a fragile peace agreement between moderate factions of the two rivalling parliaments in December 2015. The Libya Peace Agreement (LPA), also known as the Skhirat Agreement, establishes an interim Government of National Accord (GNA) which is tasked with “the management of Libyan affairs until the adoption and implementation of the Libyan Constitution” (Contracting Parties 2015). In fact, since the LPA details the functioning of state institutions, it can be considered the political parties’ agreement on a ‘mini-constitution’. UN mediators were concerned that the viability of the compromise found in the LPA could be jeopardised by a constitution-making process that produced very different outcomes. After all, the agreement had been made without any coordination with the CDA – primarily because of the CDA’s refusal to participate in political negotiations. Furthermore, the LPA had set the CDA a new deadline, 24 March 2016, by which it had to complete its work (Contracting Parties 2015: Art. 52). After Chairman Tarhuni’s sacking in February 2016 and in the light of evident rifts in the CDA, the United Nations Support Mission in Libya (UNSMIL) feared a collapse of the constitution-making process and started attempts to speed up the drafting process.

Given the tense security situation in Libya, the UN arranged and oversaw CDA negotiations in Salalah, Oman, in March 2016. A month later, the CDA presented a slightly amended third constitutional draft. UNSMIL Head Martin Kobler praised the draft as a

“basis moving Libya beyond the transition period, and building a new modern Libyan state, anchored in the principles of democracy and separation of powers, rule of law, and respect for human rights, including equality for all, and guaranteeing the rights of women and all components of the Libyan national identity.” (UNSMIL 2016)

Notwithstanding Kobler’s optimistic comment, the draft was still highly contested among CDA members and UNSMIL’s initiative brought further division into the assembly. Only 33 of an original 58 CDA members were present at the negotiations in Salalah. In addition to the boycotting minorities, other CDA members started to abstain from the proceedings, claiming that the UN involvement was illegitimate because constitution-writing was a matter of national sovereignty and should take place on Libyan soil and without any international involvement (Hanly 2016; Assad 2016).

Crucially, the adoption of the draft despite the large number of boycotting members was only possible because of a contested amendment of the CDA’s rules of procedure to allow a 2/3+1 approval by those present rather than 2/3+1 of the total number of CDA members (Hammady

¹⁸ Notably, the basis of the claim was not the substance of the constitutional draft, but the fact that Tarhuni carried dual citizenship. The way in which Tarhuni was dismissed showed once again how Libyan actors strategically used legal tools for their interests.

2016). Boycotting members, such as Mohamed al-Tumi, condemned the amendment as “legal piracy” and subsequently filed another claim at al Bayda’s administrative court (Libyan Express 2016a). In December 2016, the administrative appeals court in al Bayda issued its final verdict and annulled the constitutional draft (Libya Observer 2016b).

6.4. A Final Draft with an Uncertain Future

After the annulment of the April 2016 draft (or ‘Salalah draft’), some of the boycotting members joined the CDA again and new attempts were made to finalise a constitution – this time without the involvement of the UN. After approximately another year of deliberation amidst a continuing chaotic and divided political scene, the CDA adopted a final draft constitution in June 2017. Emblematically for the entire process, the vote took place under dramatic circumstances: the first voting procedure was interrupted by violent protests, during which protesters broke into the assembly, beating and threatening some CDA members and demanding the voting be postponed. CDA members refused to interrupt the procedure, and on Saturday, 29 July 2017, after the situation had been brought back under control by local security forces, they adopted the draft constitution with a majority of 43 out of the 44 remaining CDA members (Libyan Express 2017).

Notably, the evolution of the drafts reflects how, despite the CDA’s efforts to portray itself as a politically independent institution, it was in fact deeply embedded in the wider political process. The same fault lines that characterised Libya’s wider socio-political conflict also crystallised in the constitution-drafting process.

In contrast to previous drafts, the final constitution envisions a strong presidential system with relatively limited decentralisation. By giving the president control over government policy and creating a number of executive mechanisms of power, the new draft leaves little doubt as to who will be in charge after the new constitution enters into force (Libyan Constitution Drafting Assembly 2017: Art. 104). Some have argued that the decision for this concentration of power emphasises the CDA’s decision to “prioritize peace and stability over all else” (Al-Ali 2017). At the same time, however, the draft dismisses the three-regions model that federalists had been demanding and generally only contains vague provisions with regards to the power of local authorities. Why federalists within the CDA accepted such a centralist-leaning draft remains unclear. In any case, many easterners were deeply disappointed with the outcome of the process; CDA members from Cyrenaica were confronted with heavy criticism and if a referendum is held the draft is likely to face significant resistance from federalist groups in the east (Ibrahim 2017).

