The Role of Law in Libya's National Reconciliation (RoLLNaR)

Report on Phase 4 | Transitional Justice | October 2019 to April 2020

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With support of the Dutch Ministry of Foreign Affairs

Colophon
Report of the fourth phase of the project The Role of Law in Libya's National Reconciliation (RoLLNaR).

Carried out by

Centre for Law and Society Studies (CLSS), Benghazi University Van Vollenhoven Institute (VVI), Leiden University

Publisher

Centre for Law and Society Studies (CLSS), Benghazi University Van Vollenhoven Institute (VVI), Leiden University

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Cover photograph

Abstract painting of the map of Libya by the Libyan artist Omar Jahan.

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Acronyms and Abbreviations

CD	Constitutional Declaration
CDA	Constitutional Drafting Assembly
FFRC	Fact-Finding and Reconciliation Commission
GNA	Government of National Accord
GNC	General National Congress
HoR	House of Representatives
HSC	High State Council
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
NTC	National Transitional Council
PA	Political Agreement
PIL	Political Isolation Law
PC	Presidential Council
SJC	Supreme Judicial Council
UNSMIL	United Nations Support Mission in Libya

List of relevant legislation

Legislation	Title/Topic	Issuer	Place of Issuance
Law 4/1978	Real Property Ownership	Secretariat of the General People's Congress	-
Constitutional Declaration 2011	Since issued in August 2011, it has been amended several times by the National Transitional Council, the General National Congress and the House of Representatives.	National Transitional Council	Benghazi
Law 17/2012	Establishment of the Rules of National Reconciliation and Transitional Justice	National Transitional Council	Tripoli
Law 35/2012	Amnesty for Some Crimes	National Transitional Council	Tripoli
Law 37/2012	Criminalization of the Glorification of the Tyrant	National Transitional Council	Tripoli
Law 38/2012	Some Procedures for the Transitional Period	National Transitional Council	Tripoli
Law 50/2012	Compensation for Political Prisoners	National Transitional Council	Tripoli
Resolution 7/2012	Circumstances of the Kidnapping and Torture of the Martyr Omran Jumaa Shaaban	General National Congress	Tripoli
Law 10/2013	Criminalization of Torture, Forced Abduction, and Discrimination	General National Congress	Tripoli
Law 13/2013	Political and Administrative Isolation	General National Congress	Tripoli
Law 29/2013	Transitional Justice	General National Congress	Tripoli

Law 31/2013	Adopting Provisions pertaining to the Abu Salim Prison Massacre	General National Congress	Tripoli
Resolution 33/2015	Formation of a Fact-Finding Commission on the Abu Salim Prison Massacre	General National Congress	Tripoli
Law 2/2015	Repealing Law 13/2013 on Political and Administrative Isolation	House of Representatives	Tobruk
Law 6/2015	General Amnesty	House of Representatives	Tobruk
Law 16/2015	Repealing a number of laws (restricting real property ownership, including Law 4/1978).	General National Congress	Tobruk
Law 20/2015	Establishment of Special Regulations on the Treatment of the Effects of Ending Law No. 4 of the Year 1978	General National Congress	Tobruk
Political Agreement	Designing a new structure for unified national government and basic elements of government policy, signed in December 2015.	UNSMIL	Skhirat
Draft Constitution	Last draft of the Constitution dated July 2017	Constitutional Drafting Assembly	Al-Bayda
Resolution 15/2017	Regarding General National Congress Resolution 7/2012	House of Representatives	Tobruk

Acknowledgments

This report and the underlying research project on the role of law in Libya's national reconciliation is the product of a collective effort, and would not have been possible without the help of many contributors. We want to thank all of them for their contributions to the research. The main senior expert and the coordinating researchers of the transitional justice research to be thanked for their invaluable work are Prof. Al-Koni Abuda, Dr. Jazeeh Shayteer, Mr. Ali Abu Raas and Mr. Otman Elkaf. We also thank the wider research team, which put a considerable amount of time and effort into this research, Dr. Hala Elatrash, Ms. Lujain Elaujalli, our senior experts, Prof. Nagib Husadi, Prof. Zahi Mogherbi, and, in Leiden, Prof. Jan Michiel Otto and Ms. Nienke van Heek. Thanks are also due to the academic specialists, who provided invaluable input to the research by writing assigned papers, they are: Dr. Ibtesam Beheh, Dr. Azza Boghandora, Dr. Tarek Elgamli and Prof. Dhu Al-Mabrouk. We would further like to thank all the respondents who have been participating in the focus group discussions and interviews, and who have provided valuable comments and insights to support the research. Finally, we would like to thank those who took part in, and helped to organize, our conferences and workshops.

We would also like to express our gratitude to our colleagues at the University of Benghazi, at the Centre for Law and Society Studies (CLSS), and at the Van Vollenhoven Institute (VVI) of Leiden University, for their support in many different ways. We thank Dr. Izz Al-Deen al- Dersi, Prof. Janine Ubink, Ms. Pauline Vincenten, Ms. Kari van Weeren and Ms. Mareike Boom.

We would like also to thank the Libyan artist Omar Jahan for giving us the permission to use, free of charge, his abstract painting: the Map of Libya.

We would like to acknowledge the support of government institutions in Libya and the Netherlands. We would like to thank, in particular, the Dutch Embassy and the Ministry of Foreign Affairs in The Hague for their generous support of our project. Finally, we would like to express our gratitude to H.E. Mr. Lars Tummers, Ms. Gabrielle Metz, Mr. Jan Jaap Sas, Dr. Marieke Wierda, Mr. Pema Doornenbal and Ms. Marloes van Fulpen.

Suliman Ibrahim, Leiden, April 2020

Executive summary

1. This is a report on transitional justice in Libya, part of a research project on the role of law in Libya's national reconciliation. Major disagreements about transitional justice have hindered national reconciliation, just like disagreements about national identity, national governance, decentralization and security forces. Realizing that major governance actors in Libya have employed law on a large scale to position themselves and their preferred approach to these problems, the project examines and assesses this role of law with a view to enhancing its potential for reconciliation.

2. The report is based on research carried out from October 2019 to April 2020, involving desk research, in-depth interviews and focus groups discussions with key persons in various places in Libya (Tripoli, Bani Walid, Misrata, Ajdabiya, Benghazi, al-Bayda, and Derna), Tunisia and Egypt. The research team included academics and practitioners some of whom are involved in advising government authorities on transitional justice matters, notably drafting an executive regulation for Law 29/2013 on Transitional Justice.

3. The report is divided into five main sections. The first introduces the concept of transitional justice, its linkage with reconciliation and justifies the focus on the role of law in national reconciliation. The second presents the historical and politico-legal contexts in which Libya's transitional justice law has been introduced, and the socio-cultural conditions for transitional justice. The third section addresses the main issues of transitional justice in today's Libya. The fourth section provides a summary of key points, and the final section presents the key challenges facing transitional justice in Libya and suggests that some could be turned into opportunities.

4. The report introduces transitional justice as a response aimed at addressing a legacy of systematic and widespread human rights violations, ensuring their non-reoccurrence and enabling a transit to peace, reconciliation and democracy. It explains how transitional justice can contribute to reconciliation at individual, interpersonal, socio-political and institutional levels. While the law whose role vis-à-vis reconciliation is assessed is state law, the making of this law occurs through interactions involving not only state institutions, but also political and, economic forces as well as civil society. The report addresses also, when relevant, the role of customary and religious norms.

5. As for the socio-cultural conditions of transitional justice, the report argues that values such as forgiveness and putting the common good over one's self-interest are needed. It acknowledges that, while it can be hard for victims to forgive, good national role models could provide an inspiration.

The historical context also matters when discussing transitional justice in Libya. Frequently cited in the debate are initiatives that the Gaddafi regime took in the 2000s to address violations of the human rights of political prisoners and former owners of real property. While not entirely dismissing these initiatives, the report affirms that they were largely limited. They involved no explicit admission of guilt, but rather an attempt to purchase the victims' acceptance and silence.

As for the politico-legal context, the report found that the revolutionary fervor of the years 2011-2014 was manifested in legislation that, while targeting the former regime's atrocities, overlooked violations committed by revolutionaries. Later years (2014 – present), have seen a political split into, on the one hand, the House of Representatives (HoR) in the east increasingly becoming more sympathetic to the former regime's loyalists, and on the other, the General National Congress (GNC)/High State Council (HSC) and Government of National Accord (GNA) in the west acting to various degrees as protectors of the February 2011 Revolution. That is why these bodies enacted different, and not infrequently contradictory, legislative responses to transitional justice issues.

6. The report identifies ten key, controversial, issues of transitional justice. The first is whether Libyans see the use of transitional justice as desirable, even though a system of regular justice is already in place. Two positions exist. The first rejects dividing justice into regular and transitional; fears the negative impact that transitional justice's mechanisms such as fact finding might have on the already existing social rift; sees it as a costly undertaking that, moreover, violates established legal principles such as non-retrospectivity of criminal laws, and prescription. The second position deems transitional justice necessary for it acknowledges and addresses the victims' suffering in ways unattainable by regular justice; also, by revealing the truth behind human rights violations, especially their root causes, it paves the road for introducing measures to prevent the reoccurrence of such violations. As such, transitional justice is a prerequisite for reconciliation. While all transitional authorities - National Transitional Council (NTC), GNC, HoR, GNA - have opted, as reflected in their legislative responses, for the second position, they have approached transitional justice issues differently.

7. The second issue concerns the feasibility of transitional justice given Libya's political present bifurcation and armed conflicts. Two positions are held. The first questions its feasibility; the ongoing conflict has rendered already weak state institutions unable to enforce whatever transitional justice legislation is introduced; the conflict involves parties who, because of their vested interests, would like to halt transitional justice as they might be targeted by its

mechanisms; hence, they will ensure that transitional justice is either not introduced or not enforced. Thus, realistically speaking, the conflict needs to end before one can embark on transitional justice. The second position calls for immediate implementation of transitional justice; it is only when the truth is unveiled that proper redress becomes possible; besides, awaiting the end of the conflict would fuel old and new conflicts and lead to a further increase of unaddressed violations; depending on regular justice mechanisms can prove pointless and even counterproductive as evidenced by a recent ruling by the Tripoli Appellate Court on the 1996 Abu Salim Massacre; the Court effectively acquitted those accused of murdering more than 1,200 political prisoners based on the expiry of the statute of limitations. Libya's transitional governments opted for the second position, not only prior to the 2014 political bifurcation but also afterwards, as evidenced by their transitional justice legislation.

8. The third issue is about which human rights violations should be targeted. Diverse positions exist. For some, there should be no timeframe--all injustices deserve redress. Others see the effect the violation at hand has on reconciliation, rather than the time when it occurred, as the sole criterion for inclusion under transitional justice. A third position restricts the coverage of transitional justice to Gaddafi era violations: 1969-2011. A fourth one adds to these violations those committed, in the aftermath of February 2011. A fifth position sets the beginning during the Monarchy era (1951-1969), for that period also witnessed violations such as banning political parties and imprisoning people for their political opinions. A sixth position goes even further to include the Italian occupation era (1911-1943), since that would make sense for addressing violations related to real property. A seventh position calls for limiting the scope of transitional justice to the aftermath of February 2011; it argues that previous violations were already addressed, and that this would be the appropriate way to deal with Islamists who, while they were indeed victims of the Gaddafi regime, became the torturers in its aftermath.

Law 29/2013 on transitional justice opted praiseworthily for a timeframe extending from September 1, 1969 until the end of the post-2011 transitional period. As such, the law does not only apply to the violations that the Gaddafi regime committed, but also to those committed in this regime's aftermath. Yet, the law describes the latter in a way that limits its applicability to them. A better way would perhaps be to define the scope of the law so to include violations of international humanitarian law (IHL) and of international human rights law (IHRL) and leave it to a Fact Finding and Reconciliation Commission to decide on its priorities.

9. The fourth issue concerns fact-finding or 'forgetting', and here too, two positions emerged. The first calls for drawing a veil over what happened so that wounds are not reopened. A common historical justification is that this is exactly what the forefathers did in 1946 via the Harabi Covenant, which proved instrumental in the process of building the independent state of Libya; it was encouraged by King Idris and later endorsed as a permanent policy of 'forgetting' past violations. The second position sees no transitional justice without truth finding. In this view, the success of the Harabi Covenant was only due to Idris' religious and moral influence, while no such figure exists today. Some even question the success of the Covenant and the following policy of forgetting, since it resulted in depriving people of their rights. As for the legislative responses, the report concluded that while Law 29/2013 has opted for truth-finding and established a commission to this end, amnesty laws (Law 35/2012, Law 38/2012 and Law 6/2015) greatly limited such a mandate; these laws did not only exempt perpetrators from criminal accountability but did so in a way rendering fact finding hardly possible.

10. The fifth issue is about amnesty. While there exists a position that sees amnesty as the way towards reconciliation and peace, there is another that perceives it, at least in the way implemented in Libya, as a denial of justice to the victims. In 2012 the NTC introduced legislation aimed at granting amnesty to the revolutionaries and denying it to Gaddafi loyalists (Law 35/2012 and Law 38/2012). In contrast, three years later, the HoR introduced amnesty legislation explicitly aimed at the latter (Law 6/2015). Even Saif Al-Islam who is wanted by the ICC for crimes against humanity is said to benefit from this law. While realizing that amnesty is a transitional justice mechanism, the report argues that it should not come at the expense of other mechanisms. The present amnesty laws obstruct fact-finding, which is a prerequisite for reparation and institutional reform. Law 6/2015 in particular is said to grant amnesty for serious human rights violations such as those tried before the ICC. The report argues that such impunity should not be accepted.

11. The sixth issue concerns reparation. Two broad positions are recorded. The first rejects repairing any damage arguing that every Libyan suffered and there is no basis for favouring the victims of specific human rights violations; in addition, reparation programs will exhaust state resources. The second position argues in favour of reparations, but opinions here differ over whose damage is to be repaired, to which extent, and how. Law 29/2013 provides for reparation in a praiseworthy way by diversifying and limiting it; when monetary compensation is provided for, the law sets a limit on what can be paid. However, such provisions are ineffective because, first, they still await implementation and, second, other legislation has regulated transitional justice reparation differently, e.g., Law 50/2012 on Compensating Political Prisoners.

