Mapping of
National Legislations Related to
Transitional Justice and National Reconciliation in Libya

Analytical Study

*By **Azza Maghur***
With contributions from Mohamed Othman and Alexander Mayer Rieckh

Introduction

The outbreak of the 17 February 2011 Revolution against the former regime of Gadhafi started by peaceful demonstrations in the East of Libya, but was rapidly forced into an armed confrontation in response to the strong state repression that deprived the movement it of its peaceful civilian nature. In Libya, as in neighboring countries, the revolutions of the so-called "Arab Spring" were sparked by the desire to resist tyrannical regimes, confront oppression, demand fundamental freedoms, social justice and equal opportunity, as well as to call for democracy and the respect of human rights.

Despite that fact that the Libyan revolution started peacefully and opened the path to a democratic transition, it led to the eruption of civil war between the ruling regime and the revolutionaries, whose intensity varied according to cities and regions. Some zones rapidly aligned with the ruling regime, while others were labeled as "revolutionary". These divisions sometimes run deep among villages, tribes, or even neighborhoods and families.

Intense fighting and threats to "annihilate" the revolutionaries in Benghazi led to the intervention of the NATO forces pursuant to Security Council Resolution 1973 of 18 March 2011, with the official objective of protecting civilians against the systematic attacks of the regime. This intervention, which rapidly turned into a regime change operation, consolidated the positions of the revolutionaries and eventually led, on 23 October 2011, to the fall of a dictatorial regime that lasted for more than forty-one years.

Despite the fact that the Libyan revolutionaries were armed, their movement and demands were essentially democratic and aimed, first, at liberating the country. As a consequence, the issue of national reconciliation was naturally raised as part of the democratic track after the revolution, but it was strongly rebuffed and eventually confronted by armed militias who had no interest in peace.

National reconciliation was therefore kept aside, and never addressed as a political priority despite the adoption of a solid, and sometimes flawed, legislation in that regards. Worst, national reconciliation was even subjected to political bargaining, power struggle and instrumentalization.

The failure to successfully promote national reconciliation in Libya certainly contributed to the situation the country faces today. Based on a comprehensive mapping and legal analysis of the

various laws and decrees related to the topic and adopted since 2011, this paper will provide some recommendations on the appropriate legislative framework for national reconciliation in Libya.

Part I: The Libyan Democratic Track and the First Legislations Related to Transitional Justice and National Reconciliation

First section: The various phases of the Libyan democratic track: a short historic summary

The post-revolution transition phases in Libya can be divided into four main historical phases.

Phase 1: 2011-2012

The interim National Transitional Council (NTC) was established in February 2011, but it was not elected. After its installation, the NTC issued a statement celebrating its victory in the revolution, and reaffirming "the unity of the Libyan people and national territories and the cohesion of Libya's social fabric".

Based on the new Constitutional Declaration, issued on August 3rd, 2011 and until the issuance of a permanent Constitution, the NTC became the highest authority in the country, enjoying both legislative and executive powers. The first legislation on national reconciliation was issued through "Law No. 17 of 2012 on the Establishing the Foundations of National Reconciliation and Transitional Justice".

It is also during this initial phase of the NTC ruling that the first free legislative elections in the country since 1965 were held. On July 18th, 2012 an elected parliament was formed: the General National Congress (GNC), which held its first session on 10 August 2012, to elect its President.

Phase 2: 2012-2013

The GNC, as the first elected authority after the revolution, assumed the initial management of the transitional phase in the country. It appointed an interim government, but after only 16 months[1] a vote of no confidence was adopted against Prime Minister Ali Ziedan, and his Minister of Defense, Mr. Abdullah Al-Thini, was thus designated as a temporary Prime Minister.[2] The GNC issued a decision to appoint Ahmed Maitig as Prime Minister for the Interim Government. However, the Supreme Court ruled in June 2014 that the GNC's Decision No. 38 of 2014 to appoint Mr. Maitig was unconstitutional, and Mr. Thini continued to serve as Prime Minister of the Interim Government. This period was characterized by political turmoil and armed conflicts in various areas and between various cities.

[1] From 14 November 2012 to 11 March 2013.
[2] GNC Decision No. 23 of 2014 on the Vote of Confidence against the Interim Prime Minister, on 11 March 2014.
[2] GNC Decision No. 23 of 2014 on the Vote of Confidence against the Interim Prime Minister, on 11 March 2014.

During this second phase, a new law on transitional justice was issued: Law No. 29 of 2013 on Transitional Justice[3], which annulled the previous one. A few months earlier, Law No. 13 of 2013 on Political and Administrative Isolation was issued[4] after introducing a constitutional amendment to Article 8 of the 2011 Constitutional Declaration, with the aim of protecting the Political Isolation Law against possible future challenges before the Supreme Court[5]. A case was brought before the Libyan Supreme Court by individuals and civil society organizations against the Political Isolation Law, based on its alleged unconstitutionality. However; the ruling of the Supreme Court on this constitutional challenge was never pronounced, as described below.

In February 2014, the GNC issued Decision No. 12 of 2014 on the formation of a new committee named the "February Committee". Its task was to submit a proposal on constitutional amendments of the Constitutional Declaration that would ensure the conduct of new legislative elections for the House of Representatives (HoR), as well as for presidential elections. On the basis of this proposal, the GNC issued the seventh amendment to the Constitutional Declaration as well as an Elections Law for the House of Representatives (HoR). GNC, however, suspended the chapter on presidential elections from the February Committee proposal and left it for the new HoR to deal with.

Phase 3: 2014-2015

On 4 August 2014, shortly after its election, the HoR convened in the city of Tobruk, but the handover process between the former legislative council (the GNC) and the new one (the HoR) was obstructed, seriously threatening the democratic transition of Libya and the prospects for national reconciliation.

This period was marked by various armed confrontations. In the East, Benghazi experienced political assassinations as well as security turmoil and violent confrontations between various communities and groups. In May 2014, the so-called *Operation Karama* (Dignity) was launched, officially in order to restore security. It rapidly came to be seen as an opponent to *Fajr Libya Operation* launched in Tripoli in July 2014[6], just days before the official announcement of the elections' results[7].

During this period, the Supreme Court issued a ruling on 6 November 2014, in response to Constitutional Case No.17 of the Legal Year 61. It stated the unconstitutionality of Article 30/11 of the Constitutional Declaration that was amended pursuant to the Seventh constitutional amendment. Members of the GNC interpreted this as dissolution of the HoR and continuation of the GNC, which in turn formed a new government that became known as the Government of National Salvation. The HoR, however, continued its operation, since the ruling of the Supreme Court did not cancel its existence, and because it believed it was also established based on

[3] Issued on 2 December 2013.
[4] Issued on 8 May 2013.
[5] See Azza Maghur, "A Reading into the Fifth Amendment of the Constitutional Declaration (amendment of Article 6 is null and void and does not produce any impact)", Libya Al-Mustaqbal, at: http://archive2.libya-al-mostakbal.org/news/clicked/36270
[6] HoR elections results were announced by the High National Electoral Commission on 21 July 2014.
[7] The Operation started on 13 July 2014.

elections law n°10. As a consequence Libya *de facto* had two competitive government: one in the in the East, and the other in the West.

The Interim Government relocated from Tripoli to the Eastern city of Bayda, and Mr. Abdullah Al-Thini was tasked by the HoR to form a new government. Due to these incidents and armed conflicts, the State institutions became split and strongly divided between a legislative establishment in the city of Tobruk, and another one that clung to its continuity in the city of Tripoli. To many observers, this division transformed Libya into an effective "failed state". Violent crime, sexual violence, human rights violations and international law breaches became rampant, and the state became unable to provide the basic necessities for its own citizens. Libya entered a dark tunnel, which seriously affected future prospects for democracy and for reconciliation.

Phase 4: 2015-2016

The United Nations Secretary General announced in September 2014 the appointment of his new Special Representative, Mr. Bernardino Leon, to start a national dialogue between Libyans and reach peace between the two rival sides. The dialogue held in Skhirat (Morocco) lasted for nearly a year until a Libyan Political Agreement (LPA), was finally signed in December 2015.

The LPA was meant to become a constitutional amendment to the Constitutional Declaration, in order to govern the rest of the transitional period until the issuance of the new Constitution. It establishes a Presidency Council (PC) and the Government of National Accord (GNA) as the main executive authority of the State, in addition to the High Council of the State, a second chamber composed, among others, of former GNC members. The Agreement, however, makes the HoR the sole legislative authority in the country.

However, until now the HoR has been unable to issue a constitutional amendment by agreement[8], and it was not able to convene to approve the government proposed by the Presidency Council either. In September 2016, the HoR finally rejected the GNA and asked the PC to form a new government. The LPA's provisions on security measures were not implemented and remain highly contentious, especially in the East. Nonetheless, the Presidency Council received international recognition and support.

The implementation of the LPA is thus facing great difficulties, especially at the constitutional and executive levels. Under such circumstances, national reconciliation can hardly be promoted.