The draft also reflects unresolved tensions between liberal- and Islamist-leaning groups of Libyan society. On the face of it, the draft has a relatively strong conservative outlook, positing that Islam is the religion of the state and that *Shari’a* law is the source of legislation (Libyan Constitution Drafting Assembly 2017: Art. 6). Nevertheless, Grand Mufti Ghariani criticised the unqualified inclusion of a number of rights that had the potential of contradicting Islamic law (Al Wasat 2017a). On the other hand, liberal-leaning groups called the final version of the constitution a “dangerous constitutional draft”, claiming that the emphasis on Islam and *Shari’a* was likely to negatively impact the implementation of the rights and freedoms of its citizens (Lawyers for Justice in Libya 2017).

The draft does also not close the rifts between the Arab majority and minority groups. While CDA members gradually implemented minority-friendly provisions, such as “a minimum level of representation for cultural and linguistic minorities”, these guarantees still fell short of what the

minorities demanded (Libyan Constitution Drafting Assembly 2017: Arts. 68 and 75). Also, the rights granted in the constitution were arguably vague and other provisions to improve their position in the future Libyan state were left for future legislators to decide (Libyan Constitution Drafting Assembly 2017: Arts. 68 and 75). Finally, the draft was adopted without the inclusion of Libya's main minorities – the Tebu, the Tuareg, and the Amazigh. Tebu and Amazigh immediately rejected the draft and announced that they would boycott any referendum (Al Wasat 2017b). A website ostensibly run by Amazigh reported that the Amazigh were preparing to file another claim on the basis that the CDA had adopted the constitution without achieving consensus on minority issues, which is required both by law and the rules of procedure (Temehu 2017, see also Libyan Constitution Drafting Assembly 2014: Art. 60). They also vowed to write their own Berber constitution (Temehu 2017).

Thus, the final constitutional draft was far from being a 'consensual document'. Given the number of controversies surrounding the draft, it was unclear whether the constitution would pass in a public referendum. After all, the constitution-making process took place predominantly behind closed doors with very little public participation. The initial reactions to the draft showed that many Libyans were disappointed in both the outcome and the process of the constitutional negotiations (Saad 2017; Middle East Monitor 2018).

Apart from speculations about the likely outcome of such a vote, organising a referendum in the first place appears to pose considerable challenges. Libya's major political forces have been largely uninvolved in the constitution-making process. Numerous politicians have voiced their dismay with the draft, and for over a year after its adoption it remained uncertain whether those who hold the *de facto* power in Libya would be able to agree on organising a referendum (Toaldo 2017). Finally, the HoR passed a referendum law in November 2018 – although again under controversial circumstances (Fetouri 2019). Again, the conflict derived from the division between federalists and centralists: the law divides the country into three electoral districts along the lines of Libya's three regions – Tripolitania, Cyrenaica, and Fezzan. It requires a 50+1 vote in favour of the constitution in all three regions for it to become effective. Given the likely disapproval of the centralist-leaning draft in the eastern region of Cyrenaica centralist politicians reject the law and promptly filed lawsuits against it (Fetouri 2019). Beyond such controversies, members of the High National Election Commission, who were tasked with the organisation of the referendum, voiced concerns about security issues and a lack of funding (Libyan Express 2018).

Soon after his appointment as new head of the UNSMIL in June 2017, Ghassan Salamé announced that he would seek to resolve potential discrepancies and roadblocks through a discussion of the constitutional draft in a national conference (UNSMIL 2017). So far, the structure of the dialogue process has remained vague and its date has been postponed several times, with most recent reports suggesting a launch of the process in early 2019 (Wintour 2019). The national conference, too, is surrounded by uncertainty. CDA members who voted in favour of the July 2017 draft consider the text to be the final version and are unwilling to re-enter negotiations – not least due to the experience of the violent circumstances within which the final draft was adopted. Also, Salamé's proposal entails the risk that a painstakingly achieved and fragile compromise within the CDA will be further complicated by the addition of a plethora of new voices. When all these concerns are taken together, the future of the constitution and the question of whether it will positively contribute to the challenge of building a new Libyan state remain deeply uncertain.

7. Conclusion: Constitution-Making for State-Building?

Just as other Arab Spring revolutions did not experience a ‘clean break with the past’, Libya’s revolution and subsequent transition were marked by what Sultany termed patters of “rupture and continuity of revolutions” (Sultany 2017: xviii). Qadhafi’s death may have brought an end to his highly personalised and idiosyncratic political system, but Libya’s society was still marked by fragile national cohesion, strong regional and local identities and alliances, and what political scientist Alia Brahimi called a “geographical tradition of resistance to centralised authority” (Brahimi 2011: 605). Post-revolution leaders in Libya sought to harness the brief moment of national euphoria in the immediate aftermath of the fall of Qadhafi and lead Libya to a constitutional democracy by channelling the multifaceted voices of Libya’s revolution via a legal procedural framework.