12. The seventh issue regards institutional reform. Both the interviewees and the legislation seem to equate institutional reform with excluding (or 'isolating', *azl*, the term used in the Libyan context) those associated with the former regime from power. According to some, such isolation should apply only to those at the level of policy makers and not to those who only implemented policies. Others argue that isolation should be based on one's behaviour rather than one's position. As for Law 29/2013, the GNC left out an entire chapter of the draft which was devoted to institutional reform; apparently, it believed that Law 13/2013 on Administrative and Political Isolation would be sufficient. This law had adopted a radical approach by isolating a great many of those who served under Gaddafi based on their positions rather than their conduct. Hence this law received wide condemnation. So, the HoR abolished it via Law 2/2015. Abandoning Law 13/2013 and its approach, the report concluded, is a step in the right direction: one's conduct rather than affiliation should be the basis for isolation. Besides, attention needs to be paid to other aspects of institutional reform, e.g., restructuring institutions to promote integrity and legitimacy, establishing oversight bodies, reforming legal frameworks, training public officials and employees on human rights standards.

13. The eighth issue is about what is often called Libyan specificity, i.e. whether Libyan culture supports the value of forgiveness as a means to reconciliation, and whether traditional leaders can play an important role. To some the answer is affirmative. Political practice has shown instances of forgiving and reconciliation, e.g., the abovementioned 1946 Harabi Covenant and the numerous reconciliation agreements concluded since 2011. Others disagree. They dismiss the merit and current feasibility of the Harabi Covenant, and argue that the reconciliation agreements fail to address the root causes of conflicts; thus, their results may be unsustainable. Law 29/2013 recognizes the importance of local heritage and the role of traditional leaders. It enables the FFRC to solicit the assistance of traditional leaders known for their effective role in solving local conflicts via customary methods.

14. The ninth issue is whether the national judiciary should have an exclusive or shared mandate to address transitional justice violations. Especially judges found that the national judiciary has such exclusive mandate. Generally, opinions among respondents differed on whether the judiciary shares this mandate with the FFRC, prompted by the vagueness of Law 29/2013's provisions on the issue, which could be read as giving precedence to the FFRC over courts; it is only when the FFRC decides to refer matters to courts that these can adjudicate them. In another reading, recourse can equally be made to the FFRC or courts. Secondly opinions differ on whether the national judiciary should share the mandate with

an international body such as the ICC, or a mixed tribunal. There is growing support for resorting to international courts, prompted by recent rulings the national judiciary made, notably, the abovementioned Abu Salim ruling and an older ruling in the case of Saif Al-Islam, While acknowledging this increased acceptance within the legal community in Libya of this option, the report notes that such a step still requires more scrutiny and a careful assessment of pros and cons.

15. The tenth issue concerns how to assess the steps taken by the GNA in 2019/2020 to instrumentalise Law 29/2013 with an executive regulation. The GNA is currently considering a draft for such regulation. The first, legal, question is whether the GNA can issue the regulation, given the fact that Law 29/2013 entrusts the HoR with this task. The second question is whether it is wise to instrumentalise Law 29/2013, given its major drawbacks. The third question is whether the move is politically feasible, given that the GNA's authority is only recognized in parts of the country. The members of the committee argued convincingly that drafted the regulation, their work makes sense for several reasons. First, the law has many sound provisions, such as those addressing real property grievances. Secondly, the GNA controls a growing area, which definitely includes greater Tripoli, which is not only the capital and home of more than one third of Libya's population, but also the area where a considerable number of transitional justice grievances has occurred. Thus, instrumentalising the law has its merit. Besides, it is argued, this could revive the attention to transitional justice and be an initial step leading to a new, better, transitional justice law.

16. These ten issues have given rise to major challenges facing the implementation of transitional justice in Libya. Some of these challenges could perhaps be turned into opportunities if dealt with appropriately, as is explained below.

17. The first challenge is the absence of effective state institutions. For the success of the transitional justice process, it is necessary to have effective state institutions, hence, to end their current divide. But, as the report explains, this does not mean that, until then, everything is to be put on hold.

18. The existing transitional justice laws and regulations constitute another challenge. They do not depart from a unified vision, lack societal support, and are used as a tool to antagonize political opponents. Yet, they can also constitute a reliable asset. It is true that Law 29/2013 is marred by several faults, e.g., focusing on certain categories of perpetrators and overthrowing the institutional reform mechanism. Still, the law provides a basis for transitional justice, creates the FFRC, diversifies reparations, and removes the statute of limitations obstacle in order to hold perpetrators of serious human rights violations accountable. Besides, steps have already been taken to form the FFRC and issue the

executive regulation, which are needed to instrumentalise the law. Thus, implementing the law would be a worthwhile step towards addressing urgent disputes, for example, those related to real property. It would also help to begin uncovering the truth and provide reparations for other violations. Moreover, such a step might result in reviving the debate on transitional justice amongst both policymakers, law-makers, and the general public, and lead to other steps towards enacting a new, better, transitional justice law.

19. Another major political challenge, is the absence of a constitution. Ideally, addressing the problems surrounding the current framework of transitional justice should start from the prospective constitution. So far, it has proved impossible to get a constitution up and running. Still, the 2014-2017 constitution making process resulted in 2017 in a draft which is quite credible in its approach to transitional justice. The draft enshrines the principle of transitional justice and obliges the state to enact a transitional justice law that regulates fact-finding, reparation, criminal accountability and institutional reform. Adopting this draft would thus provide the needed legal base for transitional justice. Also, given that a constitution needs to be approved in a public referendum, this could provide an opportunity for societal participation in setting the foundations of transitional justice. If people reject the draft, it may be modified to satisfy them. But for voting to be well-informed and prudent, there is need to address another challenge, i.e., poor social awareness, which is also a key challenge.

20. If indeed the draft constitution would be adopted as the constitution, there will be a need to translate its principles into detailed provisions. A new, or thoroughly revised, transitional justice law will thus be needed. It will be important, then, to draw guidance from both Libya's own experience and other international experiences. In assessing which aspects of international experiences are worthy of upholding, guidelines developed by international organizations, especially the UN bodies, can provide a reference. The prospective law should also build on Libya's own experience such as the painful experience of excluding (in Libyan jargon 'isolating') political and administrative office-bearers.

21. While securing a better legal framework for transitional justice in the constitution and ordinary legislation is essential, it is not enough. It is important also to address the challenge of poor social awareness of transitional justice. The research found that the general public and many of the leaders in the political and media landscape know too little about transitional justice's goals, mechanisms and measures. In this regard, it would be useful to start awareness campaigns led by civil society organizations and research centres, in order to present transitional justice's global experiences and lessons, and national transitional justice issues in an accessible manner to the general public. As such, these campaigns could

inform the public and facilitate an informed national dialogue based on solid knowledge. Such views would also feed into the debate on whether to reform the existing transitional justice legislation, and how, or enact new legislation, and how. This will help to develop a sense of ownership of the transitional justice project and give Libyans an incentive to actively participate in its implementation.

22. Emphasizing in such campaigns Libya's own, unique, historical experience with transitional justice may help the actualization of the transitional justice process. To achieve this, it is necessary to highlight the specificity granted by local heritage. This can help create a sense of national ownership of the process and encourage different segments of society to participate in its success.

23. Any success in addressing the challenge of poor social awareness will help address the other abovementioned challenges. For instance, in Libya media often play a destructive role aggravating crises by inciting violence and promoting hate speech. If citizens are well-informed, they become more aware of its detrimental nature, such destructive roles can be countered. This in turn can heighten the chances for a successful transitional justice process.

24. Related to the development of social awareness is the revival of the national memory. It is important to honour the victims thought to be worthy of commemoration in each region, for example, by planting trees named after them, in the city or village in which the person was born or lost, or in the prison where they passed away. Such projects can tell the stories of these victims for generations to come, and give them another life that perpetuates their memory and perpetuates the gratitude of their fellow citizens for their sacrifices. It is imperative that the various segments of society contribute to financing such projects and thus own them.

25. Lastly, in all efforts attention should also be paid to the underlying causes of the violations that compelled us to apply transitional justice in the first place, i.e. the value system. After the issuance of fatwas legitimizing terrorism and exhuming shrines and graves, and after the failure of political elites and social leaders to reach permanent settlements, and after the outbreak of wars in which internationally prohibited weapons were used, and after nearly a decade of grave human rights violations, it is of paramount importance to address the prevailing values that allowed all that to happen. In the end, it is undoubtedly the society's value system that constitutes the real test of any envisaged transitional justice process: its legitimacy, suitability, chances of success.

1. Introduction: Transitional Justice and the Role of Law in National Reconciliation

This report concerns the role of law in achieving national reconciliation through transitional justice in Libya. This approach assumes that transitional justice (see 1.1) is one of the critical elements of reconciliation (see 1.2) and that the law plays an important role in achieving both (see 1.3).

1.1. The concept of transitional justice

The concept of transitional justice refers to "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and to achieve reconciliation".[1] These processes and mechanisms - fact-finding, criminal accountability, reparation, and institutional reform - are implemented through judicial bodies (courts, specialized chambers, etc.) or non-judicial bodies (committees, commissions, etc.).[2] What distinguishes transitional justice from other regular judicial efforts is the fact that it addresses legacies of violations in a usually fragile context, and it is their magnitude that distinguishes them from the ordinary civil or criminal approaches, especially because they are often accompanied with institutional fragility during the transitional period, as well as political instability, widespread corruption, lack of resources and the weakness of civil society.[3] Therefore, transitional justice, as highlighted by the definition, refers to a course of action that includes mechanisms and measures that go beyond regular judicial processes and institutions.

Transitional justice mechanisms and measures aim to prevent impunity for serious human rights violations, to acknowledge the dignity of the victims of these violations, as they are citizens

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1 UN Security Council. "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General 23 August 2004." *S/2004/616*, 23 August 2004. Accessed online: https://www.refworld.org/docid/45069c434.html [last accessed 30 June 2020]

2 The concept of transitional justice dates to the establishment of the Nuremberg and Tokyo tribunals shortly after the end of the Second World War, in which the victorious states expanded the scope of the mechanisms of criminal law so that they could try military and political leaders from the Nazi and Japanese regimes. This expansion has contributed to the promotion of human rights awareness at the international level, and to the formation of institutional key institutions that adopted human rights issues as their primary concern. See: Al-Jazeera Encyclopedia. "Al-ʿadalat al-intiqālīa" Accessed online: https://www.aljazeera.net/encyclopedia/conceptsandterminology/2015/11/18/%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%A7%D9%86%D8%AA%D9%82%D8%A7%D9%84%D9%8A%D8%A9 [last accessed 18 June 2020].

3 Seils, Paul. 2017. "The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions." *ICTJ Briefing*. Accessed online: https://www.ictj.org/sites/default/files/ICTJ-Briefing-Paper-Reconciliation-TJ-2017.pdf [last accessed 18 June 2020].

and rights holders, to restore citizens' confidence in state institutions, especially those charged with protecting basic human rights, and to prevent any future human rights violations. In other words, it aims to achieve the essence of justice, heal the wounds caused by severe violations, contribute to the psychological recovery and social integration of the victims and inaugurate a new era in which the perpetrators, the oppressors and the tyrants are held accountable. As such, transitional justice is a justice, remedial, and constitutive endeavour.[1]

Transitional justice expands the concept of being a victim and does not limit it to individuals who have been subjected to severe human rights violations. Instead, it includes individuals who have suffered harm from unfair policies or economic inequities, as well as cities and ethnic groups that were subjected to collective punishments, such as genocide, displacement, and denial of cultural rights.[2]

It is only described as transitional because it pertains to a period of transition from armed conflict to a peaceful consensus, or from a dictatorship to a democracy. Although transitional justice is applied in these exceptional periods, it does not include mechanisms that could be considered illegitimate, such as exceptional courts,[3] which the Libyan Council for the Judiciary defines as any courts that are subject to procedures unknown to ordinary courts such as those limiting the basic rights of the accused, or those hampering the judges' competence and fairness. The clear example of these courts is the infamous People's Courts.[4]

Transitional justice is distinguished in other aspects from regular justice. While it aims, for example, like the regular criminal justice at revealing the truth about crimes, transitional justice does not necessarily require administering the punishments that regular criminal justice provisions

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1 Buhamra, al-Hadi " Al-ʿadalat al-intiqālia ʿadalat taʾasīsīa," *Libya al-Mustaqbal*, 18 November 2016. Accessed online: http://www.libya-al-mostakbal.org/95/10290/%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%A7%D9%86%D8%AA%D9%82%D8%A7%D9%84%D9%8A%D8%A9-%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%AA%D8%A3%D8%B3%D9%8A%D8%B3%D9%8A%D8%A9.html [last accessed 18 June 2020].

2 Buhamra, al-Hadi. 2019. "Muqadima fī al-ʿadalat al-intiqālia"(Trans. "An Introduction to Transitional Justice") *Warqāt ʿilmīa fī al-ʿadalat al-intiqālia.* Tripoli: Al-munaẓimat al-Lībīa li-l-adalat al-intiqālia: 13.

3 Daham, Khamis and Amna Dakhil. 2016. *Al-ʿadalat al-intiqālia, dirāsat muqārina mā bayna janūb afrīqīā wa al-ʿIrāq*. Amman: Dār al-jinān li-l-nashar wa al-tawzīʿa: 14.

4 Al-majlis al-ʿālī li-l-qaḍā. "Tafsīr al-majlis al-ʿālī li-l-qadāʾ li-mafhūmʾal-muḥākim wa al-nīābāt al-istathnāʾīa al-wārida fī al-mādat al-awalī min al-qānūn raqm 13 li-sana 2013 bi-shaʾan al-ʿazal al-sīāsī wa al-idārī" (Trans. "The interpretation of the Supreme Judicial Council on the concept of exceptional courts and prosecutions contained in Article 1 of Law 13/2013 regarding Political and Administrative Isolation"). Tripoli, 5 June 2013. Accessed online: http://itcadel.gov.ly/2013/06/%D8%AA%D9%81%D8%B3%D9%8A%D8%B1-%D8%A7%D9%84%D9%85%D8%AC%D9%84%D8%B3-%D8%A7%D9%84%D8%A3%D8%B9%D9%84%D9%89-%D9%84%D9%84%D9%82%D8%B6%D8%A7%D8%A1-%D9%84%D9%85%D9%81%D9%87%D9%88%D9%85-%D8%A7%D9%84%D9%85/ [last accessed 29 June 2020].

prescribe. In addition, transitional justice differs from regular justice in its adoption of non-judicial measures, its engagement with the motives for human rights violations – from which the regular justice steers away as a general principle –, reopening of case files in which the judiciary adjudicated a final judgement, and its attempt to obtain recognition of the victims' suffering, even in the event of the death of perpetrators or the applicability of the statute of limitations to the latter's crimes.[1]

The above-mentioned definition of transitional justice speaks of a 'full range of processes and mechanisms'. Taking this literally, one could argue that only if *all* mechanisms are applied together, we can speak of transitional justice; this would be a restrictive definition. A second position would be that we can speak of transitional justice if a sufficient number of transitional justice mechanisms is adopted - while leaving out some others - in a way that allows for recognizing a nation's experience as transitional justice; we can call this a cluster definition of transitional justice.