The question remains of whether the national reconciliation legislations adopted until now remain valid and applicable, and if they could impulse a positive process on the ground, or if, to the contrary, an entirely new legal framework should now emerge.

[8] On 25 January 2016, the HoR issued a decision to endorse the Libyan Political Agreement. It stated that: "The HoR endorses the Political Agreement that was signed on 17 December 2015 with the cancellation of Article 8 of the Additional Provisions".

Second Section: Basic National Legislations related to Transitional Justice and National Reconciliation

National reconciliation and transitional justice legislations generally include measures to reveal the truth, preserve national memory, consolidate justice, ensure accountability for past violations, provide reparations for victims and ensure non-repetition through vetting processes and institutional reforms more generally. Such a framework remains the only way to exit the bloody conflict in Libya by addressing its root causes and consequences. Surprisingly, despite the political siding of national reconciliation, the topic was at the center of several legislations since 2011.

The issue of national reconciliation and transitional justice in Libya is complex since it includes two eras, two pasts that need to be faced: the previous regime of Gadhafi and the armed conflicts during and after the revolution. In both cases, gross violations of human rights and international humanitarian law were committed on all sides. The failure to address either of these has further aggravated the deep polarization and resentment among Libyans.

Before analyzing the main legislations and their suitability and legality for the national reconciliation process in Libya, the following table provides a mapping of the various texts adopted since 2011, with the exception of other legislations that could be relevant (such as criminal and civil legislations on property ownership or the nationality law).[9]

	Date	**Legislation**	**Source**
1	03/08/2011	Interim Constitutional Declaration	NTC
2	2011	Law No. 5 of 2011 on Establishment of Public Liberties and Human Rights Council	NTC
3	26/02/2012	Law No. 17 of 2012 on Establishing the Foundations of National Reconciliation and Transitional Justice	NTC
4	02/05/2012	Law No. 35 of 2012 on Amnesty for Some Crimes	NTC
5	02/05/2012	Law No. 38 of 2012 on Some Measures for the Transitional Period	NTC
6	11/06/2012	Law No. 50 of 2012 on Compensating Political Prisoners/and Regulations (2013)	NTC
7	14/04/2013	Law No. 10 of 2013 on Criminalization of Torture, Forced Disappearance and Discrimination	GNC
8	26/06/2013	GNC Decision No. 59 of 2012 on the Abu Salim Prison Massacre	GNC
9	30/07/2013	Law No. 18 of 2013 on the Rights of Linguistic and Cultural Components	GNC

[9] For legality reasons, the table does not include legislations issued by the GNC after the end of its term.

10	16/12/2013	GNC Decision No. 123 of 2013 on Development of a Roadmap to Resolve Current Disputes between some Libyan Cities	GNC
11	18/12/2013	Law No. 31 of 2013 on Deciding some Provisions for Abu Salim Prison Massacre	GNC
12	02/12/2013	Law No. 29 of 20013 on Transitional Justice	GNC
13	26/05/2013	Law No. 4 of 2013 on Deciding some Provisions for those Injured during the Liberation War who have Permanent Disabilities	GNC
14	19/01/2014	Law No. 1 of 2014 on Providing Care for Families of Martyrs and Missing Persons[10]	GNC
15	23/02/2014	Council of Ministers Decision No. 119 of 2014 on Addressing the Situation of Sexual Violence Victims[11]	Council of Ministers/Interim Government
16	19/04/2014	Law No. 3 of 2014 on Anti-Terrorism	HoR
17	08/06/2015	Law No. 2 of 2015 on Cancellation of Law No. 13 of 2013 on Political and Administrative Isolation.	HoR
18	07/09/2015	Law No. 6 on General Amnesty	HoR

[10] This law applies to the martyrs and missing persons of the Revolution only within a specific period, from 15 February 2011 until 23 October 2011, i.e. the duration from the revolution until the declaration of liberation. Article 2 of this Law clearly states that those "who are proven to have opposed the 17 February Revolution or to have been anti-revolution at any time and in any form" shall be exempted from benefiting from this law, thereby clearly politicizing it.

[11] The Interim Government submitted a draft law to the GNC to address the situation of victims of sexual violence, however the GNC's legislative committee did not allow its issuance. As a consequence, the Interim Government issued it in the form of a Council of Ministers Decision only.

Second Part: Analyzing the national legislation related to national reconciliation

1. The Interim Constitutional Declaration

The Constitutional Declaration remains the main constitutional document that governs the transitional period until now. It does not include any reference to national reconciliation or transitional justice[12] as such, an absence which can lead to two conclusions: either the two terms were new and unknown to Libyan law makers at that time, or the NTC did not foresee the deep divisions and conflicts that would later emerged later among Libyan regions, cities, tribes and sometimes even neighborhoods.

The Constitutional Declaration focused mainly on establishing the various phases of the democratic path during the transitional period. It aimed at consolidating fundamental rights and guaranteeing liberties in the line with the goals of the revolution. Article 6, for instance, ensures the principle of equality among all Libyans and states that "they shall not be discriminated against due to religion, sect, language, wealth, gender, lineage, political views, social status or tribal, regional or family affiliation"[13]. Article 9 adds that each citizen should adhere to civil values and combat regional and tribal fanaticism. These provisions indirectly protect the idea of national reconciliation.

The Justice and Human Rights Committee in the executive office of the first interim government rapidly realized that a more explicit legislation on national reconciliation was missing and needed. It therefore established a committee of Libyan legal experts to submit a draft national reconciliation and transitional justice law to the NTC, issued as "Law No. 17 of 2012 on Establishing the Foundations of National Reconciliation and Transitional Justice".

2. Law No. 17 of 2012 on Establishing the Foundations of National Reconciliation and Transitional Justice

This law was issued on 26 February 2012, only six months after the Constitutional Declaration. However, this legislation was far from the initial spirit of the draft law submitted by the Justice and Human Rights Committee, and prepared by legal experts. The 2012 law was strongly criticized for addressing only a specific historic era, thus being highly policitized and failing to carry any vision for Libya's present or future.

The Law is divided in two chapters. The first part includes general provisions and consists of 3 articles, while the second chapter consists of 15 articles, 13 of which are focused on the mandate and powers of the "Fact Finding and Reconciliation Commission" (FFRC).

Article 1 of the law defined transitional justice as "a set of legislative, social, administrative and judicial procedures, which address events that took place during the time of the former regime as

[12] It should be mentioned in the Preamble of the Interim Constitutional Declaration.

[13] We have to refer to the amendment of the Constitutional Declaration, which changed the aforementioned article 6, stipulating that excluding some individuals from leadership and sovereign positions in the state shall not prejudice the principle of equality. This was a way to protect the Political Isolation Law from accusations of non-constitutionality, as explained below.

well as violations against human rights and basic freedoms committed by state bodies, and seek to eliminate discord among segments of society through amicable means".

Article 2 stipulates that the provisions of this law apply only to "events that took place as of 1 September 1969 until the purpose of this law is achieved."

The objectives of the law were stated in Article 3, but most of them were general and vague, making the text very difficult to implement[14].

Although article 2 specified the end point term of the law's mandate ("until the purpose of this law is achieved"), the dominant interpretation of the law is that it is concerned only with the former regime and does not go beyond that period. Violations committed during and after the revolution are therefore excluded. The time limitation seriously hampers the impact of this law on national reconciliation.

Furthermore, the adoption of Law No. 29 of 2013 on Transitional Justice abolished this 2012 law.

3. Law No. 35 of 2012 on Amnesty for Some Crimes, and Law No. 38 of 2012 on Some Measures for the Transitional Phase, issued by the NTC

These two laws were issued on the same date, May 2nd, 2012, and can be considered as falling within the framework of national reconciliation. The first law grants amnesty for some crimes of the past, while the latter defines measures and procedures to address human rights violations committed during and after the revolution. Both laws were issued to confront specific events and actions, and were a way to legally justify the release of convicted inmates.

With the exception of crimes listed in Article 1, the 2012 law grants amnesty for crimes under the conditions listed in Article 2, which mostly concern crimes committed by "revolutionaries" against former regime officials or "counterrevolutionary" forces.

Article 4 states that: "There shall be no punishment for what the 17 February Revolution has deemed necessary in terms of any necessary military, security or civil actions carried out by the rebels for the success or protection of the revolution."

The law therefore acknowledges the existence of extrajudicial arrests and gross violations, but considers these acts as necessary for the revolution. Because they were meant to serve its objectives, they can benefit from an amnesty. Due to the vagueness of the terms used, along with its clear politicization and violations of international standards against impunity, this law is a doubtful contribution to national reconciliation in Libya.

4. Law No. 50 of 2012 on Compensating Political Prisoners and its Regulations, Issued by the NTC on 11 June 2012

[14] Examples of such vague formulation include the stated goals of "strengthening civil peace", "deterring human rights violations", or "achieving community reconciliation".

Although law No. 17 of 2012 on Establishing the Foundations of National Reconciliation and Transitional Justice was issued in early 2012, the law about political prisoners was issued at the end of the same year, and explicitly refers to Law No. 17 in its preamble. The law consists of four articles.