However, Libya’s divisions soon manifested themselves in the transitional framework. Electoral competition brought about a highly fragmented parliament and a weak and contested central government with very limited control over countless militias. Rather than containing sometimes violent political discourse, legal procedures became yet another battleground for warring political entities who sought to lock in certain contested worldviews, policy preferences, and institutional structures before and during the constitution-making process. This increased political division as partisan political interests became ‘entrenched’ as a normative perspective of the state at the expense of other, less powerful actors. The Libyan constitution-making process, and the transitional process in general, underlined the state institution’s vulnerability vis-à-vis local power holders and exhibited the fragmentation of the Libyan political landscape and the fragility of Libyan state- and nationhood. The CDA’s 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.

While the Libyan case needs to be understood on its own terms, insights drawn from this empirical analysis allow us to reflect critically on the hopes and expectations that are often attached to constitution-making times of transition. The qualitative empirical approach taken here allows us to shift our perspective away from normative understandings of what law *ought* to do, to how law functions in practice – that is, to look at how law and legal procedures are used and understood by the actors in the process. This shift of perspective is particularly important when theoretical assumptions drive the use of constitution-making as a tool for state-building.

The Libyan example emphasises that when societal conflict is high and the political landscape deeply divided, conflicts are unlikely to be solved through a redistribution of power or resources or the elaboration of a unitary vision for a state in a constitution. As in the case of Libya, the disagreements that the constitution seeks to solve often lie at the core of the political conflict. Since the idea of a constitution is to entrench the law at a higher legal level, constitution-making is at risk of becoming a high-stakes arena of political conflict. Given the importance placed on the constitution for the future distribution of power in a country, constitution-making might enflame political conflict rather than bridging different positions. Alternatively, if constitution-making is isolated from the political process, thus disregarding the political process through which allegiance is forged, it risks becoming irrelevant in the eyes of political actors and decisions about the future of the state will be taken elsewhere.

The case of Libya illustrates that in order for law, particularly constitutional law, to play a stabilising role in a political community, certain conditions need to be met. Somewhat paradoxically, this analysis suggests that a meaningful and effective constitution-making process requires the existence of a somewhat institutionally organised and minimally united political community prior to the initiation of such a process (Sultany 2017: 260). In Libya, such a minimal political agreement on the future of the state was missing. Instead, from very early on a variety of political actors sought to lock in their partisan political visions into the transitional framework. This led to an ever more complex patchwork of competing legal claims, which in the end became difficult to unravel. Weak and divided central institutions meant that there was no authority that the CDA could rely on which had the capacity to implement a controversial constitutional draft.

Emerging literature on constitution-making suggests deferring long-term constitutional settlement in post-conflict environments and in deeply divided societies by either adopting an “incrementalist approach” to constitution-making (Lerner 2011: 30); by drafting interim constitutions to create “space and time to undertake more comprehensive discussions regarding the longer-term settlements” (Rodrigues 2017: 33); or by more carefully sequencing post-conflict reconstruction and seeking prior political agreement on “how power is to be held and exercised” (Bell and Zulueta-Fülscher 2016: 16). The rise of national dialogues, which provide for more flexible and inclusive platforms for trust-building, learning, reflection, and decision-making, also suggests a gradual shift in the way that policy makers approach post-conflict scenarios (Blunck et al. 2017: 11–12). What these approaches have in common is their focus on finding a *modus vivendi*, a sense of collective belonging and political cohesion, before rushing into constitutional settlement. What such a *modus vivendi* or sense of community entails and how it can be achieved in Libya and elsewhere, remains uncertain. It is equally unclear why men and women in this community subsequently choose to obey those who seek to govern them and abide by the laws they create. Ultimately, this opens up the more elusive question of legitimacy, namely the question of how legitimate authority in a state is constituted and sustained.

Thus, this paper contributes to an emerging trend in scholarship and policy-making that is moving away from a legal rational, procedural and technocratic approach to constitution-making and state-building, by taking a country’s broader socio-political, cultural, and historical context seriously. This also means recognising the contingent, indeterminate, and haphazard aspects of post-conflict political ordering. Once one acknowledges the open, provisional, and dynamic dimensions of constitutional ordering, it seems more pertinent to approach comparable situations as long-term processes of state-*formation* rather than as short-term state-*building* projects. Such a reading may encourage policy makers to rethink current policy approaches and to put more thought into options that go beyond the *legal-procedural approach*.

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