Within the cluster definition, there are two choices. The first choice allows local specificities to dictate the transitional justice programme, so that each country can implement the mechanisms that suit its historical legacy and current conditions. This was the case, for example, in South Africa, which focused on revealing the truth, and in Morocco, where the focus was on institutional reform. The second choice adopts a hierarchy that attaches particular importance to specific mechanisms, so that the merit of any programme related to transitional justice depends on their implementation. This way, emphasizing that there can be no reconciliation without truth implies the adoption of the second option,[2] because it conditions the description of any justice project as a transitional justice one upon the inclusion of a fact-finding mechanism.

In the context of discussing the mechanisms historically linked to transitional justice, it should be mentioned first that the criminal accountability mechanism seeks to prosecute those legally authorized in a previous era to take decisions and enact laws, which resulted in massive violations of human rights and international humanitarian law. The state in the transitional period has the prime responsibility for exercising jurisdiction over these violations. Yet, it is often the case that having recently emerged from internal conflicts, the state may not be able or lack the will to conduct any effective investigation and prosecution. Thus, there might be a need for an international or hybrid criminal court to exercise this jurisdiction.

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1 Buhamra, "Al-ʿadalat al-intiqālia."

2 There is a popular Libyan proverb that bears a similar meaning: "Recognize my right and then you can usurp it if you wish."

Secondly, the search for truth represents a founding value for transitional justice.[1] The victims of human rights violations have an inherent right to know the conditions and circumstances that accompanied the repression practiced against them. Knowing the truth gives both individuals and their families a sense of salvation, restoration of dignity, and recognition of the inequity, suffering and humiliation that they sustained.

Fact finding is often implemented by independent fact-finding commissions that investigate the patterns of violence to reveal its causes and effects. Each commission is considered a unique institution designed in a specific societal context and based on national consultations involving victims and civil society organizations.[2]

In unveiling the truth behind human rights violations, these commissions attempt to reveal patterns, forms, causes and consequences of these violations, collect witness statements and hold public hearings broadcasted via various media outlets. This entails providing victims with a public platform through which they can express their thoughts and feelings, which is a task that does not fall within the concern of the regular courts. Hence, these commissions are supposed to have the authority to hear witnesses, the power to order attendance, summon, inspect, and seize, and they may even have the authority to protect those witnesses.[3]

Thirdly, the reparation mechanism constitutes recognition of the human rights violations that took place and a real beginning for reconciliation with the victims.[4] This mechanism aims to address the harm these victims have suffered by securing moral and material reparation, such as gratification and rehabilitation, restitution of or compensation for confiscated properties, designing rehabilitation programs, providing shelter for those who were displaced by civil wars, and tackling developmental disparities between regions.[5] It aims to not only recognize the victims' rights, but also to ensure the non-recurrence of the harm they suffered, to promote social solidarity with them, and to restore their confidence in the state. Every violation of rights results in losses and fears of recurrent damage, and the reparation mechanism is a serious attempt to dispel these fears and compensate for the losses.

Fourth and last, it is important to remember that institutional reform affects public institutions that have practiced severe violations of rights or colluded with the perpetrators,

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1 Al-Farshishi, Wahid, Marwa Bilkacem and Marwan al-Tashani. 2016. *Dalīl al-ʿadalat al-intiqālia fī Lībiā* (Trans. A Guide to Transitional Justice in Libya). Tunis: Al-maʿhad al-ʿarabī li-huquq al-insān: 11.

2 United Nations Human Rights Council. 2009. "Dirāsat taḥlīlīyya bi-shaʾān huqūq al-insān wa al-ʿadalat al-intiqālia" (Trans. "Analytical Study on Human Rights and Transitional Justice") 6, 12th session, issued on 6 August 2009.

3 Ibid: 37.

4 Daham and Dakhil, Dirāsat janūb afrīqīā wa al-ʿIrāq, 14

5 Buhamra, "Al-ʿadalat al-intiqālia."

making them institutions that support social peace, protect human rights, and promote a culture of respect for the rule of law. The security, defence and justice institutions are most often in need of institutional reform.

Regular justice mechanisms often preclude an effective reform of state institutions, being subject to provisions such as those protecting acquired rights and safeguarding administrative decisions from repealing and cancellation.[1] Thus, institutional reform confirms, in its own way, that there are fundamental differences between transitional and regular justice.

Institutional reform contributes to ensuring the non-recurrence of violations by, among others, reforming legislation and isolating persons that enabled them to occur, as well as creating mechanisms for monitoring the targeted institutions to curb their misconduct and their involvement in infringement of rights.[2]

1.2. Transitional justice and reconciliation

Even though references to reconciliation are common in transitional justice contexts, its meaning and standing in these contexts is not sufficiently clear.

What is certain about reconciliation in the context of this report is that it involves constructing, or reconstructing, relationships following human rights violations. Reconciliation can take several forms, and can occur at different levels. A first form is individual reconciliation, which is the reconciliation of the victims with their past A second is interpersonal reconciliation, i.e. between the victim, the perpetrator, and the beneficiary. A third form is socio-political reconciliation, which occurs between groups (political, ethnic, linguistic, religious, etc.) in a divided society, and a fourth form is institutional reconciliation, which takes place between state institutions that are entrusted with the protection of fundamental rights and freedoms, and the citizens affected by these violations, the aim of which is to restore their confidence in these institutions. These forms of reconciliation can be reclassified vertically, i.e. between state institutions and citizens, and horizontally, i.e. between citizens, individuals and groups. It is also possible to talk about "thin" reconciliation, which aims for peaceful coexistence, even if trust, respect and shared values are absent or barely present, and "thick" reconciliation, which aspires to construct, or reconstruct, relationships on the basis of trust, respect and shared values.[3]

As such, transitional justice processes may lead to reconciliation. For instance, transitional justice is conducive to individual reconciliation by recognizing and reaffirming victims' dignity, and

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1 Al-Jazeera, "Al-ʿadalat al-intiqālīa."

2 Al-Daghili, Salwa. "Al-iṣlāḥ al-muʾasasī fī sīyāq sīyāsāt al-ʿadalat al-intiqālīa" (Trans. "Institutional Reform in the Context of Transitional Justice Policies). *Warqāt ʿilmiyya fī al-ʿadalat al-intiqālīa*. Tripoli: Al-munaẓimat al-Lībīā li- al-ʿadalat al-intiqālīa: 24.

3 Seils, "Place of Reconciliation."

adopting, to this end, programs such as those aiming at providing psychological assistance and overcoming trauma. Likewise, interpersonal and socio-political reconciliation is to be promoted by uncovering the truth about violations, apologizing to and redressing their victims, individuals or groups, and taking measures to prevent their reoccurrence. Moreover, institutional reform programs may contribute to achieving institutional reconciliation.[1]

However, transitional justice does not always go hand in hand with reconciliation. For example, if there is a complete removal of, and a break with the former regime to which violations are attributed, transitional justice legislation may refrain from referring to reconciliation as one of its goals. In such a case, the new regime will not be enthusiastic about reconciliation. In contrast, if there is a continuation of the former regime in some way, or if the culture of reconciliation is predominant in society, then transitional justice legislation may well make reconciliation its goal.[2]

Transitional justice can also be a cause for discord instead of reconciliation. This can happen, for example, if transitional justice is perceived as lacking legitimacy or impartiality. This may happen in cases where its processes lack transparency and victim or community participation, and in cases where reconciliation is presented as a substitute for accountability or recognition of victims.[3] The last point is particularly important in the Libyan context, as amnesty laws, which are part of transitional justice legislation,[4] have been widely understood as promoting impunity for the perpetrators.[5]

While the societal context may discourage recourse to mechanisms of criminal justice, establishing this type of justice does not necessarily exclude reconciliation. South Africa and Chile feared that prosecutions would lead to discord and instability. Instead, they focused on revealing the truth about the violations: what happened, why it happened, and who is responsible for it. The chairman of the South African Truth and Reconciliation Commission presented criminal justice as being antithetical to restorative justice.[6] However, this course of action was subject to criticism, as criminal accountability does not necessarily exclude reconciliation, for what would prevent the perpetrators, even if they were convicted, from apologizing to their victims? In addition, conviction may not necessarily entail retribution, as the latter is only one of the objectives of criminal justice, and punishment, even if imposed, should aim for reform.[7]

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1 Ibid: 9.

2 Ibid: 4.

3 Ibid: 10.

4 See infra 3.5.

5 See infra 3.5.

6 Ibid: 9.

7 Ibid: 10.

In the context of this research project, national reconciliation is a goal that cannot only be achieved by an agreement ending political division, but it requires addressing the roots of this division. The latter could be grouped under five main concerns: national identity, national governance, decentralization, transitional justice and security forces. Reconciliation, as such, is a goal of transitional justice, whether it relates to individual reconciliation, interpersonal reconciliation, socio-political or group reconciliation, or institutional reconciliation. In order to achieve this goal, transitional justice should not be perceived as a ready-made recipe, or, as some describe it, a toolkit. Instead, in selecting transitional justice mechanisms, attention should be paid to the Libyan context. This may require, for example, not prosecuting perpetrators in some cases, provided that this does not hamper revealing the truth about the violations, providing reparation for its victims and ensuring that it would not happen again. In addition, the transitional justice processes need to be legitimate, impartial and participatory.

The next section raises the question whether the law has so far succeeded in achieving reconciliation.

1.3. Assessing the role of law in national reconciliation: the adopted approach

This report is part of project which assesses the role of law in Libya's national reconciliation. Implied in this approach is an assumption that the state, via law, plays an important role, actual or potential, in reconciliation. Yet, the project sees this law as a result of interactions involving more than the state institutions, and envisages that other norms can also be applied to compensate for the absence, or ineffectiveness, of the law.

While both state driven approaches - sometimes called top down – and community driven approaches– sometimes called bottom up - are envisaged in reconciliation processes, our project assumes a major role for the state to play. The desired reconciliation is national and not just regional or local. While it is true that bottom-up approaches are considered to play a major role in addressing transitional justice related conflicts, the role of the state remains essential. On the one hand, the enforcement of reconciliation initiatives of local communities depends to a large extent on the parties' goodwill, which can be hard to have or sustain. On the other hand, some of the local initiatives assign a significant role to the state in sponsoring and honouring reconciliatory agreements (for example, payment of compensation), such as those concluded to end the conflict between Misrata and Tawergha. Besides, local reconciliation initiatives may fall short of achieving all the above-mentioned forms of reconciliation (individual, interpersonal, socio-political and institutional), or of realizing them as intended.

However, the focus of the project on the role of the state and its legislation does not ignore the role of other actors, as the project has employed a concept where governance is seen as "the formation and stewardship of the rules that regulate the public realm – the space where state as

well as economic and societal actors interact to make decisions."[1] Researching transitional justice, its related challenges and issues, and the role of law is thus not limited to examining the role of the state and the interaction between its legislative, executive and judicial institutions, at the national and subnational levels, it also includes the interaction of these institutions with other actors: other political community components such as political parties and currents, civil society, and the economic community. For example, in determining positions relating to a particular issue, the research is not limited to identifying the views of representatives of state institutions, it has also sought to identify those of representatives of civil society, political parties and the economic community. The project, thus, while focusing on law, and on the state, being the formal producer of this law, also investigates the opinions of actors other than the state, because law, according to the governance approach, is formed and implemented as a result of the interaction of all those actors, even though the state is the one that officially enacts and promulgates it. Furthermore, the project addresses also grassroots norms (religious or customary) when state law fails to effectively resolve the relevant contentious issue.

1.4. Vision on transitional justice

"A society adopting transitional justice in pursuit of national reconciliation combating the causes of conflict so to attain a lasting societal peace."

The following are the principles upon which we approach the various transitional justice issues. Together, they constitute the foundations of the vision.

- The prevalent values in a society should form the ultimate basis for deciding whether to adopt a transitional justice process and assessing the chances of success this process might have in achieving its goals.
- Still, existing political, social and security circumstances might require adopting such a process now rather than delaying it as the delay will only result in more human rights violations and increased difficulty in addressing them.
- The adopted transitional justice process should be designed so that national reconciliation and justice are its twin ultimate goals.
- The impact on national reconciliation should form the basis for our assessment of the positions taken on transitional justice issue and the measures taken towards them.
- The implementation of transitional justice should rise above political, ideological and regional rivalries.

[1] Hyden, Goran. 2004. *Making Sense of Governance: Empirical Evidence from Sixteen Developing Countries.* Boulder and London: Lynne Rienner Publishers.

- There can be no reconciliation without truth, hence, unveiling the truth of past human rights violations should constitute a pillar of the adopted transitional justice process.
- Any future constitution should lay foundations for transitional justice to be subsequently translated into a law overcoming the drawbacks of existing transitional justice legislation.
- Developing societal awareness of transitional justice so that its importance is more appreciated, hence, its chances of implementation.

2. Transitional justice contexts and conditions

To understand transitional justice and appropriately assess the responses given to the issues it raises, it is of utmost importance to understand its historical context (2.1), politico-legal context (2.2) as well as its socio-cultural conditions (2.3).

2.1. Transitional justice initiatives prior to February 2011, a brief history

During its last decade, the Gaddafi regime took initiatives that some considered to be of a transitional justice nature. These initiatives were part of a so-called Reconciliation Project sponsored by Saif al-Islam Gaddafi[1] and at the time, it sparked, and continues to spark, a debate about its seriousness and effectiveness.

Saif al-Islam's reform efforts were part of the regime's responses to international and domestic changes, mainly an economic depression which followed the regime's clash with western countries, and from domestic political mismanagement. The efforts included closing critical international cases of state-sponsored terrorism, such as compensating the victims of Pan Am and Air France,[2] and of the Berlin nightclub.[3] Inside Libya, there were several initiatives, including the attempt to remedy the effects of the Abu Salim Massacre, compensating those affected by the socialist laws that restricted private property ownership, lifting restrictions on ethnic minorities' exercise of their linguistic and cultural rights, abolishing exceptional courts (the People's Court), and writing a draft constitution after decades of its deliberate absence.