Article 1 defines political prisoners as "individuals, military or civilian, whose freedom was restricted in prisons and special detention [centers] because of their opposition to the former regime starting from 1 September 1969 to 15 February 2011".

The Law offers 8,000 LYD in reparations for those victims every month in addition to abolishing past convictions issued against them as a way to rehabilitate their dignity.

Since the issuance of Law No. 50 of 2012, other laws providing reparations for specific cases of violation that occurred during the former regime have been issued. This fragmentation of the legislation risks creating a fragmentation among victims themselves, thus weakening the reconciliation process further.

5. Legislations Related to Abu Salim Prison Incident/Special Legislations:

Since the convening of the GNC in April 2013, three legislations were issued in relation to the Abu Salim prison incident which took place in 1996, and during which allegedly more than 1200 prisoners, mostly Islamist activists, were killed. The legislations include:

- GNC Decision No. 59 of 2013, issued on 26 June 2013 on the Massacre of Abu Salim Prison

The specificities of the law are that:

1. It focuses on a particular crime and a singular category of victims of the former regime and on the location of the crime ("Abu Salim prison") rather than on its material elements.

2. It grants investigation competence on the incident to a specific committee of judges and a member of *Dar Al Iftaa*.

3. It describes the case of Abu Salim as genocide, although Libyan criminal code does not yet include such crime, and before any investigations are led to legally allow such strong qualification[15].

4. It focuses only on material compensations and financial benefits for the victims, to the expense of the more symbolic aspects of reparations.

- Law No. 31 of 2013 issued on 18 December 2016 on Deciding some Provisions for Abu Salim Prison Massacre

[15] Article 4 states that "Abu Salim massacre shall be considered genocide. Anyone who is proven to commit or contribute to this crime shall be punished accordingly."

1. This Law abolishes Decision No. 59 of 2013.

2. It defines the Abu Salim massacre as a "crime against humanity" and expands the facts of the crime beyond the historic incident of 1996 to include also "those who were killed in the massacre or those who died inside the prison because of disease, torture or other factors, regardless of whether or not their death is officially declared".

3. Most of the articles of Law focus on financial advantages and material compensations. Accountability and truth seeking are left aside.

4. Article 10 states that the compensations and financial advantages provided to the victims by the law are not final, and that its provisions shall not affect the right of families to receive compensation in accordance with general rules.

This Law plans for the creation of a fact-finding committee on the Abu Salim massacre, which was later established by the GNC in 2015, based on Law No. 33 of 2015 on the Formation of a Fact Finding Committee on the Abu Salim Prison Massacre.

6. Law No. 29 of 2013 on Transitional Justice:

The main goal of the first interim government after electing the GNC was "to issue legislations necessary for transitional justice, including fact finding, hearings, trials, compensations and vetting of the institutions, to establish the necessary environment for any national reconciliation processes that might be necessary for the return of the refugees and displaced"[16].

In January 2013, the Government submitted a draft transitional justice law to the GNC. The legislative committee of the GNC completed reviewing the law in December 2013, after some substantial modifications.

The main points of this law can be summarized as follows:

1. It abolishes Law No. 17 of 2012 on Establishing the Foundations of National Reconciliation and Transitional Justice.

2. The title of the law does not mention national reconciliation and focuses only on transitional justice. However, the law does mention in Article 2 that national reconciliation is one of the objectives of transitional justice.

3. In its preamble, the law refers to "international treaties concluded between Libya and other States and within the context of regional and international organizations".

4. Most of the articles of the law focus on the establishment and mandate of the Fact Finding Commission (articles 7-24), while only articles 1 to 6 address the general rules of transitional justice.

[16] Work Plan of the Ministry of Justice for 15 months (1 December 2012 – 28 February 2014).

5. In its first article, the law defines the concept of transitional justice[17], in a broader sense than in Law No. 17 of 2012, but it is still insufficient and relies too much on an arbitrary distinction between the crimes of the former regime and those of the revolution.

6. The law aims at "addressing what the Libyans were subjected to under the former regime". It states that the concept of justice includes addressing "some of the effects of 17 February Revolution", but its scopes remains limited to "the positions and actions" which affected the social fabric, and to "acts that were necessary to protect the revolution and that were marred by some behaviors that did not adhere to its principles."

7. In its definition of the concept of transitional justice, the maw differentiates between crimes that occurred under the former regime as "systematic violations of fundamental rights and freedoms by the state apparatuses under the former regime", and what is described as "positions and actions" committed for the 17 February Revolution. While Article 2 of the Law defines gross and systematic violations[18], it does not define what is meant by those "positions and actions", thereby allowing for serious abuses.

8. The law includes references to the corruption, tyranny and criminality of the former regime, and opposes it to the inherent justice of the 17 February Revolution (articles 4-5).

9. The law establishes a Fact Finding and Reconciliation Commission (FFRC) consisting of 8 members appointed by a decision of the GNC for a 4-year term. The mandate of the aforementioned Commission is defined in Article 7, and includes a clear reference to investigating the gross and systematic violations committed under the former regime. However, the law also refers indirectly to other and more recent violations such as "the circumstances of internally and externally displaced persons", their safe return, and addressing the issue of missing persons and detainees more generally.

10. Article 8 specifies the role of the various departments of the Commission. Among them, one department is established to conduct investigations on violations committed under the former regime. It has to "present the results of these investigations in a comprehensive report that includes evidence, applications, affected persons, and recommendations; this report shall be widely published in the media". Another department is established to conduct investigations on violations committed following the fall of the Gadhafi regime and the events that accompanied the 17 February

[17] "Addressing the gross and systematic violations of fundamental rights and freedoms to which Libyans were subjected by the state apparatuses under the former regime. This shall be done through legislative, judicial, social, and administrative measures, in order to reveal the truth, hold perpetrators to account, reform institutions, preserve the national memory, and provide reparations and compensation for the misdeeds for which the state is responsible."

[18] Article 2 states that a gross and systematic violation is a violation of human rights "through killing, abduction physical torture, or the confiscation or destruction of funds, if committed as the result of an order issued by a person acting with a political motive, as well as breaches of fundamental rights that result in severe physical or moral repercussions."

Revolution. However, its role is limited to "recording information in a manner that preserves the rights of all." A strong discrepancy therefore seems to appear on the treatment of both types of crimes.

11. The FFRC was to be re responsible for the following efforts: (1) collecting evidence and testimony in order to establish the truth about crimes and abuses committed under the previous regime; (2) collecting and publishing the experiences of victims and survivors; (3) assessing and addressing the conditions facing internally and externally displaced people; (4) assessing the issue of missing persons; (5) cooperating with civil society in Libya; and (6) issuing reparations to those who have suffered abuses and rights violations. The FFRC is to be composed of a Commission board and sub-bodies dedicated to fact-finding, reviewing legislation, studying displaced persons, arbitration and reconciliation, and reparations.

12. The law acknowledges, in Article 26, the existence of cases of extrajudicial arrests without judicial supervision. It states that ministries of Justice, Interior and Defense shall "take the necessary measures to end the detention of the accused persons associated with the former regime", by referring them to the relevant prosecutor or by releasing them. However, this law interferes in judicial matters and violates the general rules of the Code of Criminal Procedure in two instances: first, it grants 90 days to take the aforementioned actions; second, it does not consider the detention as invalid "if there is sufficient evidence that they have committed acts considered to be crimes under the law."

13. Article 29 creates a committee of the GNC to review past decisions granting Libyan nationality. The Law gives the committee the competence to propose, revoke and/or nullify such decisions. It gives it the power of revoking and/or nullify to the "executive authorities", without further specification. The Law adds that "competent authorities shall implement the decisions issued by this committee", which is an abnormal order compared to the texts and objectives of the transitional justice law. Indeed, the revocation and nullification of nationality is a serious act of punishment that should only be placed under the general regulations of the Penal Code and strict judiciary supervision. Addressing the grievances due to the unjust system of nationality granting in the past is nonetheless an important step in the reconciliation process that should be given proper attention through specific mechanisms.

14. There is no reference in the law on any coordination mechanism between the Fact Finding Commission and judicial authorities, including the public prosecutor. The Commission thus appears as a parallel authority to the judiciary, and risks being a tool to hide impunity. The law does not grant the prosecutor the right to refer any complaint or file to the Commission.

15. Article 3 stated that the law applies to events that occurred between 1 September 1969 and the end of the period of transition[19], which is a rather unclear and vague goal.

16. In the final version of the adopted law, the entire chapter dedicated to the vetting of institutions has been removed. The separation of vetting from transitional justice could have led to abuses and misunderstanding about institutional reforms as a guarantee of non-repetition, and an integral part of any transitional justice processes.

17. Article 33 referred to the issuing of executive regulations for the law, which were never adopted until today. The Board of the Fact Finding Commission was not formed either[20].

Analysis:

The transitional justice law passed by the GNC in 2013 fails to truly tackle the question of reconciliation by appearing, to the contrary, as overly political and entrenching divisions, as it seeks to achieve "the legal recognition of the just character of the February 17 Revolution" and to "criminalize the former era", an imprecise categorization of affiliation with the former regime that can be used a tool to arbitrarily exclude or further punish military or political opponents from the past. The assumption that Libya is divided between "winners" and "losers" or that the acceptance of the principles and goals of the "February 17 revolution" is the condition to any actor's legitimacy, cannot be a good starting point for a national reconciliation process.

The transitional justice law in its present state does not seem to provide sufficient guarantees, as it limits its scope to "systematic violations of the basic rights to which Libyans were subjected to by State affiliated apparatuses under the former regime", thus excluding acts committed by non-state groups in a context where the distinction between the two remains so difficult to establish.

7. The Political and Administrative Isolation Law of 2013

The following table maps the main decisions with regards to the political and administrative isolation.

Source	Legislation	Date
National Transitional Council	Decision No. 177 of 2011 to Establish the High Authority for Application of Integrity and National Standards	2011

[19] Law No. 17 of 2012 on Establishing the Foundations of National Reconciliation and Transitional Justice (Article 2) stipulates that: "The provisions of this law shall apply to events that occurred between 1 September 1969 until the objectives of the law are realized."

[20] On 1 April 2014 the GNC announced receiving nominations for the positions of chairman and members of the Fact Finding Commission

National Transitional Council	Decision No. 192 of 2011 on the Identification and Application of National and Integrity Regulations and Standards	2011
National Transitional Council	Decision No. 16 of 2012 on the Nomination of the Members of Authority	2012
National Transitional Council	Law No. 26 of 2012 on the High Authority for Application of Integrity and National Standards and its Amendments	4 April 2012
General National Congress	Law No. 13 of 2013 on Political and Administrative Isolation	8 May 2013
House of Representatives	Law No. 2 of 2015 on Abolishing Law No. 13 of 2013 on Political and Administrative Isolation	8 June 2015

The June 2015 decision of the HoR to abrogate the political isolation law, along with the passing of the amnesty law, makes it clearly irrelevant today, as confirmed by the fact that neither the Presidential Council nor the proposed GNA have been seemingly affected by it. Nevertheless, some observations about the lustration process in Libya since 2011 are worthwhile, to better understand the needs for a fair, transparent and legally defined vetting process in Libya.

Post-Qadhafi Libya introduced two closely related vetting processes that succeeded each other. The Integrity and Patriotism Commission was established in 2011 and was to function for the duration of the transition. The Integrity and Patriotism Commission operated throughout the year of 2012 and during the first months of 2013, but came to an end with the entry into force of Law no. 13 (2013) on Political and Administrative Isolation on 8 June 2013. Heated debates in the General National Congress (GNC) on the scope and content of a more long-term political isolation process preceded the passing of the law, and eventually led to violent conflicts.

On 8 May 2013, the GNC finally passed Law no. 13 on Political and Administrative Isolation with a two-thirds majority, as required in the First Amendment to the Interim Constitutional Declaration. However, a number of GNC members appear to have been coerced to pass the law, including through personal threats and occupation by pressure groups of the GNC buildings. For instance on 5 March 2013, a number of GNC members were held hostage by 500-600 armed demonstrators and were told they could only leave the Congress building after passing the Political Isolation Law.

Law no. 13 (2013) includes 20 articles. Article 1 contains two categories of disqualification criteria. A person would be disqualified from any of the positions listed in Article 2 if he or she met any of the criteria between 1 September 1969 and 23 October 2011. The first list of categories consists of 14 function-related criteria, and covers high-level national functions in the Qadhafi regime, while some criteria relate to positions at the local level. The second list of

categories contains eight criteria of individual conduct. Some of the criteria relate to human rights violations, for instance, "anyone who perpetrated, or in any way participated in, the killing, imprisonment, or torture of Libyan citizens, inside and outside, for the benefit of the regime. Others are vague, such as "repeatedly glorified Gadhafi".

Article 2 lists 11 categories of positions that persons who meet any of the disqualification criteria under Article 1 cannot hold. The 11 categories cover positions in legislative, judicial and executive bodies, security and military institutions, the diplomatic service, universities and other institutions of higher education, political parties and other political bodies, fully or partially state-owned enterprises, financial auditors, and media and publishing institutions.

Articles 3-9 refer to the establishment, status and administration of the High Commission for the Application of the Criteria for Occupying Public Positions [hereinafter: the High Commission], the body tasked with implementing political isolation. The High Commission must grant a hearing to the person concerned, assess the information provided by the person (Article 10), and issue a reasoned decision (Article 11). Within 10 days of notification, the person can appeal the decision before the administrative judicial chamber of the relevant Court of Appeal. The court's decision can be appealed before the Supreme Court within 10 days of notification (Article 12). The law shall be applied for a period of 10 years from the date of its adoption (Article 18).

Law no. 13 (2013) applies also to members of judicial bodies (Article 2, section 5). However, the Supreme Judicial Council rather than the High Commission is mandated to screen the members of judicial bodies (Article 16). In mid-2013, the commander in chief of the Libyan army issued Decision no. 17-d (2013) establishing the Integrity and Army Reform Commission to screen the members of the armed forces. The relationship between Decision no. 17-d (2013) and Law no. 13 (2013) on political isolation was not entirely clear.

On 18 February 2014, the Constitutional Circuit of the Supreme Court heard challenges against Law no. 13 (2013), which were brought by five individuals and the National Council for Civil Liberties and Human Rights. To date, the Supreme Court has not yet ruled on the constitutionality of Law no. 13.

On 2 February 2015 however, the Tobruk-based House of Representatives revoked Law no. 13 (2013); but he status of the law remains currently unclear because of the existence of two legislative bodies in Libya[21]. One could argue that the Political Isolation Law was *de facto* abrogated considering the current composition of the PC and the GNA.

Analysis

Existing tension between newly empowered rebels who were persecuted under former regime and the remaining political and military elite who built their careers under Qaddafi, demonstrates the complexity of how to deal with Gaddafi's loyalists, but also of how to implement a coherent reconciliation process. The structuring opposition between *Thuwar* (revolutionaries) and *Azlam* (former regime) remains an important obstacle and should be at the heart of any future

[21] See Alexander Mayer Rieckh, presentation at the UNSMIL Experts' meeting on national reconciliation, September 1st, 2016.

comprehensive transitional justice and reconciliation framework. However as we have previously seen, in its present state, the transitional justice law passed by the GNC in 2013 fails to truly tackle this problem by appearing, to the contrary, as overly political and entrenching this division as it seeks to achieve "the legal recognition of the just character of the February 17 Revolution" and to "criminalize the former era", an imprecise categorization of affiliation with the former regime that can be used a tool to arbitrarily exclude or further punish military or political opponents from the past.

The assumption that Libya is divided between "winners" and "losers" or that the acceptance of the principles and goals of the 'February 17 revolution" is key to any actor's legitimacy, cannot be a good starting point for national reconciliation. As a consequence, debates over vetting (or "lustration") have been one of the main sources of conflict in Libya, raising the question of how to vet the administration without furthering divisions, and how to reform the application of the Political Exclusion Law (PIL) to respect basic norms and due process guarantees. Such a vetting process cannot apply to virtually anyone associated with the previous regime. But if people involved in past crimes continue to serve in the administration, especially in the justice and security sectors, people's trust towards the system will be seriously affected. However, any vetting process must be fair and transparent, based upon a careful previous screening of public employees' possible involvement in past abuses. It would also have to respect due guarantees and consider everyone innocent until proven guilty: strong evidence of collaboration and misconduct under the former regime, or since the revolution, should be the only criteria for the removal of civil servants[22]. Institutional reform must therefore be at the heart of reconciliation, while developing a clear strategy on the possible reintegration and future role of former regime representatives, including in the military sector.

Security sector reform (army and police) should thus be part of reconciliation efforts and implemented not just between the East and the West, but also between central and local governments as well as between Arabs and minorities, ensuring also that no alleged perpetrator of war crimes, crimes against humanity, or other gross human rights violations, is allowed into the national army. Establishing of independent oversight mechanisms in the security and justice sectors will also be key.

From a strictly legal point of view, the constitutionality of both the 9 April 2013 amendment to the Interim Constitutional Declaration and Law no. 13 (2013) is questionable. The amendment can indeed be considered unconstitutional because it violates the basic structure and several fundamental norms of the Interim Constitutional Declaration. The amendment prevents the application of the Declaration's non-discrimination clause to discriminatory legislation. Therefore, the amendment itself is likely to be discriminatory (Article 6 of the Interim Constitutional Declaration). The amendment also limits the constitutional right to judicial review (Article 33 of the Interim Constitutional Declaration) and the separation of powers (Article 32 of the Interim Constitutional Declaration). The 9 April 2013 constitutional amendment indeed states

[22] Article 42 of the LPA, as well as additional measures 6 and 7, fully recognize this necessity and the role the vetting process can play in national reconciliation. It states that the reintegration of militias within the national army depends on a full screening process to ensure that they respect international human rights law and international humanitarian law, to verify that they haven't perpetrated crimes against the Libyan people, and generally must be guided by the principles of the rule of law, non-discrimination and transparency.

that passing "a law that isolates some persons from taking sovereign, leadership or senior administrative positions in government for a temporary period" does not constitute a breach of the Interim Constitutional Declaration. But not all positions listed in Article 2 of Law no. 13 (2013) can be considered positions "in government". For instance, leadership positions in different media and publishing institutions clearly are not positions in government. The same is true for leadership or membership positions in political parties or bodies of a political tinge, or in universities, or even in the judicial sector.