These initiatives raised scepticism and criticism. For example, addressing the Abu Salim Massacre did not include revealing the truth about what happened. Instead, it was limited to compensating the victims' families, which some critics considered as buying their silence. In addition, ethnic minorities saw as insufficient the measures taken to lift restrictions on their

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1 Saif al-Islam Gaddafi is the second son of Muammar Gaddafi. At the time, he was heralded as a likely successor to his father.

2 On 21 December 1988, Pan Am Flight 103 exploded over Lockerbie, Scotland, killing 259 people on board and 11 on the ground. A Libyan citizen was convicted.

3 On 5 April 1986, a bomb exploded in West Berlin's La Belle disco, killing two US servicemen and a Turkish woman. Libya was accused of ''state-sponsored terrorism, and a Libyan citizen was convicted.

linguistic and cultural rights. The change took the form of allowing them, as an exception to the prohibition of using non-Arabic-Muslim names, to register names that expressed Libyan authenticity or were inherited and transmitted intergenerationally according to traditions and customs. To the minorities, the change did not extend to repealing the law prohibiting the use of any non-Arabic languages. This would have required enacting a law by the General Popular Congresses (the legislature) rather than merely a decision issued by the General People's Committee (the Council of Ministers).[1]

Besides, compensation for those affected by the laws restricting private property ownership was not based on an admission of the regime's mistake. Instead, it was limited to addressing the "misapplications" of these laws. For example, Law 4/1978 restricted ownership to only one property, a dwelling or a plot of land; the state seized any property found in excess to this limit and assigned it, a.o., to those in need of housing. The former owners were supposed to be compensated, but the law was 'misapplied' and many did not receive full or any compensation. The attempt to address the consequences of this law was limited to a large part to 'correct' this misapplication via establishing a compensation committee. This clearly reveals a conviction that Law 4/1978 in itself was not wrong. This law was not applied correctly and it would be the task of the committee to fix that. A further indication of this view is the rejection of a proposal to abolish this law. A committee tasked with reviewing the Civil Code proposed to end all exceptional laws, including Law 4/1978 with an immediate, rather than a retroactive, effect. Such laws, the committee opined, had already achieved their purpose. The regime, however, rejected the proposal.

The abolition of the People's Court could be a further argument to prove the lack of seriousness of the reform. Abolishing the Court did not include abolishing its "exceptional" competencies, which constituted the reason for deeming it exceptional, hence ending it. According to Article 2 of Law 7/2005, these competencies were transferred to specialized courts and prosecution offices regarding cases that used to be part of the People's Court's competencies. This meant that the People's Court was abolished in body, but not in spirit. It was only in the aftermath of the February 2011 Revolution that the Supreme Court ruled that Article 2 was unconstitutional.[2]

Similarly, the draft constitution did not materialize, despite the constant reviews that significantly reduced its potential impact. In the beginning, the "Libya's Vision 2025" committee

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1 Tawalt. 2007. "(Al-janāza kabīra wa al-mīt fār) tāwalt turaṣidu rudud ifʿāl qīadāt amāzīghiyya hawla qarār riʾāsat al-wuzaraʾ al-Lībīa (al-lajnat al-shaʿabiyya al-ʿāma) bi-shaʾān al-simāḥ bi-istikhdām ghayr al-lughat al-ʿarabiyya" (Trans. "(Too much ado about nothing) Tawalt monitors the Berber Leaders' reaction about the decision of the Libyan Prime Minister (the General People's Committee) regarding the permission to use non-Arabic language"). Accessed online: http: //www.tawalt.com/?p=12284 [last accessed 18 June 2020].

2 Supreme Court, Constitutional Jurisdiction. Appeal 25 for the Judicial Year 59 on 23 December 2012.

prepared a report in which it confirmed that there was "a need to draft a constitution that defines the powers of state institutions in a manner that serves the country's interests and ensures a balance between citizens' rights and freedoms, and achieving security, safety, and national and social stability."[1] Indeed, a committee of Libyan and foreign experts prepared a draft constitution.[2] This draft, however, was subjected to reviews by other committees that eventually made it consistent with the regime's ideology. A leaked version of the amended draft revealed that the government system remained premised on the Jamahiriya model. According to the chairman of the committee which ended up in charge of the drafting process, the draft took as references the Declaration on the Establishment of the Authority of the People, the Great Green Charter of Human Rights, and the Green Book.[3] The changes the draft included were limited to adopting a secret voting system inside the Basic People's Congresses, establishing a constitutional court, and banning exceptional courts.[4] Despite these limited changes, the draft was not adopted, and it was said back then that Gaddafi rejected it.

Despite the limited nature of Saif al-Islam's reform initiatives, they contributed to creating an environment that allowed Libyans to express their grievances in public space in an increasing and unprecedented fashion.[5] For example, the families of the victims of the Abu Salim Massacre organized weekly sit-ins in front of the North Benghazi Primary Court demanding to know the truth. The arrest of the families' lawyer was the spark that ignited the February 2011 Revolution, which ended with the fall of the regime.[6]

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1 Markaz al-buḥuth wa al-istishārāt. 2008. *Lībiā 2025, ruʾiyyat istisharārafiyya, al-taqrīr al-nihāʾī. Benghazi* (Trans. *Libya 2025, A Forward-looking Vision, Final Report*). Benghazi: 80.

2 McClennen, Ned "Saif al-Islam Gaddafi and the Libyan Constitution." *Critical Inquiry,* 12 September 2011. Accessed online: https://critinq.wordpress.com/2011/09/12/annals-of-philosophy-in-libya/ [last accessed 18 June 2020].

3 "Lajnat Lībiā ḥukūmiyya tadarasa awal dustūr li-l-bilād taḥt riʿāiyya Sayf al-Islām al-Gadhāfī" (Trans. "A Libyan government committee is studying the country's first constitution under the patronage of Saif al-Islam Gaddafi"). *Dunia Al-Watan*, 12 December 2008. Accessed online: https://www.alwatanvoice.com/arabic/content/print/133791.html [last accessed 18 June 2020].

4 Mahmud, Khalid. "Lībiā tabḥath mashrūʿa dustūr jadīd… wa Sayf al-Islām yarūju li-ʿaqad ijtmāʿī la yumassa sulṭat wālidihi" (Trans. "Libya is considering a new draft constitution... and Saif Al-Islam is promoting a social contract that does not affect his father's authority"). *Al-Sharq al-Awsat*, 13 December 2008. Accessed online: https://archive.aawsat.com/details.asp?section=4&issueno=10973&article=498705#.Xm9yLp NKhQK [last accessed 18 June 2020].

5 Pargeter, Alison. 2016. "Libya: The Dynamics of the 2011 Revolution." In *Oil States in the New Middle East: Uprisings and Stability,* edited by Kjetil Selvik and Bjørn Olav Utik, 170-187 (179-180). London and New York: Routledge.

6 Pargeter, Alison. 2012. *Libya: The Rise and Fall of Qaddafi.* New Haven, CT: Yale University Press, 220, 221.

2.2. The politico-legal context

Understanding the political context since February 2011 is necessary to understand and assess the transitional justice legislation. In this regard, it is possible to detect an increasing revolutionary fervour that called for breaking with the former regime and celebrating those who revolted against it. What followed was a decline in that fervour caused by bitter disappointment at the failure to achieve the Revolution's goals. This decline was manifested in changing positions vis-à-vis the former regime and its violations, on the one hand, and towards groups linked to the Revolution, especially the Islamic ones, on the other. The enacted legislation mirrored these changes.

The National Transitional Council (NTC) (2011-2012), the first transitional authority, worked in an environment that witnessed a gradual increase of the revolutionary fervour calling for a break with the former regime's legislation, institutions, and persons. However, the NTC did not fully identify with this fervour due, perhaps, to the fact that it included persons who had until recently held important positions under the former regime. Still, the Council adopted a more favourable attitude towards this revolutionary spirit when it moved in October 2011 from Benghazi, where it was established, to Tripoli, and that was perhaps because of the increasing role of the new revolutionary forces in the capital and the decline of their opponents' role within the council.[1]

On 3 August 2011, the NTC issued the Interim Constitutional Declaration without any reference to national reconciliation or transitional justice. According to prominent lawyer Azza al-Maghur, the reason may lie in the novelty of the terms and that the drafters of the Declaration could not have expected that the country would face crises ending in civil wars.[2] This reasoning, however, is not entirely plausible. It is true that neither transitional justice as a concept, nor as a term were familiar in Libya's legal sphere at the time,[3] but what about national reconciliation? The actual reason behind neglecting it may be found in the fact that the NTC did not feel the need to reconcile with the previous regime, especially since the signs of its complete downfall had become clear by the time the Declaration was introduced.[4]

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1 Ahmad al-Abbar (Former NTC member), in-depth interview in Benghazi, 25 June 2019.

2 Al-Maghur, Azza. 2016. *Tashrīʿāt al-waṭaniyya dhāta al-ʿilāqa bi-al-ʿadalat al-intiqāliyya wa al-muṣālaha al-waṭaniyya: dirāsa taḥlīlīyya* (Trans. *National legislation related to transitional justice and national reconciliation: an analytical study):* 6.

3 In a telling story, Jumaʿa Atiga, a well-known lawyer and former vice-president of the GNC, recounted how he referred to 'transitional justice' during a meeting with Ian Martin, head of UNSMIL from September 2011 to October 2012. A well-known lawyer and human rights activist amongst those present inquired about the meaning of the term. It was, according to Atiga, the first time this lawyer encountered the term (High-Level Meeting on National reconciliation in Libya. Tunis: 16-17 September 2019).

4 See 2.1.

However, a number of lawyers pointed out the need to address transitional justice, and proposed to enact a law to this effect. Thanks to the efforts of Mohamed al-Allagi, a prominent lawyer and human rights activist who acted as the minister of justice, a committee was formed to draft a law. It worked with another committee composed of lawyers, and the end result was a draft made in consultation with the International Centre for Transitional Justice (ICTJ) and UNSMIL. The NTC adopted the draft under the name: Law 17/2012 on the Establishment of the Rules of National Reconciliation and Transitional Justice. However, the NTC, according to al-Hadi Buhamra, a member of the drafting committee, introduced changes that "fundamentally changed the philosophy and content of the draft". The changes included, for instance, "leaving out a whole chapter devoted to criminal prosecution which formed the hard core of the draft."[1] Law 17/2012 also included provisions indicating that it aimed only at violations attributed to the former regime. As to Article 1, "transitional justice is a collection of legislative, judicial, administrative and social measures that address what happened during the period of the former regime […]". As for Article 2, the law applied to any events that occurred in the period starting from 1 September 1969, when Gaddafi came to power, until the objectives of the law would be achieved. The reference to achieving the law's objectives could give rise to an understanding that the law applied to post Gaddafi era violations, in addition to the previous ones. Yet, such an interpretation would not stand when recalling other provisions of Law 17/2012. [2]

In fact, reviewing other legislation that the NTC introduced in the same period clearly shows a tendency to distinguish between the violations of the former regime and the subsequent ones. On 2 May 2012, the NTC enacted Law 35/2012 on Amnesty for Some Crimes, which excluded from amnesty any crimes that Gaddafi's family (wife, children, in-laws) and assistants committed (Article 1). On the same day, it enacted Law 38/2012 on Some Procedures for the Transitional Period ordaining that there would be no punishment for any acts, whether of a military, security or civilian character, that the revolutionaries committed for the purpose of making the revolution a success or protecting it (Article 4).

Such legislation attracted criticism, at home and abroad. For instance, UNSMIL published a report on 17 September 2012 calling on the General National Congress (GNC), the NTC's successor, to revisit and revise the legal framework of transitional justice, not only Law 17/2012,

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1 Buhamra, al-Hadi. 2012. "Baʿḍ mushāriʿa al-qawānīn allatī qadamat li-l-majlis al-waṭani al-intiqālī (al-aṣal wa al-māl" (Trans. "Some of the bills that were submitted to the NTC (The Origin and the Outcome)"). *Libya Al-Mustaqbal*, 9 July 2012. Accessed online: http://archive2.libya-al-mostakbal.org/news/clicked/24496 [last accessed 20 May 2020].

2 Al-Maghur, *Tashrīʿāt*, 8.

but also the amnesty laws.[1] The GNC (2012-2014) indeed revisited this legal framework, but the end result was not as, perhaps, UNSMIL expected. The GNC, in fact, introduced legislation accommodating more of the said revolutionary fervour. For instance, Law 29/2013 on Transitional Justice, which repealed and replaced Law 17/2012, declares as a transitional justice objective the legal recognition of the fairness of the February Revolution and the acknowledgment of the former regime's corruption, tyranny and criminalization (Article 4). Admittedly, the scope of the law extends from 1 September 1969 to the end of the transitional period, which could be understood as including any violations committed in post-February 2011 era. Yet, a reading of other provisions casts doubt on such understanding. The law, first, defines such violations in a way implying that its applicability to them is limited. According to the law, these violations are some effects of the February Revolution that resulted in a rift in the societal fabric, and acts that, while being necessary to protect the Revolution, were associated with behaviours violating the Revolution's principles. The law also requires violations to be systematic, and this is expected to leave out many violations attributed to the revolutionaries.

It is quite telling in this regard that the draft law, as written by the ministry of justice and presented by the government,[2] did not require violations to be systematic, nor grave. Adding these qualifications was actually the doing of the GNC to, perhaps, protect the revolutionaries. As to Article 4 of the draft, the fact-finding commission is to unveil what happened in "the events related to human rights violations" and "study and investigate the incidents of a collective nature, and acts of violence and *systematic* or *indiscriminatory* assaults by groups or by regular or irregular formations". The draft also did not discriminate between violations in terms of who committed them: the former regime and the revolutionaries, or the state agencies and regular or irregular formations. The draft was also devoid of provisions emphasizing the fairness of the February Revolution and descriptions of the former regime as tyrant. Furthermore, affirming beyond doubt that applies to post-February violations, it proposed to establish a committee of judges to investigate the arrests, detentions, inquisitions and custodies that occurred after the liberation to verify whether they were necessary for the success or protection of the Revolution, and identify any associated violations, e.g., killing, torture and forced disappearances, and to refer those constituting crimes to the Public Prosecutor (Article 44).

In addition, the draft differs from the enacted law with regard to institutional reform. The draft included a whole chapter on institutional inspection where isolating personnel was based on

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1 United Nations Support Mission in Libya. 2012. "Transitional Justice: Foundation for a New Libya" (September 17, 2012). Accessed online: https://reliefweb.int/sites/reliefweb.int/files/resources/Transitional_Justice-Foundation_for_a_new_Libya_%28English%29.pdf [last accessed 18 June 2020].