The affiliation-based disqualification criteria in the first list of categories in Article 1 of Law no. 13 (2013) entails restrictions to several fundamental rights such as the right to freedom of expression and opinion, to freedom of association, to access to public office, to vote and to run for elected office, to form political parties, to privacy, and other rights guaranteed in the Interim Constitutional Declaration and in international instruments to which Libya is a party. The vague and far-reaching conduct-based criteria in the second list of categories in Article 1 are likely to violate the principle of legality, to be arbitrary and violate the right to non-discrimination, and to result in disproportionate restrictions of other rights.

The fourteenth category in the first list of Article 1 ("anyone who belongs to foreign organizations that threaten the stability and security of the country") stands out because it does not relate to the period of the Gadhafi regime but appears to target on-going activities. Such a provision has little to do with political isolation. Activities that threaten national security should not be covered in a political isolation law that focuses on the abusive past but be addressed under criminal and other regular law.

8. Prison and detention legislation

Grievances related to detention conditions, political prisoners and prisoners' exchange are at the heart of the Libyan conflict, but no legal framework has been adopted since 2011 to reform the system inherited from the Gadhafi era. The Law on Correctional and Rehabilitation Institutions (2005), commonly referred to as "Law No. 5", still provides the core legal framework for the management of the prison system until today.

Although the law dates from the Gadhafi era, it does contain some progressive and positive elements, including on inmate admissions, classification and treatment, on the accommodation and treatment of female inmates, the rights of inmates to work, the right to education in prisons, the right to medical treatment, visits, and regulations on prison discipline. Law No. 5 adopts a rather a rehabilitative approach, but still lacks an overall vision of the purpose of imprisonment, including a clear statement on the rights of detainees[23]. In particular, provisions pertaining to prisoner complaints and to the monitoring and oversight of the prison system are weak.

Therefore, although Law No. 5 provides a useful foundation for future prison legislation in Libya, it would be greatly enhanced by more detailed debate on the vision and purposes of imprisonment in post-Gadhafi Libya, including a more detailed focus on strengthening relevant

[23] Law No. 5 of 1373 P.D. (2005) on Correctional and Rehabilitation Institutions.

human rights provisions. This is all the more crucial that prison and detention issues are the heart of so many grievances today[24].

9. The legal framework on land and property

Another important grievance that fuelled the revolution and continues to contribute to the conflict concerns land and property. Failure to properly address the legacy of Muammar Qaddafi's severe and unfair confiscation, redistribution and relocation land policy will seriously hinder any future efforts at national reconciliation.

After the revolution, land property rights were considered a high priority, but the absence of fully functioning judiciary and security sectors has prevented the adoption of new property laws. The legal framework inherited from the Gadhafi era has consequences until today. Article 1 of Law 4/1978 states that every citizen has the right to own a house or a plot of land on which to construct a house and that this "ownership of the house is sacred." However, the law prescribes that anyone in possession of an amount of property in excess of this should choose which house or plot of land they wish to retain (Article 2). It adds that all additional properties, unless required to run a business, and land fit for construction (Article 3) should be transferred to the ownership of the State. Excess properties are then to be assigned to citizens in need of housing, although the law allows for properties to be kept by the state for the purposes of public interest (Article 7). The law entitles those whose property is expropriated to compensation (Article 8), but no implementing regulation has been installed for this payment, and most property claimants say today that this compensation was never paid[25]. *De facto*, this law permitted the regime to confiscate land for the public good, while offering nothing in return.

Besides Law n°4, property violations continue today in Libya, including through acts of confiscation of properties belonging to former regime members, or to others who fled the civil war. Therefore, any process to address these grievances should not be limited to Law no. 4 and extend to ongoing violation of property rights due to internal war and conflict.

The 2011 Draft Constitutional Declaration, Libya's governing legal document in the interim period until the promulgation of a new Constitution, does guarantee the right of private property. It declares property inviolable, and prohibits the prevention of an owner's disposal of his or her property, within the limits of the law (Article 8 and 16). However, it provides no guarantee for restitution, compensations, or reparations.

In 2012, the NTC proposed a Constitutional Declaration that made property rights inviolable and guaranteed owners the right to dispose of their property within the limits of the existing law. In 2014, the preliminary draft of the new Constitution also made several references to property rights. Chapter Six of the draft, which relates to rights and liberties, included the following article:

---

[24] See Fiona Mangan and Rebecca Murray*, Prisons and Detention in Libya*, Peaceworks, United States Institute of Peace, 2016.

[25] See USAID, "Libya: The Draft Law Concerning Properties Transferred to the State Per Law n°4 of 1978", June 2013. See also Mary Fitzgerald and Tarek Megerisi, "Libya: Whose Land is It? Property Rights and Transitional Justice", *Legatum Institute*, 2013.

- Private property shall be inviolable.
- Commitment to utilization of private property shall be in accordance with the requirements of public interest.
- Private property may be utilized whenever necessary in return for a fair compensation paid in full.
- Private property may be expropriated for public benefit in return for fair and advance compensation.
- General confiscation of properties shall be prohibited.
- Imposition of custodianship shall be prohibited unless by an agreement or order by the competent judge.

The ministry of Justice under Prime Minister Abdurrahim el-Keeb laid the groundwork for what later became a proposed amendment to Law Number 4 submitted by Salah Marghani, the Minister of Justice of Ali Zeidan's government. The "Draft Law concerning properties transferred to the State per Law n°4 of 1978" addressed restitution and compensation issues arising from the unfair implementation of Law Number 4 that had allowed the state to seize private property. It was issued by the Ministry of Justice in March 2013.

The draft allows occupiers of residential properties to be given one year to relocate, using a loan from the government. Otherwise, they could negotiate with the owner to buy the property, using the same government loan. The law allows a timeframe of six months for the occupiers of commercial properties to negotiate with the owners, after ownership had been established through a legal process. Despite these progresses, the law is flawed in many respects. Indeed, it misses:

- A legal framework to ensure efficient and timely registration of property documents;
- Gender sensitivity and provisions to ensure that women are not disadvantaged by the restitution process and are able to participate equally;
- Identification of the institutions that will be responsible for the management and implementation of the restitution program;
- Sufficient provisions to protect the rights of the current occupants of seized property;
- A clear methodology on the evaluation of the necessary level of compensation;
- A process for filing and processing restitution claims.

The current constitutional drafting process by the CDA should offer an opportunity to highlight and reinforce the principles and rights of personal property and restitution.

10. The Legal Framework on the Missing Persons

Both the former regime and the revolution have led to forced disappearances that remain unclear until today. For the families of the missing, this uncertainty about the fate of the their loved-ones is a continuous gross human rights violation. The grievances thereby created are strong obstacles to national reconciliation.

Acknowledging the importance of addressing this issue and establishing the truth about forced disappearances, several laws were issued.

- In 2011, the NTC issued an Executive Office Decision No. 51 on the Establishment of the National Commission for the Search and Identification of Missing Persons, which creates a governmental body called the "National Commission for the Search and Identification of Missing Persons" to be established under the authority of the Executive Office, who names its members. The Commission is tasked with the search and identification of missing persons as a result of the events that took place in Libya in 2011, as well as other acts committed by the former regime. To do so, it can receive and record missing persons reports from families of victims and other witnesses, list them into a database, take all necessary measures to search and identify missing persons, search for locations and mass graves where they can be found, and extract bodies for identification using DNA technology.

- One year later, the Libyan Transitional Government issued Decision 16/2012 on Dissolving the National Commission for the Search and Identification of Missing Persons, established by the Executive Office Decision 51/2011 described above. The Decision states that assets and staff shall be transferred to the Ministry of Martyrs and Missing Persons Families Affairs.

- The Council of Ministers on January 17th, 2012 issued Decision No. 89 of 2013 on the Establishment of the General Commission for the Search and Identification of Missing Persons, placed under the Council of Ministers. Its main competences are to search and identify missing persons in Libya since 1969, establish their fate, and create a database of all names of the victims. Unfortunately, this decision on the creation the General Commission for the Search and Identification of Missing Persons was not activated by the Prime Minister, and remains inactivated to date.

- It is only in 2014, based on a proposal by the Libyan Interim Government, that Law n°1/2014 on Providing Care for Families of Martyrs and Missing Persons during 17 February Revolution was issued. The law refers to the necessity of establishing a special commission for the missing persons named "General Commission for the Search and Identification of Missing Persons", under the Ministry of Martyrs and Missing Persons. It defines missing persons as "anyone absent whom we do not know if he is alive or deceased during the war of liberation." Families of the martyr or missing person include the relatives of the martyr to first degree, who are entitled to material and modal advantages. Under the provisions of this Law, a public authority called "Public Authority for the Search and Identification of Missing Persons" shall be established, reporting to the Council of Ministers.

- The Libyan Political Agreement signed in Skhirat in 2015 also refers to the need, for the Government of National Accord, to form an independent body for the missing persons within 60 sixty days of commencing its tasks. In the confidence building measures, article 26 states that: "all parties to this Agreement shall commit to collecting complete information on abductees and missing persons and submit it to the Government of

National Accord, which shall commit itself to establish an independent body on missing persons pursuant to the provisions of Law 1 of 2014 within sixty (60) days of commencing the performance of its tasks." It adds that: "All parties to the conflict shall, within thirty (30) days of the Government commencing the performance of its tasks, release persons held in their custody without legal basis or hand them over to the judicial authorities, which will determine within the following sixty (60) days whether they should be brought before the judiciary or released on the basis of Libyan legislations in force and international standards"[26].

Institutionally, the Ministry for the Affairs of Families of Martyrs and Missing Persons (MAFMM) derives its legal mandate from the following documents[27]:

1. Council of Ministers' Decision No. 28/ 2012 Concerning the Regulation of the Administrative body of the Ministry for the Affairs of Families of Martyrs and Missing Persons

This decision allows the Ministry to implement the existing legislation related to martyrs and missing persons, including: Law no. 19/1989 pertaining to the declaration of benefits for those killed, missing and imprisoned as a result of military operations and its amendments; Law no. 12/1991 deciding the rights and benefits of the military and civilians who lose their lives doing their duty; Decision no. 128/2005 of the General People's Committee to set the foundations, rules, and provisions for deciding the rights and benefits of those who lose their lives doing their duty; and Decision no. 62/2011 of the National Transitional Council's Executive Office to re-organize the Fund of the Families of the Martyrs, Wounded, and Missing.

But the MAFMM is also requested to make proposals for new legislation on the issue of martyrs and missing persons, including through rehabilitation programs for their families. The Department of Martyrs' Affair created by this Decision has the power to collect data on martyrs and their families; facilitate moral support for them; provide them with free education, health care and training; and establish mechanisms for distributing reparations. It also creates an obligation to collect data on the missing, including through DNA analysis and the search and opening of mass graves.

2. Resolution of the Cabinet of Ministers No. (85) of 2012 regarding the Care and Honoring the Families of the Missing

This decision defines the amounts payable to families of the martyrs and the missing, as well as the forms of moral and symbolic support to be provided. Article 1 stipulates that a monthly gratuity of 500 Libyan Dinars (LYD) is to be distributed to each family of a martyr plus an additional 100 LYD to each dependent of the family. In the case of a missing person, a monthly payment of 500 LYD is to be distributed to each family.

[26] See Mohamed Othman, presentation made at UNSMIL national reconciliation experts meeting, September 2nd, 2016.
[27] See Physicians for Human Rights, « Libyan Human Identification Needs Assessment and Gap Analysis », 2013.

Article 2 sets out the other forms of moral support to be provided to martyrs' families, namely the creation of a Martyr's Day on February 17th to commemorate their anniversary, or the erection of a monument in their name. Under Articles 3 and 4, the MAFMM is responsible for identifying the relevant beneficiaries and arranging the payments.

3. Resolution of the Minister for the Affairs of Families of Martyrs and Missing Persons No. (32) of 2012 regarding payment of financial gratuities to families of the missing.

Article 1 provides that each family of the missing for the year 2011 shall receive a payment of 2,000 LYD. However, article 2 states that this amount is to be deducted from the other amounts provided under Cabinet Resolution 85 of 2012 described above.

Analysis

Although Libya has not signed or ratified the International Convention for the Protection of All Persons from Enforced Disappearance, it does have certain obligations under international humanitarian law and international human rights law. Indeed, Libya is a party to several treaties that require it to take steps to protect civilians, combatants, and prisoners during war and internal armed conflicts, including the Geneva Conventions. It is also party to the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples' Rights. As a consequence, Libya is obliged to take steps to ensure that families are informed of the whereabouts of their missing and disappeared loved-ones, and also has responsibilities toward the dead whose remains must be traced, identify and recovered, allowing the families to finally provide them a dignified burying ceremony.

The laws and decrees related to the missing persons contain many flaws and limitations.

- The legal framework is explicitly discriminatory against the families of missing. In practice, differences of amount granted to families of martyrs and families of the missing were reported. Families of missing saw their monthly allowances suspended after only four months, while families of martyrs continued to receive their reparations. While families of the martyrs and missing receive similar monthly financial support under Article 1 of Cabinet Resolution 85/ 2012, only families of the martyrs are authorized to receive an additional 100 LYD for each dependent, not families of the missing. Ministerial Resolution No. 32 of 2012 provides for a lump sum payment to the families of the missing, but by stating that this amount is to be deducted from monthly payments made under Cabinet Resolution 85, it has led in practice to a suspension of additional payments to families of missing.
- Apart from this unfair difference, there was no precise assessment of individual needs, and each family received the same amount regardless of the harm suffered or the urgency of their situation.
- The current legal framework falls considerably short of international norms and standards. The fact that the institution responsible for identifying the missing and

supporting their families depends upon the executive branch is a clear obstacle to its independence and autonomy.
- Insufficient investigatory powers are granted to this body.
- "Martyrs" and "missing" are not legally defined by clear and transparent criteria.

In order to overcome these limitations, new legislations should be passed further defining the responsibilities of the State towards families of missing persons. As per the LPA, an independent commission on missing persons should be created to search and identify human remains, thus addressing the right to truth of the families of the disappeared.

The urgent needs of these families, including psychological and social, should also be addressed with no discrimination.

Finally, mass graves should be protected and national forensic capacities reinforced.

4. Bill concerning the care for victims of torture and sexual violence of 2014

This decree signed by Minister of Justice Salah al-Marghani in 2014 plans for the provision of reparations for victims of sexual violence, defined as "those who suffered gross bodily assault or sexual attack, or suffer the attempt to do that, during the War of Liberation". Victims are divided into several categories:

- Victims of attack;
- Victims of attack which resulted in birth of a child who remains in her care;
- Victims of attack who suffered severe bodily injury, such as the removal of ovary or permanent impotence or other chronic disease;
- Victims who suffer grievous bodily injury such as (a) removal of the breast, (b) severe bodily burns of the first degree, or (c) gross bodily deformation;
- Victims who suffer permanent psychological disorder as a result of the attack, which hinders their ability to engage in normal activities in their communities.

The reparations provided includes a monthly stipend, including for the child born out of rape, provision of psychological and medical care, training opportunities and preferential recruitment in the public services, legal recognition of children born out of rape, housing opportunities, legal assistance in pursuing the perpetrators, as well as original provisions such as discount on travel tickets and for performing the Haj.

The decree guarantees the protection of victims from "stigma" and the confidentiality of the reparations process. It creates a specific committee within the Minister of Social Affairs, with a Chairperson to be nominated by the Minister of Justice and tasked with the following:

1. Establish a system for demographic information about victims of rape and sexual violence encompassed by legislation;
2. Ensure the precise application of the criteria and regulations laid down by this legislation upon its intended subjects;
3. Determinate the intended beneficiaries of all or part of the benefits provided for by this

legislation, while ensuring the confidentiality of the information used by the Committee to perform its functions.

Finally, the law includes a provision allowing the inclusion of male victims of sexual violence in the reparations benefits, an important step in recognizing the violations committed in the past.

Despite these significant progresses, no mechanism has yet been put in place to permit the implementation of those various provisions. Furthermore, accountability for perpetrators of sexual violence is yet to be guaranteed.

Third Section: The Libyan Political Agreement

The Libyan Political Agreement (LPA) was signed in December 2015 in Skhirat (Morocco). Although there was a unanimous Security Council resolution endorsing the Agreement (resolution 2259) on 23 December 2015, and a conditional decision form the HoR to endorse it as well[28], the HoR, which is the legislative authority, did not issue a national legislation for the Political Agreement yet, nor did it consider it a constitutional amendment to the Constitutional Declaration.

The Libyan Political Agreement addresses national reconciliation and transitional justice in various instances, including by citing, among "confidence-building measures" (art.26.1), "the commitment of all parties to the establishment of an independent body on missing persons" as well as "the appointment of the Board of the Fact Finding and Reconciliation Commission" (art. 26.5). The board is composed, according to the law, of "a Chairperson and eight members who are known for their independence, impartiality and competence". It should be representative of the diversity of the Libyan society and be fully protected from political interferences and intimidation. But the Political Agreement also addresses national reconciliation in other instances:

- Preamble: "Looking forward to building a secure and coherent society in which national reconciliation, justice, respect for human rights and freedom of expression prevail".