2 The text of the draft law and the observations made by the International Center for Transitional Justice can be found on the centre's website: https://www.ictj.org/ar/news/ictj-comments-on-libya-draft-law-on-transitional-justice [last accessed 20 May 2020].

criteria related to the conduct of the person involved rather than the post held. They included: carrying weapons to kill Libyans or taking part in that in whatever manner; abusing office to torture, insult or degrade any person in any way, or ordering these abuses, and violating the law or breaching work principles, foundations and rules with the intention of discriminating between Libyans.[1] The GNC, however, omitted the entire chapter. The reason, apparently, was that the GNC had already enacted a law on institutional reform, Law 13/2013 on Political and Administrative Isolation. Unlike the draft just presented, Law 13/2013 vetted persons based mainly on holding specific posts regardless of their conduct. As a result, it even applied to persons known for their decades long opposition to the former regime and others who joined the February Revolution in its early days, e.g., Mohammad al-Muqariaf, president of the GNC, for serving in 1981 as ambassador to India, and Mahmoud Jibril, head of the NTC's executive board, for serving as head of the national planning council under Gaddafi.

The GNC amended the Constitutional Declaration, after broad criticism of its performance, which developed into calls for early departure, and enacted a law to elect an alternative legislative assembly: a House of Representatives (HoR). When elected on 7 July 2014, the HoR turned out to be a body wherein revolutionary and Islamists forces, which once dominated the GNC, had a very modest representation. The HoR also took as its seat Tobruk, around 1,500 km far from the capital Tripoli where such forces enjoyed immense influence. Ultimately, the few representatives of those forces in the HoR boycotted its sessions, and the GNC, citing procedural arguments, then refused to transfer power to the HoR, resulting in a rivalry over which of the two was the only legitimate legislature. Each body associated itself with a military operation: the HoR with Operation Dignity in the east and the GNC with Operation Dawn in the west.

Two relevant differences, in terms of this research, between the HoR and the revived GNC, were their position on the former regime, on one hand, and the revolutionary and Islamists forces, on the other. Positions taken had an effect on how each dealt with transitional justice issues. As for the GNC, now becoming almost entirely controlled by the revolutionary and Islamists forces, it acted as the guardian of the February Revolution, a role that entailed, in this understanding, breaking with the former regime's laws, institutions and figures. Conversely, the HoR enacted legislation revealing a rethinking of the position on the former regime, and a call to hold the revolutionary and Islamists forces accountable. Both bodies, however, were united in ignoring Law 29/2013.

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[1] See Article 18. However, it may be noted that one of the criteria may be related to the position held rather than the actual behaviour. The draft refers also to "anyone who was an active member of the Liaison Office of the Revolutionary Committees, who assumed the presidency of, or membership in the Cleansing Committees or the Revolutionary Courts, or the Popular Leaderships." The assumption here may be that assuming the presidency or membership of one of these institutions is an irrefutable yet questionable presumption of a person's behaviour.

As for the GNC, it enacted laws addressing transitional justice violations that overlooked and sometimes violated the provisions of Law 29/2013 on transitional justice. For example, on 19 August 2015, the GNC enacted a law allocating financial and in-kind benefits to the victims of the Abu Salim Massacre without any reference to Law 29/2013.[1] It also enacted on 14 October 2015 Law 16/2015 that repealed a number of laws restricting real property ownership, such as Law 4/1978, without referring to Law 29/2013.[2] It subsequently enacted, on 17 December 2015, Law 20/2015 to address the effects of repealing Law 4/1978, which includes reparation for its victims. The law, however, neither referred to Law 29/2013 nor to the fact-finding commission that is entrusted with dealing with human rights violations, including those arising from Law 4/1978.[3]

Meanwhile, the HoR enacted laws reviewing, on one hand, any legislation targeting the former regime loyalists, and targeting, on the other, revolutionary and Islamist forces. For example, the HoR enacted Law 2/2015 that repealed Law 13/2013 regarding Political and Administrative Isolation,[4] and Law 6/2015 that granted amnesty for many violations attributed to the former regime's loyalists.[5] While the HoR did not repeal Law 29/2013 on transitional justice, it refrained from taking the steps necessary to implement it, i.e. issuing its executive regulation, and forming the FFRC, despite receiving several proposals to this end.[6]

Another example showing the difference between the GNC and the HoR with regard to the position on the former regime's loyalists is what is known as Resolution Number 7. The GNC passed Resolution 7/2012 after the kidnapping, torture, and death of Omran Jomaa Shaaban, one of those who had arrested Gaddafi. The responsibility for what happened to Shaaban was attributed to

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1 "Qānūn raqm 11 li-sana 2015 al-ṣādir bi-tārīkh 19 aghusṭus 2015 bi-shaʾan taʿadil māda bi-l-qānūn 31 li-sana 2013 bi-shaʾan taqrīr baʿaḍ al-aḥkām al-khāṣa bi-mudhabiḥat sijin Abu Salīm" (Trans. "Law 11/2015 promulgated on 19 August 2015 regarding amending an article of Law 31/ 2013 regarding the approval of some provisions related to the Abu Salim prison massacre"). *Official Gazette* 4 (Fourth year).

2 "Qānūn raqm 16 li-sana 2015 al-ṣādir bi-tārīkh 14 uktuber 2015 bi-shaʾan ilghāʾ baʿaḍ al-qawānīn" (Trans. "Law 16/ 2015 promulgated on 14 October 2015 regarding the repealing of some Laws"). *Official Gazette* 5 (Fourth year).

3 "Qānūn raqm 20 li-sana 2015 al-ṣādir bi-tārīkh 17 disembir 2015 bi-shaʾan taqrīr baʿaḍ al-aḥkām al-khāṣa bi-l-muʿālaja al-āthār al-mutratiba ʿala ilghāʾ al-qānūn raqm 4 li-sana 1978 bi-taqrīr al-aḥkām al-khāṣa bi-l-malikīa al-ʿaqārīa wa al-qawānīn dhāta al-ṣala bi-hi" (Trans. "Law 20/2015 promulgated on 17 December 2015 regarding the determination of some provisions concerning addressing the consequences arising from repealing Law 4/1978 by approving the provisions on real property ownership and its related laws"). *Official Gazette* 1 (Fifth Year).

4 "Qānūn raqm 2 li-sana 2015 al-ṣādir bi-tārīkh 8 yuniu 2015 bi-shaʾan ilghāʾ al-qānūn raqm 13 li-sana 2013 bi-shaʾan al-ʿazal al-sīāsī wa al-idārī" (Trans. "Law 2/ 2015 promulgated on 8 June 2015 regarding repealing Law 13/ 2013 concerning Political and Administrative isolation"). *Official Gazette* 6 (Fourth year).

5 "Qānūn raqm 6 li-sana 2015 bi-shaʾan al-ʿufū al-ʿām" (Trans. "Law 6/2015 regarding General Amnesty"). Available on the House of Representatives' website: https://www.parliament.ly/ [last accessed 20 May 2020].

6 See infra 2.3.

individuals belonging to Bani Walid, a city widely seen as still loyal to the former regime. The resolution authorized the Ministries of Interior and Defence to arrest these individuals and to release other "prisoners". It also conferred on Shaaban the status of martyr and associated entitlements.[1] Bani Walid was then besieged and the military operations resulted in causalities and displacement.[2] In contrast, the HoR issued Resolution 15/2017 that described Resolution 7 as an infringement of the competencies of the executive and judicial branches, and as a violation of the separation of powers (Article 1) and considered it null and void (Article 2).[3] It obligated the state to disclose the reasons behind issuing Resolution 7, how it was implemented, its consequences and how to address them (Article 3). It also required the state to act neutrally and refrain from serving regional or ideological considerations (Article 4), to hold those who issued the resolution criminally accountable (Article 5), and to consider the Bani Walid victims as martyrs (Article 6).

To end the political divide, UNSMIL sponsored a dialogue that resulted in a Political Agreement (PA) in December 2015. The PA deemed the HoR as the legislature, replaced the GNC with a High State Council (HSC) with broad "advisory" competencies, formed a Government of National Accord (GNA) headed by a Presidential Council (PC) and extended the mandate of the Constitutional Drafting Assembly (CDA).

For many, the 2015 PA was not a success. It is true that the HSC replaced the GNC, but the latter was not satisfied with an advisory role. Instead, it continued to act, as a second legislative chamber, alongside the HoR.[4] For its part, the HoR rejected the PA and declined to comply with its envisaged amendment of the Constitutional Declaration so as to include the PA's provisions as an integral part of it. Subsequently, it did not approve the GNA, and continued to recognize the Interim Government residing in the east of the country as the only legitimate government. Outside Libya, however, the GNA enjoyed a wide recognition as the only legitimate government. In explaining the failure of the PA, some point to the exclusion of important parties from the dialogue

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1 "Qarār al-muʾatamar al-waṭanī al-ʿam raqm 7 li-sna 2012 al-ṣādir bi-tārīkh 23 sibtambir 2012 bi- shaʾan ẓurūf wa taʿdhīb al-shahīd: Omran Jomaa Shaaban" (Trans. "GNC Resolution 7/ 2012 promulgated on 23 September 2012 regarding the Circumstances of the Kidnapping and Torture of the Martyr: Omran Jumaa Shaaban"). *Official Gazette* 6 (Second year).

2 Human Rights Watch. 2012. *Libya: Residents of Bani Walid at Risk: Government Should Ensure Lives, Protect Property.* Accessed online: https://www.hrw.org/news/2012/10/24/libya-residents-bani-walid-risk [last accessed 20 May 2020].

3 "Qarār majlis al-nawāb raqm 15 li-sana 2017 al-ṣādir bi-tārīkh 23 18 disimbir 2017 bi- shaʾan al-qarār raqm 7 al-ṣādir ʿan al-muʾatamar al-waṭanī al-ʿām li-sana 2012" (Trans. HoR Resolution 15/2017 promulgated on 18 December 2017 regarding Resolution 7 of the GNC for 2012"). *Official Gazette* 3 (Seventh year).

4 Al-Jazeera.net. 2016. "Ḥukumat al-inqādh al-Lībīā tuwaqaf aʿmālha wa "al-muʾatamar" yulja li-l-qaḍaʾ" (Trans. "The Libyan Salvation Government stops its activities and the "Congress" goes to court"). 6 April 2016. Accessed online: https://www.islamweb.net/ar/article/210406/ [last accessed 20May 2020].

that preceded it, such as the supporters of the former regime.[1] Indeed, some of the former regime loyalists described the PA as an agreement between the supporters of the February Revolution.[2] The head of UNSMIL admitted this drawback and announced plans to overcome it when reviewing the PA.

The PA's provisions on transitional justice can find their explanation in, first, the absence, or exclusion, of the supporters of the former regime from the preceding dialogue, and, second, the focus on addressing the conflict between parties associated with the February Revolution. The Agreement sets the February Revolution as its reference, but at the same time it acknowledges the violations that occurred afterwards, including those attributed to revolutionary forces. For example, it confirms in its introduction that the Libyan people will always remain "indebted to the revolutionaries for the role they played in liberating the country from decades of autocracy". In the same vein, the preamble states that it "condemns all forms of tyranny that characterized the former regime, which was an unjust and an oppressive era that represented a black period in the history of Libya and which lasted from 1 September 1969 until the triumph of the blessed February Revolution". Likewise, the governing principles include the "principles of the February Revolution" (Principle No. 6). And while the Agreement makes the implementation of transitional justice and national reconciliation mechanisms one of its principles (No. 26), it links these mechanisms to what is stipulated in Law 29/2013 (Article 26/5). However, the PA also contains provisions related to violations that occurred after February 2011, such as those dealing with addressing the situation of missing persons, the detainees, and the displaced persons (Principles No. 24 and 27, and articles 27 and 26).

Divergent positions on transitional justice are also evident in the work of the CDA. Elected in February 2014, the CDA worked in a period which was characterized increasingly by political divide and polarization, which had an impact on its outputs. When elected, the popularity of Islamists was in a significant decline for they were blamed for the failure of the GNC. As a result, they scored badly in the elections and had only a modest representation in the CDA. Gaddafi loyalists, on the other hand, could not technically run for the election as loyalty to the February Revolution was a condition; still, representatives of regions and groups affiliated with the former regime were able to get elected. In conclusion, the elections resulted in a body largely representing various components of Libyan society – apart from the Amazigh who boycotted them. In addition, the Assembly took as its seat the city of al-Bayda, in the east of Libya, which, while contributing to distancing it from the direct influence of the revolutionary and religious

[1] ʿAywān Lībīā. "Khabīr Lībī: Ṭrābulis ʿala khuṭa bi-ghadād baʿad tawqīʿa ittifāq al-Skhīrāt" (Trans. "A Libyan expert: Tripoli follows in the footsteps of Baghdad after signing the Skhirat agreement"). 20 December 2015. Accessed online: http://ewanlibya.ly/news/news.aspx?id=4046 [last accessed 20 May 2020].

[2] Muhammad Jibril al-Orfi, in-depth interview in Al-Marj, 9 August 2018.

forces dominant in the west of the country, exposed it to the influence of an environment that was rapidly becoming more tolerant of, and even welcoming to, the former regime's loyalists.

Two examples could demonstrate the impact of this environment on the CDA and its drafts. The first concerns the preamble. According to al-Hadi Buhamra, a scholar of constitutional law and key member of the CDA, some members demanded that the preamble include a glorification of the February Revolution and a condemnation of the former regime. Others, however, called for a preamble for a constitution that accommodates the February Revolution's supporters as well as those who oppose it; hence the constitution, in their view, should focus on the future, avoid the past, and not be "tailored to an event [i.e., the February Revolution] about which the Libyans differ now and may further disagree in the future".[1] Consequently, the draft announced in April 2016 adopted a preamble that neither referred to the February Revolution, nor to the former regime, but mentioned the Libyans' struggle against the dictatorship and the need for a complete break with autocracy. Yet, the supporters of the former regime saw this as a reference to Gaddafi.[2] For this reason, the CDA, in its latest draft, announced in July 2017, dropped the preamble in its entirety.

As for transitional justice, instead of the detailed provisions of the 2016 draft, the CDA opted in the 2017 draft for fewer and much more concise provisions. In the former, for example, Article 197 obligated the state to take the necessary measures to reveal the truth about human rights violations, including those related to cultural and linguistic rights, to disclose the fate of missing persons, victims and those affected by military operations and armed conflicts and to compensate any damage sustained. The 2016 draft listed various kinds of reparation and singled out specific violations, probably because of their importance. This draft also provides for the criminal prosecution of those involved in these violations. It also established a commission for transitional justice and reconciliation. In addition, the draft (Article 198), stipulated guarantees for the non-recurrence of violations including the inspection of public institutions to structurally reform them and to vet those involved in human rights violations and corruption crimes, and dismantling and disarming all armed groups. The state commitment included, according to the draft (Article 199), the reconstruction of areas affected by military operations and armed conflicts.