- Governing principles, item 26: "Activate transitional justice and national reconciliation mechanisms in order to uphold the truth and achieve accountability, reconciliation, reparation and reform of state institution, in line with the Libyan legislations in force and international standards"

- High State Council, article 24/6 and 7: the State Council shall "support national reconciliation efforts and social peace through current mechanisms" and the "voluntary and safe return of refugees and displaced persons".

- Confidence building measures, article 26/1: "All parties to this Agreement shall commit to collecting complete information on abductees and missing persons and submit it to the Government of National Accord, which shall commit itself to establish an independent body on missing persons pursuant to the provisions of Law 1 of 2014 within sixty (60) days of commencing the performance of its tasks."

- Confidence building measures, article 26/5: "Parties to this Agreement shall commit themselves to work towards the implementation of Law 9 of 2013 on Transitional Justice, including the appointment of the Board of the Fact Finding and Reconciliation Commission within ninety (90) days of the entry into force of this Agreement."

[28] On 25 January 2016, the HoR endorsed the LPA in an official meeting attended by 114 members, where 97 out of 104 members approved it. The decision reached was the following: "The House of Representatives endorses the Political Agreement signed on 17 December 2015, while removing article 8 in the additional provisions".

- Article 61 of the Final Provisions: “Parties to the Agreement shall give extreme priority to the need to promote cooperation and coordination between the bodies and institutions that stem from this Agreement to enhance stability, security and national reconciliation until the Constitution has been adopted.”

- Annex 2, Priorities of the Government of National Accord - Political priority n°2: “Continue to support the dialogue, national reconciliation and transitional justice”; Security Priority n°9: “Support the judicial system and promote criminal justice systems”; Priority n°10: “Address the conditions of detainees, prisoners and missing persons.”

There are separate texts in the Agreement related to the return of refugees and displaced persons, addressing the conditions of prisoners, detainees and missing persons, disbanding armed formations, rehabilitating and demobilizing their members, regaining Sirte and Derna and surrounding areas and addressing social and humanitarian conditions in the two cities (government priorities).

There is a questionable reference to immunity from prosecution for some crimes committed during the conflict, although the LPA states that “there shall be prosecution for those who committed war crimes, crimes against humanity and other crimes under international law” (article 11, additional provisions). The relation between these provisions and previous amnesty laws is yet to be clarified.

Fourth Part: The Constitutional Process in Libya

1. The Constitution Drafting Assembly and National Reconciliation:

There is no doubt that the constitutional process in Libya, by the Constitution Drafting Assembly (CDA), or the Sixty-Committee[29], could have been the opportunity to launch a real national reconciliation process. Indeed, a new Constitution will set the foundations of a future Libyan state, define its governing principles, and contribute to ending the current conflict by providing strong guarantees for the fundamental rights of all. For now, however, this process is mostly a missed opportunity.

The "Sixty-Committee" was elected in February 2014 and held its first session in Al Bayda on 21 April 2014. Two years later, on 19 April 2016, after the working committee met in Salalah (Oman) under the auspices of the United Nations Support Mission in Libya, and in the presence of several members of the CDA, a few agreements were reached. In a session held in Al Bayda on 19 April 2016, 34 members[30] voted in approval of the proposed draft Constitution. It was referred to the HoR to issue the referendum law and start the referendum process. In that session, three important decisions were taken: (1) to include the Salalah agreement in the draft of the working committee, (2) to refer the draft Constitution to the HoR, and (3) to give an opportunity to those who did not attend to sign the minutes of the session.

However, this session and its decisions were strongly contested. On 3 August 2016, there was an urgent ruling by the Court of Appeals in Al Bayda and the Administrative Chamber to suspend the contested decision issued by the CDA in its 68th session, held on 19 April 2016. This decision was preceded by other legal disputes among the CDA members, the first of which was the administrative complaint No. 1/2015 filed before the Bayda Court of Appeal to abolish the CDA decision to hold its meetings outside Libya, on which a ruling was issued in May 2015. Then an administrative appeal was filed before the Bayda Court of Appeals against the President of the CDA, followed by another administrative appeal before the same Court to abolish its decision to amend the bylaws of the CDA.

Instead of issuing its decisions by consensus and resorting to voting as a last resort, the CDA disregarded these decisions. The CDA thus failed to heal the rift and play the important role it could have played to promote national reconciliation, laying the grounds of the future State and safeguarding the rights of all its citizens.

2. National Reconciliation in the Draft Constitution

[29] The number of members did not reach 60, but is believed to be around 56 or 58 because some members from cultural minorities were boycotting the Assembly due to the difficulty of holding elections in Derna.

[30] The number is unconfirmed. Some say it is between 36 and 28 because some members joined after the vote. Opponents boycotting the CDA object that the quorum was not realized unless there is a vote from 40 members, based on the Constitutional Declaration and Law No. 17 of 2013 on the election of the CDA and the CDA rules of procedure, that stipulate the quorum of the vote to be two thirds plus one.

Regardless of the existing legal dispute explained above, the draft Constitution does refer to national reconciliation related measures in several articles. Indeed:

1. Article 43 states that: "Forced displacement of all forms shall be prohibited, and the State shall guarantee reparations and the right of return."
2. Article 44 mentions the obligation to prosecute crimes against humanity.
3. Articles 197 and 198 define transitional justice measures and guarantees of non-repetition.
4. The draft Constitution also states that "public posts shall be open to all Libyans" (article 22) which could be interpreted as a negation the May 2013 Political Isolation Law that barred broad categories of officials who had served the Qaddafi regime from holding public office.
5. While Arabic is the sole official language, the draft Constitution does call for protection of the right to speak the Amazigh, Tuareg and Tebu languages.
6. Men and women are granted equal rights. By law women will get a minimum of 25 percent of HOR seats, and seats on local councils.

Analysis:

Despite these progresses, the draft Constitution fails to introduce a clear definition of transitional justice and to set a solid framework for national reconciliation, nor to enact clear future laws in that regards. The measures set forward are of a general nature, as they include all violations of human rights and aim at uncovering the fate of all missing persons, victims and persons harmed by "war violations and operations and armed conflicts on the individual and regional levels." This is a positive step that takes the process away from the excessive politicization and fragmentation of previous laws adopted so far, which were too often limited to certain crimes and relied on a false dichotomy between the "inherent justice of the revolution" and the criminal nature of the former regime. The measures set forth in the draft Constitution provide for the criminal prosecution of all those who were involved "in human rights violations" and who "allowed corruption". Compensation for victims, restitution of usurped property rights and return of these assets to their original owners are planned for.

The draft constitution provides for the establishment of a transitional justice and reconciliation authority according to a future law, thereby seeming to imply that the previous laws on transitional justice are annulated.

Article 198 stipulates that guarantees of non-repetition shall be promoted through three measures: (1) screening of public institutions, promoting structural reforms and removing those who were involved in human rights violations and acts of corruption; (2) dismantling the armed groups and rehabilitating their members; and (3) uncovering the truth and reasons of communal disputes. This is an understanding of vetting that is closer to international standards, and further from the spirit of the Political Isolation Law – a positive step for national reconciliation.

Part II: Results and Proposals

Result of the analysis:

1. The Libyan interim Constitutional Declaration of 2012 did not include a text or clear reference to national reconciliation or transitional justice. These references only appeared later in the transition process, with the enactment of Law No. 17 of 2012 on establishment of rules of national reconciliation and transitional justice, adopted by the interim National Transitional Council. The period from 2011 to 2013 is characterized by a focus on addressing the crimes of the former regime only, not the gross violations committed during and after the revolution. This politicization of the "national reconciliation" and "transitional justice" vocabulary contributed to legitimizing the new authorities, and led to deeper polarization of the Libyan society.

2. In a country in transition, with substantial security problems caused by presence of armed groups and militias, and with a weak and politicized judiciary system, having left aside the issue of national reconciliation had grave consequences for the building of a lasting peace. Moreover, focusing too much on the opposition between supporters of the former regime and "revolutionaries" contributed to strengthening divisions within the Libyan social fabric. Laws were too often politicized and instrumentalized for short-term goals.

3. The lack of political will of the NTC to implement transitional justice and national reconciliation is confirmed by the following four indicators:

    - The fragmentation of the process through the enactment of separate legislations, in particular those focusing on incidents that are should normally be covered and addressed within the global framework of the Law No. 17 of 2012. This is the case, for instance, for Law No. 50 on political prisoners .
    - The enactment of specific legislations for victims of the Abu Salim prison, giving these victims specific rights and distinguishing them from other. This preferential approach creates an unjustified categorization between victims, and goes against basic human rights, which are applicable to all.
    - The justification of extra legal and extrajudicial arrest of supporters of the former regime, recognized by various legislations issued during that period.[31]
    - Prosecution of supporters of the former regime before regular courts, in conditions that do not respect fundamental guarantees and were criticized by a number of human rights international organizations.[32]

These are all indications of the global ineffectiveness of Law No. 17 of 2012 and Law No. 29 of 2013 on transitional justice, as well as of their instrumentalization through specific legislations

[31] Law No. 38 of 2012 on some special transitional procedures.
[32] See for instance https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials

(such as the Political Isolation Law) and/or trials before regular courts in unfair conditions that violated basic standards of justice, and further contributed to dividing the country.