While the CDA preserved in the 2017 draft the provision concerning reconstruction (Article 182), it left out many of the just cited provisions. The detailed obligations of the state were reduced, as can be seen in Article 181, to implementing transitional justice measures, enacting a law that will reveal the truth, repair harm, ensure accountability and institutional inspection, and

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1 Buhamra, al-Hadi. 2019. *Al-musār al-dustūrī al-Lībī* (Trans. "The Libyan constitutional path"). Tripoli: Dar Al-Rowad: 140, 141.

2 Ibid: 144.

establish a transitional justice and reconciliation commission. One may say that being concise is what a constitution should be; details should be left to ordinary legislation. In that sense the CDA made the right move. Still, the actual reason behind the change just explained was the objection of some CDA members to the repeated reference to the criminal and administrative accountability of perpetrators. They saw such a reference as targeting certain parties to the ongoing conflict.[1]

Bearing these contexts in mind, whether socio-cultural, historical or political-legislative, will help us to explain, and assess, the legislative responses to the transitional justice issues.

2.3. Socio-cultural conditions

At an international forum on transitional justice, held in 2011,[2] the South African judge, and former political activist, Albie Sachs spoke about how he concluded his first meeting with the person who tried to assassinate him by a car-bomb (an attack which caused him to lose his right hand and the sight in his right eye) by telling him that he would normally, when saying goodbye to somebody, shake their hand, but he could no longer do that. However, in another encounter, he began to consider his attacker as a human being with feelings, instincts and delusions, and he soon felt that there was a radical change in his own feelings about him and he realized that, instead of losing one of its subjects, South Africa had a real opportunity to gain a citizen who is aware of his rights and duties, and can contribute to forming a new state to which honest citizens aspire to belong.

When the perpetrator confessed his guilt, expressed his regret, and apologized for the crime, Sachs could not help but forgive him. To his surprise, this gave him a satisfaction that he had never experienced before. He felt that he had triumphed over himself by winning over his emotions and that he had succeeded in creating a new friend out of his enemy. This is just one of the stories that can be used in the awareness campaigns accompanying the implementation of transitional justice mechanisms[3] in a way that allows benefiting from its profound positive impact on human souls.

As is the case in various endeavours that aim to bring about radical change in prevailing social attitudes, good examples may have an incomparable impact. To lead by example is a value-based concept *par excellence*. The role model is expected to be endowed with certain ethical dispositions whose vocation is to disseminate the values of compassion, solidarity and altruism

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1 Personal communication with al-Hadi Buhamra, 29 April 2017

2 This forum was held in Cairo in November 2011 and was supervised by the UNDP Regional Support Office.

3 There are also contemporary local stories that can be used in this context, including the poet, journalist, revolutionary and political activist Rabiʿa Shirir's, who was kidnapped and tortured during the February Revolution. He announced, on the day he was honoured in early 2012, that he had pardoned those who investigated, mistreated and tortured him, and kidnapped some of his family members. He issued an appeal in which he asked the Libyans to honour the villages and the cities that were rallying with Gaddafi's loyalists, at least for the sake of those who sacrificed their lives there during the Revolution, no matter how few they were.

which are necessary for the establishment of security and stability. If this role model happens to have charismatic properties, such as spiritual or moral authority, then their effect on the behavioural level may well be clear and effective, and it may have more powerful and lasting effect than that of deterrent legal mechanisms.

It is no secret that there is a human attitude that is implied in the concept of transitional justice, which considers revenge as a human instinct, and forgiveness for human rights violations, as a hard challenge. Such attitude values mercy, benevolence and forgiveness whenever possible, and recognizes that to err is human, that human nature gravitates to wrongdoing and inherently fails in resisting whims, desires and impulses, and that dire circumstances may contribute to explaining many violations without justifying them.

There is also an implicit recognition that feelings of revenge may be an obstacle to achieving real national reconciliation, and that it is important, thus, to prosecute those responsible for human rights violations and corruption, but what is more important than that is to create an environment that does not give rise to such acts.

Transitional justice has firstly a patriotic dimension and secondly a value-based dimension, as it is based on the principle of upholding the common good over the private one, with all the altruism, sacrifice, and redemption this upholding contains. As aforementioned, transitional justice mechanisms aim not only to satisfy the spirit of justice, but also, primarily, to maximize the chances of national reconciliation, to consolidate social peace, establish the rule of law, and accelerate the transition to democracy on sound foundations;[1] all of this makes transitional justice a national project, as well as a legal and justice-based project.

Transitional justice is, one should note, by no means a recipe for reforming all the imbalances and violations that society suffers from. While it may aid social struggles and long-term political endeavours aimed at achieving social justice and equal opportunities, it cannot be a substitute for them.

Transitional justice mechanisms take, or are supposed to take, into consideration the fact that feelings are seldom under control. For this reason, these mechanisms may encourage the victims to forgive their oppressors, so refrain from retaliation. What these mechanisms are not supposed to do is to demand such forgiveness to be earnest, that is, based on sincere and intense conviction, for feeling, as just said, are seldom under one's control. Of course,

[1] Daham and Dakhil, *Dirāsat Janūb Afrīqīā wa al-ʿIrāq,* 5

it is more conducive to reconciliation to base forgiveness on such conviction, and transitional justice may indeed encourage developing such feelings.[1]

While hatred and injustice could fuel resentment and tempt the victims to seek relief from the distress and frustration they suffered, it remains a negative unsettling feeling. For this reason, transitional justice does not ask the victims not to feel hatred towards their oppressors, but rather to refrain from translating this hatred into bloodshed. As expressed in a Libyan proverb: "You can hate, but do wrong to nobody (*ikrihu wa lā taballa*)."Following the same analogy, victims cannot be blamed for gloating at their foe's misfortune, but rather for expressing such *schadenfreude*, acting out of spite and taking revenge. Even though all these situations result in quenching one's thirst for revenge by relieving anger and hatred, the former is only synonymous with rejoicing at another's misfortune, but without taking part in causing this misfortune. The latter, however, entails taking part personally in hurting the other.[2]

There is no doubt that some of the transitional justice mechanisms, such as fact-finding and reparation, offer solace to the victims who harbour such negative feelings as a result of being subjected to oppression, aggression, and humiliation. Such mechanisms contribute to achieving psychological and social recovery, and enhance their chances of reconciliation with themselves and others.

Similarly, transitional justice does not require the perpetrator to sympathize with his victims and to feel sorry for their suffering and anguish. Instead, he is only required to show sympathy and admit to and apologize for his crimes, regardless of whether he is really afflicted by those feelings of regret. This is because it is the perpetrator's actions and not his feelings that represent the real test of his repentance for the crimes he committed. If he sympathizes with his victims, but does not show his sympathy for them, or he regrets the atrocities he had committed against them, but does not apologize for them, he cannot expect to be pardoned. In this regard, the law only, as a general rule, judges what is shown and expressed and because feelings and emotions are hidden, it is not possible for others to interpret or read them. So, the perpetrator who expresses remorse without feeling any is more worthy of pardon than the one who feels regret without showing it.

However, individuals' feelings and emotions when translated into behaviours and actions become as important. Most victims feel hatred, spite, thirst for retribution and grudge towards

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1 There are those who expressly state that national reconciliation requires pardoning. See: Daham and Dakhil, *Dirāsat Janūb Afrīqīā wa al-ʿIrāq*, 50

2 In a related context, it would be better to interpret the hadith "No one of you becomes a true believer until he desires for his brother that which he desires for himself" (Al-Bukhari and Muslim) as an invitation to adopt the same behaviour one wants to receive from others, regardless of an individual's inner motivation, since responsibility lies mainly in actions rather than in feelings, even though actions done with love are rewarded doubly.

their oppressors, and those who harbour negative feelings towards their opponents tend to yield to these sentiments and proceed to aggression. Thus, it is important to monitor those feelings.

On the other hand, research on the reasons why members of a specific society harbour negative feelings and react upon them may help to understand the effect of the social rearing they had. In turn, this may direct attention to alternative upbringing methods that would contribute to making people less vulnerable to the psychological conditions that could be translated into violence.

Thus, although transitional justice mechanisms are not supposed to dictate people's feelings, it is incumbent upon the methods of socialization to contribute to instilling values that are more favourable to positive emotions and which may lead to mutual compassion and togetherness, and to seek to counteract negative emotions that may be behind oppression and aggression.

An important question here is whether, and if so to what extent, values favourable to transitional justice exist in Libyan society. As detailed later, the report shows that different answers are given to this question (see 3.8).

3. Transitional justice issues

Transitional justice in Libya raises several issues. In this section, we will explain the different positions taken on each issue. Then, we will present and assess the relevant legislative responses.

3.1. Legitimacy of the concept

Our field work shows that there are conflicting positions on transitional justice. The opposing views can be summed up as follows:

1. Justice is indivisible, that is, it cannot be categorized as regular and transitional. Justice cannot be linked to a specific, transitional, time period.[1]
2. Transitional justice results in revisiting events and cases in which final judgements have already been rendered; hence, it deepens societal rift and discord.[2]
3. Transitional justice burdens the new government with substantial costs when it should not be held accountable for its predecessor's violations.[3]

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1 Saʿad Aquila (Former justice of Supreme Court), Benghazi Focus Group, 18 January 2020.

2 Ashraf al-Qataʿani (Human rights activist), Ajdabiya Focus Group, 14 January 2020.

3 Buhamra, al-Hadi. 2019. "Muqadima fī al-ʿadalat al-intiqālia" (Trans. "An Introduction to Transitional Justice"). *Warqāt ʿilmīa fī al-ʿadalat al-intiqālia.* Tripoli: Al-munaẓimat al-Lībīa li-l-adalat al-intiqālia: 10; Jumaʿa Buzid (Former judge to the Supreme Court), in-depth interview, 21 January 2020.

4. Transitional justice violates principles that protect inalienable natural rights,[1] since it (1) requires revisiting and revising cases that already received final judicial verdicts, (2) applies criminal legislation retroactively, and (3) adjudicates crimes whose statute of limitations has long expired.

5. Transitional justice suffers from a conceptual problem. Laws that a regime introduces to address transitional justice might be interpreted differently, or even be criminalized, under a subsequent regime. Likewise, what one regime may regard as a natural right, such as the right to private property, may be considered a flagrant violation of a natural right by another. This is the case, for instance, of Law 4/1978. Introduced by the Gaddafi regime as part of its efforts to realize social justice, this law was interpreted in the aftermath of the February Revolution as infringing on basic human rights, and calls were made to repeal it.[2]

Others, however, see merit in transitional justice for the following reasons:

1. Any denial of transitional justice oversteps an ethical imperative to recognize victims' suffering. Such denial overlooks the fact that the past is never forgotten but lingers in people's hearts, stirring up anger and impeding efforts for national reconciliation.[3]

2. The alternative to transitional justice is regular justice wherein laws are not designed to address war crimes, genocides, and crimes against humanity.[4]

3. Regular justice is mainly applied by courts, which, given their faithful, literal application of legal texts, can issues rulings that negatively impact social peace. For example, in November 2014 the Supreme Court deemed on procedural grounds the amendment of the Constitutional Declaration that paved the way for electing the HoR unconstitutional, hence the House itself. The ruling resulted in deepening the political conflict. As such, it, according

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1 Tariq al-Jomli (Professor of Criminal Law at Benghazi University), Symposium on Transitional Justice held as part of the RoLLNaR project at the Center for Research and Consulting, 25 January 2020.

2 Law 4, enacted under the former regime in the context of achieving social justice, which some considered relevant to transitional justice legislation, restricted real property ownership to one residence or one building plot, and stipulated the appropriation of excess property by the state and called upon the right to redistribute it to those in need.

3 Buhamra, "Muqadima," 11.

4 Ahmed al-Jahani (Professor of Criminal Law at Benghazi University), Benghazi Focus Group, 18 January 2020. Salah al-Marghani stated in an in-depth interview that the tools of transitional justice are broader and more capable of dealing with cases where the judiciary fails to materialize its elements, such as the case of unidentified assailants, as it is impossible to prosecute the offender according to the procedures established in laws governing the ordinary judiciary. However, transitional justice has the tools to redress the victims in other ways. (Salah al-Marghani (Former Minister of Justice), email interview, 18 February 2020)

to this opinion, might be sound from a purely legal viewpoint, but it clearly shows how little, or too little, regard the Court gave to the political context.[1]

4. Regular justice may end up granting impunity to perpetrators of severe human rights violations, hence open the door for foreign interference. The international community will not accept such impunity and will impose alternatives to national courts such as the ICC or special tribunals. Thus, Libya should ensure that no such impunity is granted via implementing transitional justice's mechanisms and measures.[2]

Clearly, the arguments in favour of transitional justice are stronger than those against. Transitional justice is a response to the duty to recognize the suffering of victims of severe violations, which regular justice fails to fulfil. Besides, as international experience has shown, reaching a lasting peace and establishing a new era requires dismantling the violations and the causes of conflict, which in turn necessitates a legislative context that differs from regular justice.[3] It is indeed important to maintain that criminal laws ought not to be applied retroactively, that judicial verdicts, once final, constitute conclusive evidence of the truth, and that there can be no prosecution for crimes whose statutes of limitation expired. Yet, transitional justice often requires not adhering to these principles. For example, it is only to be expected that courts under a dictatorship cannot adjudicated human rights cases involving the regime independently and impartially. Once this dictatorship falls, its legacy of human rights violations should be addressed including those in which courts made final verdicts. The constitution of the country should free the bodies entrusted with applying transitional justice from adhering to these principles as is the case, for example, with the Tunisian constitution (Article 9/148) which stipulates that "The State undertakes to apply the transitional justice system in all its domains and according to the deadlines prescribed by the relevant legislation. In this context the invocation of the non-retroactivity of laws, the existence of previous amnesties, the force of res judicata, and the prescription of a crime or a punishment are considered inadmissible."

As for Libya's post-February 2011 legislation, it clearly shows that the transitional authorities, despite their differences, agreed on the importance of transitional justice, yet they all failed to include in the Constitutional Declaration any provisions establishing for this type of justice. The only exception perhaps is the inclusion in the Declaration a provision protecting the then future political isolation law from a possible constitutional challenge. As explained below (See 3.7), the GNC saw preventing persons from holding, or continuing to hold, leadership positions because of

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1 Abdel Karim Buzid (Judge), Symposium on Transitional Justice, 25 January 2020.