4. The absence of political will became even more obvious after the GNC elections, as witnessed in the submission of the Transitional Justice Draft Law by the Ministry of Justice of the interim government to the GNC, which only issued it (through the enactment of Law No. 29 of 2013) after nearly a year. The subsequent failure of the GNC to form the Fact-Finding Committee planned for by the law is another indicator of this absence of political will. Although this law, in theory, applies "until the end of the transition period", it focuses mostly on the violations committed under the former regime and refers only in a shy and unclear manner "to some of the impacts of 17 February revolution". It refers twice to the "fairness of 17 February Revolution", a political statement that has nothing to do with the law. Therefore, Law No. 29 of 2013, as well as Law No. 1 of 2014 on Families of Martyrs and Missing Persons during 17 February Revolution (referred to in Article 26/1 of the Chapter on Confidence Building Measures in the Libyan Political Agreement), do not constitute a solid and fair legal basis for national reconciliation, and they should be revised.

5. This politicization of transitional justice and reconciliation is confirmed by the enactment of Law No. 13 of 2013 on Political and Administrative Isolation[33] and the issuance of the Fifth Amendment of the Constitutional Declaration, which violates the fundamental principle of equality among Libyan citizens. This was further aggravated by the decision to protect this law from any challenge before the Constitutional Court, through the adoption of the Fifth Amendment. This law exacerbated the political polarization of the country, unfairly excluding a whole category of people who did not commit any crimes, and depriving them of their fundamental political and participation rights.

6. The aforementioned legislations were enacted in the absence of a general strategy for the transition itself, in particular with regards to institutional reforms in the security and justice sectors, in the prison and detention system, or for the protection of victims and witnesses. In the absence of such key structural reforms, transitional justice and national reconciliation will remain empty words. It is indeed difficult, if not impossible, to implement measures of transitional justice and national reconciliation in the light of the current ineffectiveness of the judicial and security sectors: institutional reforms, including a fair and transparent vetting process, are both an element and a precondition of the success of transitional justice and reconciliation in Libya.

7. In the absence of such strategy, the process of addressing past violations so far had a tendency to focus on compensations and material benefits only. This approach contributed to discrediting transitional justice in the eyes of many Libyans, and raised suspicions about the actual intentions of victims making these claims. Lenient and loose standards of evidence to prove these violations, as defined in Act No. 50 of 2012 on

[33] The Libyan House of Representatives passed Law No. 2 of 2015 on the Abolition of the Political and Administrative Isolation Law. The proposed composition of the Government of National Accord shows that, in practice, Law No. 13 of 2013 on Political and Administrative Isolation has been bypassed and is no longer applicable: indeed, two ministers to which this law should have applied are part of the GNA.

political prisoners (article 4)[34], played against the goal of truth seeking. The same applies to the decision to expand the application of the legislation on the Abu Salim prison beyond the 1996 victims in order to include (article 2) "the martyrs of Abu Salim Prison, whether those who perished in the genocide or died in prison because of disease, torture or other reasons; whether their death is officially confirmed or not they are martyrs to which all of the following legal provisions shall unconditionally apply…." This approach contributed to dividing victims in arbitrary categories, granting them different reparations packages, and further fragmenting the process of transitional justice.

8. Transitional justice thus *de facto* became a "selective justice". All subsequent legislations issued in the framework of transitional justice and national reconciliation are controversial to the extent that they reinforce this selective justice and make compensations the basis for any future remedy. They thus played against the goal of national reconciliation, by offering a political basis for differentiating between victims depending on the location of the crime committed or the specific status of the victim, thereby enhancing a form of "victim competition".

9. Focusing only on the era of the former regime, or considering only the martyrs and missing persons of 17 February Revolution, to the expense of all others, and more generally making the "fidelity to the objectives of the revolution" a condition to benefit from transitional justice measures (especially material reparations) seriously hindered the prospects for national reconciliation in the future. Such an approach excludes the many cases of human rights activists who were murdered after the revolution[35], or who are still missing today, as well as crimes committed by the revolutionaries themselves. Transitional justice should not rely on such exclusive and excessively political categorization.

10. The Political Agreement does include various measures for national reconciliation and transitional justice in several articles, focusing on accountability for serious violations of international humanitarian law and international human rights law, or truth seeking on the missing and former detainees. But the LPA limits these measures within the framework of Law No. 29 of 2013 on transitional justice and Law No. 1 of 2014 on Families of Martyrs and Missing Persons during 17 February Revolution, which are inadequate frameworks to achieve its objectives. Moreover, to be applicable, these texts require true implementation mechanisms, including legislative and executive ones that have still not been put in place.

11. Article 11 of the Final Provisions of the LPA is complex and ambiguous, as it provides amnesty for some of the acts committed during the conflict, while forbidding impunity

[34] The article states that if the prisoner cannot obtain a proof, from the security forces, of his imprisonment, he can nonetheless be recognized as a victim as a "political prisoner".

[35] We can mention names such of martyrs as Salwa Bughaighis, Fraiha Bergaoui, Abdul Salam Al-Mismari or the missing Moez Bannon,a s well as other martyrs and missing persons to whom this law does not apply.

for the most serious violations. In itself, this article requires an entire separate legislation to define its scope and application.

12. The Councils of Elders, notables, tribes and civil society organization in Libya have done well in resolving local disputes and conflict among groups, regions and cities[36]. These experiences should be supported by a legal framework, including through the enactment of provisions on restorative and traditional justice mechanisms that respect international norms.

13. The contents of the draft Constitution referred to the HoR deserve specific attention, in order to ensure that it can be the starting point for developing of a coherent future strategy for national reconciliation.

Proposals and recommendations

1. Classify the measures set out in the Political Agreement related to national reconciliation and transitional justice, to provide suggestions on the needed legislative and executive mechanisms to put them best into practice. This process can be based on Article 57 on International Support, and Article 62 of the Final Provisions, which open the door to a reviewing of the existing legislations.

2. Develop a comprehensive study of how transitional justice and national reconciliation are applied and promoted at the municipal and local level. Apparently, some municipalities have indeed succeeded in maintaining harmony within and among them, and have managed to overcome local conflicts and rivalries, particularly in small towns or places remote from the capital and from major cities. This study should inform decision as to whether transitional justice and national reconciliation measures should begin at the level of municipalities, rather than at the central institutional level, and/or how the two can interact positively. Lessons could also be learned from those local reconciliation processes.

3. National reconciliation should not be left to official institutions only: the strong expertise of notables, tribal leaders, elders, youth, civil society organizations, and other unanimously respectable personalities, should be better invested in. Traditional conflict resolution mechanisms should be developed and given a stronger, binding force, including through the judiciary system, while respecting international law.

4. Involve more clearly women in national reconciliation efforts, in particular by strongly recognizing the specificity of the crimes they suffered, providing strong measures to guarantee accountability for sexual violence and rapidly implement the measures of the 2014 decree.

[36] See the mapping of local initiatives of reconciliation established by Virginie Collombier and Ahmed Khaled for UNSMIL.

5. Involve young people and youth organizations in national reconciliation, relying on new and innovative ways such as sports events, arts, music and cultural competitions that will create links and bridges among them for national reconciliation.

6. Focus on the media as a main actor for national reconciliation, and address the issue of hate speech and violence promoted in the media sector.

7. The drafting of a new legislative framework can only come after this process of gathering information and developing a national strategy, with the assistance of UNSMIL and Libyan experts. The source of this strategy should be grassroots oriented, through genuine dialogue, and not be left to the central authorities.

8. A new step must begin with a new spirit of unity and reconciliation, in order to achieve justice and prevent the recurrence of violations and armed conflicts. The Political Agreement and the draft Constitution can be the starting point for such a positive process of reconciliation.

Conclusion

After five years of armed conflicts accompanied by serious violations of international humanitarian and human rights law, after almost 42 years of dictatorship, and as Libyans are still suffering today from the inability of the central authorities to carry out their duties, transitional justice and national reconciliation should start by a comprehensive and sustained national dialogue.

The legislation process should only come at a later stage, based on these consultations, to achieve and install the mechanisms proposed to achieve the result of this inclusive dialogue and the national strategy for reconciliation – and not *vice versa*, as has been done so far through a top-down approach. Past experience have indeed proved the enactment of national legislations of political instead of legal nature has achieved neither transitional justice nor national reconciliation. Focusing only on reparations as financial compensations, enacting specific laws for specific events, or unfairly excluding former regime associates from the political life, only contributes to reinforcing a sense of "selective justice".

In Libya so far, the legislation adopted since 2011 was not a solution, nor a remedy for reconciliation: to the contrary, it was even at the heart of the problem.