2 Ahmad al-Jahani (Professor of Criminal Law at Benghazi University), Benghazi Focus Group, 18 January 2020; Omar al-Habassi (Human rights activist), Tripoli Focus Group, 26 December 2019; Abdelkarim Buzid (Judge), Symposium on Transitional Justice, 25 January 2020.

3 Ibid.

their, presumed, affiliation with the former regime as part of institutional reform. To this end, the GNC introduced a law on political isolation. Fearing that the Supreme Court might deem the law unconstitutional for violating Article 6 of the Constitutional Declaration that bans discrimination upon political views, the GNC amended this article so it explicitly state such isolation compatible with therein. The amendment was seen as indicative of a selective and vengeful approach.[1]

3.2. Feasibility of transitional justice

While agreeing that it is a legitimate concept and cannot be replaced by regular justice, there are those who question the feasibility of transitional justice. To them, (re)building state institutions capable of maintaining security and stability is a prerequisite. Key arguments in favour of this view can be summed up as follows:

1. There can be no transitional justice unless, and until, the conflict is over either through a victory for one party or a political settlement. In Libya, however, the conflict has not yet ended. In fact, violence is increasing and the odds that either party emerges victorious or both reach a political settlement are low.[2] Since the country's need for the time being is for political or even social settlement, and since digging in the past can obstruct such a need, the country does not need transitional justice as much as it needs restorative justice.[3]

2. The existing political instability, persistence of armed conflicts, and the ineffectiveness of state institutions prevents any effective implementation of transitional justice legislation.[4]

3. There is no real political will to implement transitional justice. For instance, implementing Law 29/2013 is conditional on issuing an executive regulation and forming a fact-finding and reconciliation commission. Neither the GNC nor its successor, the HoR, took any steps in this regard despite the fact that the latter received three drafts of this executive regulation.[5] To some, this lack of political will finds its explanation in the presence of persons in legislative, executive and other, informal but influential, authorities whose

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1 Ali Abu Raas (Judge, Tripoli Court of Appeal), personal communication, 14 May 2020.

2 Jumaʿa Buzid (Former judge, the Supreme Court), in-depth interview in al-Bayda, 22 January 2020; Issa Abd al-Qayyum (Journalist and political activist), Benghazi Focus Group, 18 January 2020.

3 Tariq al-Jumli (Assistant Professor of Criminal Law, Benghazi University), Symposium on Transitional Justice, 25 January 2020.

4 Al-Farshishi et al, *Dalīl,* 4

5 A first one from the United Nations, a second from the Fact-finding and National Reconciliation Commission, and a third from a group of academics [quoting Salem Suleiman (Member of the Fact-finding and National Reconciliation Commission in the Eastern Region)].

interests require not enacting, or not implementing, transitional justice for they will be then targeted by it.[1]

However, this view is not unanimously held. There are others who believe that transitional justice in today's Libya is both legitimate and feasible. Their main reasons can be summarized as follows:

1. Implementing transitional justice is the only way to achieve lasting stability in the country. Had the political and security conditions been favourable in the past, transitional justice goals would have had a better chance at succeeding, still, starting to implement transitional justice is a step towards security and stability.[2]

2. Given the conflicts that the country is witnessing, with no end on the horizon, any delay in implementing transitional justice will only accumulate violations and exacerbate their severity. This in turn will fuel further conflicts; add to feelings of injustice; and swell the desire for revenge and personal reprisals, which will tear the social fabric and damage attempts at national reconciliation.[3]

3. The recent ruling by the Tripoli Court of Appeal on the 1996 Abu Salim Massacre, wherein the court effectively acquitted those accused of murdering more than 1,200 prisoners because the statute of limitations had expired, conveys how important it is to implement transitional justice. This ruling shows that courts are unable to adjudicate on past severe violations,[4] which threatens to discredit the image of the national judiciary,[5] and opens the door to internationalizing the course of transitional justice.[6]

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1 Khalid al-Mishri (Chairman of the HSC), Abd al-Moneim al-Wahishi (Resigned GNC member), in-depth interview, 17 January 2020.

2 Issam al-Maoui, former president of the National Council for Public Liberties and Human Rights, and a political activist [an in-depth interview]. January 21, 2020

3 Abd al-Karim Ali al-Burasi (Professor of Sociology, Omar Mukhtar University), Symposium on Transitional Justice, 25 January 2020.

4 Ahmad al-Jahani (Professor of Criminal Law, Benghazi University), Benghazi Focus Group, 18 January 2020.

5 Omar al-Habassi (Human rights activist, Tripoli Focus Group, 26 December 2019.

6 That there is no constitutional basis for transitional justice in Libya is, according to some judges, an excuse relieving the regular judiciary of blame. According to them, the judiciary is bound by conclusive provisions such as those requiring dismissing cases if their statute of limitations expires. As to these provisions, the passage of time that results in this expiry cannot be suspended for any reason (Article 107 of the Penal Code). Courts in such cases can only adhere to these provisions and dismiss the cases. It is only when the constitution/the Constitutional Declaration would provide an exemption from these provisions in transitional justice cases, that courts could adjudicate on them. Ali Abu Raas, (Counsellor to the Tripoli Court of Appeal), personal communication, 14 May 2020.

4. While the presence of state institutions capable of implementing transitional justice is indeed required, the lack of a bureaucratic structure should be no excuse to initiate transitional justice procedures. Steps should be taken to pave the way for transitional justice. Until such conditions are established throughout the country, ad hoc measures must be taken to enable the implementation of transitional justice mechanisms. For instance, Abdelaziz Trabelsi, retired judge), has proposed appointing an Attorney General in Benghazi, besides the one already residing in Tripoli. In their opinion, this new appointment would help process cases specific to the east that are currently neglected.[1]

When examining the two positions for and against the merit of transitional justice, it seems that immediately but gradually implementing transitional justice is a more viable option than the alternative. Admittedly, this is no easy task. While the role of bureaucratic institutions is instrumental in this process, state institutions are currently divided between the west and east camps. This not only weakens their efficacy but also makes their involvement counterproductive, as evident in the legislation the parallel authorities enacted as part of their rivalry.[2] Still, this does not mean putting transitional justice on hold until the political divide ends. There are important steps to take immediately, and a key step is to build consensus on major disagreements including those related to transitional justice.[3] For instance, transitional justice requires taking a position towards the former regime and those associated with it: should the violations of this regime, both preceding the February 2011 Revolution and accompanying it, be addressed? If so, should any measures the former regime took to address these violations be considered, e.g., compensating victims or their families? And how should perpetrators of these violations be treated? Should they be pardoned or punished? Building consensus on such issues is a daunting task and might take a long time; yet, it is essential for having a lasting national reconciliation, and for nation and state rebuilding. In building this consensus, it is important to assess the actual or potential effect of the already enacted legislation, and proposed legislation focused on national reconciliation. Accordingly, any steps taken to implement this legislation, or enact proposed ones, such as the GNA's plan to issue the executive regulation of Law 29/2013, can be assessed.[4]

3.3. Temporal and substantive framework

This issue concerns which human rights violations to address, temporally and substantively. Our research shows that there are several positions.

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1 Abdelaziz Trabelsi (Retired judge), in-depth interview in Derna, 25 December 2020. However, the direct link between this step and transitional justice seems to be unclear, and could have an impact on the unity of the Libyan judiciary, which is among the few success stories that need to be supported.

2 See infra 3.2.

3 See 3.1.

4 See infra 10.3.

The first position sees no need to set a timeframe as these is no basis for distinguishing between injustice and any timeline will be arbitrary and result in denying justice to the victims of uncovered violations.[1]

The second position distinguishes between human rights violations. Only those which, if left unaddressed, will have a negative impact on national reconciliation should be tackled, regardless of when they occurred.[2]

The third position sets the timeframe from 1 September 1969 onwards, when Gaddafi came to power. This period witnessed severe and systematic violations, which had long-lasting impact on the people, especially those associated with the pronouncement of the Cultural Revolution on 15 April 1973, and the People's Authority on 2 March 1977.[3]

The fourth position expands the timeframe to include the entire transitional period because it is argued that violations occurring since February 2011 are as severe as those preceding it.[4] Besides, if the political change to the rule of law that the February revolution promised is the reason for addressing past violations, violations occurring during this transition should have priority.[5]

The fifth position goes further into the past to include the monarchy era (1951-1969). In that time, violations such as banning political parties and imprisoning people for their opinions took place. The policy of forgetting, expressed as "*Ḥaṭḥāt ʿala mā fāt,*"[6] i.e., let bygones be bygones, was also initiated under the auspices of the late king, Idris, The effects of these violations left a long trail of infringed rights unaddressed until today.[7]

The sixth position goes even further to include the Italian occupation era (1911-1943). Back then, some Libyans collaborated with the colonizers in exchange for land. While many of those were later deprived of their property by Gaddafi's regime, they managed to receive compensation,

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1 Saʿad Aquila (Former justice of the Supreme Court), Benghazi Focus Group, 18 January 2020

2 Issam al-Maoui (Former president of the National Council for Public Liberties and Human Rights, and political activist), in-depth interview in al-Bayda, 21 January 2020.

3 Ahmad Bellou (Journalist, poet, and a former prisoner), Derna Focus Group, 25 January 2020.

4 This is the time frame adopted by Law 29/2013.

5 Tariq al-Jumli (Assistant Professor of Criminal Law, Benghazi University), Benghazi Focus Group, 18 January 2020.

6 According to Faraj Najm, "ḥaṭḥāt ʿala mā fāt" was not said first by the King, but by an elder of the al-Darsa tribe called Abu Bakr al-Darsi [Symposium on Transitional Justice].

7 Najat al-Arabi (Legal Counsellor to the Prime Minister in the Interim Government), in-depth interview in al-Bayda, 26 January 2020; Ashraf al-Qataʿani (Human rights activist), Ajdabiya Focus Group, 14 January 2020.

either during the regime's time or in its aftermath. Advocates of this position argue that transitional justice requires taking into account the origin of their wealth.[1]

The seventh position restricts the timeframe for transitional justice to the period following February 2011. The argument for this restriction is that the violations that took place after the fall of Gaddafi's regime were more horrific than those of previous eras. This restriction also seeks to prevent Islamists, a large percentage of the victims of the pre-February 2011 violations, from being compensated because of their post-February 2011 actions.[2]

Lastly, the eighth position also limits the timeframe to the aftermath of February 2011, but on different grounds: the former regime, especially in its last decade, addressed whatever violations occurred during its time. In that period, the regime adhered to a transitional justice process as evidenced by (1) releasing and compensating political prisoners, (2) compensating the families of the victims of the Abu Salim massacre, (3) compensating those suffering from AIDS, (3) drafting a constitution, and (4) launching media platforms that enjoyed a wider margin of freedom.[3] Therefore, this position argues that the violations that occurred during Gaddafi's regime should be considered absolved.[4]

In response to this last position, some argue that transitional justice mechanisms were not applied at all during the Gaddafi regime because unveiling the truth behind violations was not part of the remediation process. Besides, the regime never admitted any wrongdoing.[5] The measures it took had no national or human rights aspirations; they were, instead, attempts to contain the restlessness of the people and to pave the way for the succession of Saif al-Islam Gaddafi.[6]

These diverging positions mirror a difference in legislative responses. When the revolutionary fervour was at its height, the enacted legislation focused on the violations perpetrated by the Gaddafi regime while minimally addressing those perpetrated by the revolutionaries. Law 29, and its predecessor, Law 17, explicitly address the former regime's violations. The latter focuses on addressing "the severe and systematic violations of basic rights

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1 A private lawyer, Derna Focus Group, 25 January, 2020

2 Amal Buqaiquis (Human rights activist, Benghazi Focus Group, 18 January

3 Buhamra, "Muqadima," 10

4 According to this position, the Gaddafi regime had taken revolutionary measures in the beginning of its reign to address violations of the monarchy, which were cruel. At the end of his reign, Gaddafi took measures aimed at addressing violations he had committed. Shayteer, Jazia. 2020. "Awjaha al-ʿadalat al-intiqālia fī al-sīaqāt al-sīʾāsīa al-Lībīa" (Trans. "Aspects of transitional justice in the Libyan Political Contexts"). *Al-mufikrat al-qānūnīa*, 14 January 2020. Accessed online: https://www.legal-agenda.com/article.php?id = 6353 [last accessed 20 May 2020].

5 Ahmad Bellou (Journalist, poet, and a former prisoner), Derna Focus Group, 25 January 2020.

6 Issam al-Maoui (Former president of the National Council for Public Liberties and Human Rights, and a political activist), in-depth interview, 21 January2020

and liberties to which the Libyans were subjected by state affiliated apparatus under the former regime (Article 1)," which limits the range of transitional justice to "the events that took place as of 1 September 1969 (Article 3)." Law 17 also takes as its first objective the "The legal recognition of the just character of the 17 February Revolution, and that it is a right to the Libyan people as well as the recognition of the corruption and tyranny of the former era and to criminalize it (Article 4/1)," and to this effect adds the objective of "exposing and documenting the suffering of Libyan citizens under the former regime (Article 4/10)." Consequently, the first foundation of transitional justice, according to Law 17, is to "issue laws and constitutional texts revealing the just character of the 17 February Revolution and the injustice of the former regime and the illegality of [this regime's] unjust laws (Article 5/1)."

On the other hand, the position of Law 29 on the post-February 2011 violations is ambiguous. It expands the timeframe to include the events that occurred from 1 September "until the end of the transitional period when parliamentary elections [would] be held based on the permanent Constitution (Article 3)," which supports the interpretation that it includes post-February violations. At the same time, however, its definition of transitional justice is limited to "some" of these violations, and the terms used to describe the ones it includes raise doubts, to say the least, on their condemnation. For instance, the first article states that "The concept of transitional justice in this law includes some of the effects of the 17 February Revolution, namely: (1) Positions and acts that led to a breach in the social fabric; (2) acts which were necessary to reinforce the Revolution, and which were accompanied with some behaviour that did not adhere to its principles (Article 1)."

In addition, by requiring the violations subject to its provisions to be severe and systematic, Law 29 limits its scope, and there are indications that protecting the revolutionaries was behind adding this qualification. The law defines its scope of application as the "severe and systematic violations of the basic rights and liberties to which the Libyans were subjected by state affiliated apparatus under the former regime." It then adds, as previously explained, some of the violations of the February Revolution (Article 1). This article can be interpreted in two ways: the first is that severity and systemization are prerequisites only to violations committed by the former regime, and the second is that they are necessary in relation to all violations, i.e. both those of the former regime and the revolutionaries. If we evoke the political context in which the law was enacted[1] and the burning desire expressed by the GNC to safeguard the revolutionaries from accountability, then the second reading seems more accurate. It would spare them accountability if their acts were not described as systematic, which is a condition that may not be of much help in the case of the former regime's violations.[2]

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1 See supra: 3.2.

2 According to Mohammad Saʿad Muʾazib (Former member of the GNC and a current member of the HSC), in-depth interview in Tripoli, 24 September 2019), there should be a distinction in the provisions of transitional justice between officials of the former regime and post-February groups. For instance, Muʾazib cannot excuse

The law also defines what is considered to be severe and systematic in confusing wording. It describes such acts as "violating human rights through murder, abduction, physical torture or confiscation or damage of property if committed by an order of an individual acting out of a political motive..." Had the text stopped at this point, it could have been interpreted as limiting the severe and systemic violations to these specific categories, requiring that they be politically motivated. However, it proceeds to include any "violation of the fundamental rights in a manner that results in severe physical or moral consequences (Article 2)." This inclusion opens the text to an interpretation that classifies as severe and systematic any violation of fundamental rights that results in severe damage without requiring it to have a political motive. A second reading sees the violation of fundamental rights as basically another category to be added to the others: murder, abduction, physical torture or confiscation or damage of funds, and like them, it needs to be politically motivated. As in the case of Article 1, the first reading appears to be more consistent with the intention of the legislature when enacting the law because it is more protective of revolutionaries, unlike the second reading that expands the circle of violations for which they can be held accountable.

As aforementioned, the parameters to consider certain violations systematic was absent from the bill submitted by the Ministry of Justice, and was added by the GNC. This addition was criticized because it enabled many to evade criminal accountability, since it was difficult to prove the systemic nature of many severe violations, not to mention the fact that the concept of "systematic violation" is quite vague. The law was also criticized for being limited to politically motivated violations, which, given that such motives can be difficult to establish, allowed many to evade accountability.[1] The rationale behind this restriction, according to some, might be to limit the scope of the law, either to protect specific persons or parties, or to relieve the State of the negative consequences of a wide application.[2] Had those involved in the application of the previous transitional justice law (17/2012) been consulted when Law 29 was being discussed, they would have warned against the inclusion of vague criteria such as systematic.[3] Given the way the

Abdullah Sanusi, because he committed his crimes willingly, and under an existing state (*fī ẓill dawlat qāʾima*). Therefore, excuses should not be sought for him and for similar persons. However, the situation is different for post-February groups, so they must be reassured because their crimes are not systematic or done to serve a regime. For Abdul-Rahman al-Sweihli, a former member of the GNC, and former head and current member of the HSC, a distinction should be made between violations that occurred under the former regime and those that occurred after February 2011: the former is systematic while the second is not, despite concluding that justice should be extended to both because justice is indivisible.

1 Salim Suliman (Member of the FFRC), in-depth interview in al-Bayda, 22 January 2020.

2 Jumaʿa Buzid (Former judge, the Supreme Court) and Salim Suliman (Member of the FFRC), in-depth interview, 22 January 2020.

3 Salim Suliman (Member of the FFRC), in-depth interview, 22 January 2020; Hussayn Zahaf (Lawyer), Tripoli Focus Group, 26 December 2019.

GNC acted, however, it would have been doubtful if such a warning would have made any difference.

3.4. Fact-finding or forgetting?

The issue here concerns whether to unveil the facts of past violations, and our research shows that there are two positions to take into account. The first calls for revealing the truth and documenting the violations because that contributes to deterring their reoccurrence, relieves the victims' feeling of injustice, and empowers them to forgive their perpetrators.

The second position, however, calls for refraining from revealing the facts of past violations because they may rekindle past transgressions and incite violence. The solution, as to this position, is in forgetting, and moving beyond, the past.

As for legislative responses, the legislature enacted, as aforementioned, transitional justice legislation with the intention to reveal the truth. The first of these was Law 17/2012 on Establishing Rules for National Reconciliation and Transitional Justice, which established a Fact-Finding and Reconciliation Commission (FFRC). A year later, the GNC introduced Law 29/2013 on Transitional Justice which repealed Law 17/2012 and ordered the formation of a new FFRC. More than seven years later, however, the new FFRC has yet to be formed while the old one has continued as a caretaker. This makes the existence of the FFRC created via Law 17 short-lived but important because it is unique.

While Law 17/2012 did not stipulate that the commission be composed of judges, it was. As some analysts described it, it was more like a quasi-judicial committee composed of elderly male judges, which did not include representatives of civil society, psychologists, sociologists, political scientists, or archivists.[1]

This judicial composition was reflected in the performance of the Commission. As aforementioned, one of the objectives of the hearings held by the FFRC was to provide victims with the opportunity to recount the violations they experienced, with the idea that this would help them find closure. As the experiences of other countries show, radio and TV channels broadcast clips of the hearings and provide live coverage, which can help achieve communal healing as well. However, the Libyan FFRC followed none of these practices. Upon the start of its work, the

[1] International Crisis Group. 2013. "Trial by Error: Justice in Post-Gaddafi Libya." *ICG Middle East/North Africa Report* 140: 17. Accessed online: https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/trial-error-justice-post-qadhafi-libya [last accessed 21 June 2020].

It is worth noting that the Commission addressed the president of the NTC on 1 May 2012 to inform him about complaints it received concerning its lack of inclusion of representatives of different social groups, neglecting the role of women, and being composed of jurists only. The Commission then requested amending Law 17/2012 to reconstruct the Commission's board members so such complaints would be addressed. Otman al-Kaf (Judge who previously worked with the Commission), personal communication, 9 May 2020.

Commission announced that it was ready receive complaints filed by the victims of a very limited number of Gaddafi era violations.[1] The victims had to file the complaints themselves. Moreover, there was no audio or visual documentation of the hearings, and no participation of psychologists or social workers. Instead, investigators conducted sessions with the victims in a Q and A style, asking the victims for evidence to support their complaints.[2] This made the hearings feel more like criminal investigations instead of sessions aimed towards mending past violations.

The drafters of the bill of Law 29/2013 tried to address this shortcoming. The bill stipulated that the Commission's board members need to include specialists in sociology, psychology, law, media, and archiving (Article 5). However, this proposal was dropped from Law 29. Furthermore, in response, apparently, to the advice of the International Center for Transitional Justice (ICTJ), in Law 29, the competence of the FFRC was not confined to investigating specific incidents. When commenting on an early draft bill, the ICTJ advised that the mission of the commission should be "to conduct a general historical analysis of policies, causes and conflicts in order to achieve a better understanding of the causes that had led to violations over several decades, and how to avoid the recurrence of such attacks," as well as to prepare a "final, comprehensive, and consolidated report."[3] In response, Law 29, while empowering the FFRC to investigate facts on specific events, requires it also to "draw a complete picture of the nature, causes and scope of the severe human rights violations that were committed during the former regime era (Article 7)." It should be noted, however, that this article seems to imply that drawing this restorative picture does not extend to the violations occurring in the aftermath of the former regime's era.

It should be noted also that the FFRC does not enjoy an exclusive mandate to fact-finding. Frequently, special commissions were formed to investigate violations subject to Law 29. For example, under Law 31/2013, the GNC established a fact-finding commission on the Abu Salim Massacre[4] and another was also established for the same purpose with Resolution 33/2015.[5] Law

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1 These types of violations included the Abu Salim Massacre, the Chad war, the Uganda war, the Lebanon war, Pan Am, the army attacks, enforcement of Law 4/1978, the events of 1996 in al-Jabal al-Akhdar and the damage of mustard gas in Tobruk. (Otman al-Kaf (Judge who previously worked with the Commission), personal communication, 22 January 2020.

2 Salim Suliman (Member of the FFRC), in-depth interview in al-Bayda, 22 January 2020.

3 International Center for Transitional Justice (ICTJ). 2013. "Taʿalīqāt al-markaz al-dawalī li-l-ʿadalat al-intiqālīa howl musawada qānūn al-ʿadalat al-intiqālīa al-Lībī" (Trans. "The International Transitional Justice Center's Comments on the Libyan Draft Transitional Justice Law." *ICTJ Report.* Accessed online: https://ictj.org/sites/default/files/ICTJ%20comments%20on%20Libya%20TJ%20law-AR.pdf [last accessed 21 June 2020].

4 "Qānūn raqm 31 li-sana 2013 bi-shaʾan taqrīr baʿad al-aḥkām al-khāṣa bi-muzabiḥa sijin Abu Salim" (Trans. Law 31 of 2013 regarding the Determination of some Provisions related to the Abu Salim Prison Massacre"). *Official Gazette* 4 (Third year).

5 "Qarār al-Muʾatamar al-waṭanī al-ʿām raqm 33 li-sana 2015 al-ṣādir bi-tārīkh 25 māris 2015 bi-shaʾan tashkīl lajna taqaṣī al-haqāʾiq hawla muzabiḥa sijin Abu Salim" (Trans. "GNC Resolution 33 of 2015, issued on 25 March

29 itself refers to an independent commission for real property grievances to be established via a special law (Article 28).

The starting point in assessing the aforementioned legislative responses lies in knowing that the truth is a right that must be preserved. This was the conclusion of the Study on the Right to the Truth included in a report of the OHCHR, which states that

> [T]he right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-degradable right and not be subject to limitations.[1]

The study listed the legal bases for the right to the truth, which was corroborated by the United Nations Human Rights Council (UNHRC) resolution on 10 October 2012.[2]

In addition, transitional justice can be envisioned without criminal accountability, but it cannot exist without revealing the truth. Knowing the truth is a prerequisite for reparation and institutional reform.[3] According to al-Hadi Buhamra, transitional justice in Libya is based on unveiling four facts. The first is the truth concerning severe violations of human rights and basic freedoms. Revealing the truth will help free both the victims and those wrongly accused of inflicting such violations, since they experienced social rejection due to false accusations levied against them. The second fact which needs to be unveiled according to Buhamra is the nature of the violations of social and economic human rights. Exposing them will help reveal the truth of marginalization and exclusion that specific regions and groups claim to have suffered. If found true, the marginalized regions and groups should enjoy positive discrimination. Unveiling this truth will also expose any corruption associated with violations of economic rights, and hence help to combat it. The third fact deals with the reality of violations of ethnic minorities and cultural and linguistic rights. The fourth relates to exposing the root causes of the armed conflict between

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2015, regarding the Formation of a Fact-Finding Commission on the Abu Salim Prison Massacre"). *Official Gazette* 4.

1 UN Commission on Human Rights, Economic and Social Council. 2006. "Promotion and Protection of Human Rights: Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights." *E/CN.4/2006/91* Accessed online: https://www.refworld.org/docid/46822b6c2.html [last accessed 20 May 2020].

2 UN Human Rights Council. 2012. "Right to the Truth: Resolution adopted by the Human Rights Council, A/HRC/RES/21/7." Accessed online: https://www.refworld.org/docid/50ae27412.html [last accessed 20 May 2020].

3 Buhamra, "Al-ʿadalat al-intiqālia."

Libyan towns after February 2011, which is necessary to effectively address them.[1] One can conclude that revealing the truth of past human rights violations is important, not only for the individual victims, but also for rebuilding the state.

3.5. Amnesty: justice or peace?

Should human rights violators be forgiven? Those in favour see amnesty as conducive to reconciliation, hence peace. Those against it perceive it as denial of justice for the victims. In Libya, both arguments have been used to support or criticize the amnesty laws introduced since the Revolution's early days.

The earliest of these laws is the NTC's Law 35/2012, on Amnesty for Some Crimes. Article 1 of Law 35/2012 excluded from amnesty the crimes committed by Gaddafi's family: spouse, children, in-laws, and his assistants (*ʿunwān*). Initially, the courts interpreted the term "assistants" broadly, but the Supreme Court narrowed it down later.[2] Still, one may argue that the exclusion of other categories is problematic. If reconciliation, and peace, is the rationale behind amnesty, such persons should have been included. It is something the new regime would have to reconcile with. In contrast, the NTC enacted another law on the same day granting amnesty explicitly to the crimes of the revolutionaries. According to Law 38/2012 regarding Some Procedures for the Transitional Period, there is no punishment "for the military, security or civil actions required by the February Revolution and carried out by the revolutionaries for the success or the safeguard of the Revolution (Article 4)."[3] The question then arose as to whether acts like torture could be described as having been committed with the aim of the success or the safeguarding of the

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1 Buhamra, al-Hadi. "Kishif al-ḥaqīqa ka-jasar li-l-intiqāl" (Trans. "Revealing the truth as a bridge of transition"). *Al-ʿAdala*, 21 May 2020. Accessed online: http://aladel.gov.ly/home/wp-content/uploads/2020/05/%D8%B5%D8%AD%D9%8A%D9%81%D8%A9-%D8%A7%D9%84%D8%B9%D8%AF%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%B9%D8%AF%D8%AF-140.pdf [last accessed 21 June 2020].

2 In the case at hand, the competent court rejected the appellants' allegation for the application of Amnesty Law 35/2012 to them. According to the court, they were Gaddafi's assistants, as they were soldiers in an armed formation called "Legions of Victory" (*Juḥāfir al-Naṣar*) formed to suppress the February Revolution. As for the Supreme Court, this rejection is incorrect because it is based on a, too, broad interpretation of who Gaddafi's assistants are. The first article of the law, according to the Supreme Court, indicates that "the legislature considered Muammar Gaddafi's assistants to be equal to his wife, children, and in-laws. Therefore, the reference is made to those men and women who were close to him and on whom he relied in managing the country's political, economic, social, and military systems, in which they often assumed leadership and high positions. Accordingly, not anyone who was employed or recruited by Gaddafi was considered to be one of his assistants. Since the two appellants were merely recruits or volunteers in the People's Guard (*Ḥaras al-Shaʿabī*), and since they were not related to Muammar Gaddafi, they were not considered to be his assistants. However, since the appealed verdict saw otherwise and considered the appellants to be assistants, it is then mistaken in applying the law and deficient in reasoning, hence it must be annulled. Supreme Court – Criminal Cassation. "Al-Taʿun raqm 48 li-sana 60 qaḍaʾīa bi-tārīkh 2 māyū 2018" (Trans. "Appeal 48 of the 60th Judicial Year, 2 May 2018.).

3 Ibrahim Bukhzam went on to say on "the supporters of the former regime" that the former regime's policymakers must issue an official apology to the Libyan people and to the regime's supporters (in-depth meeting in Cairo, 27 February 2020).

Revolution. The law was considered as conferring impunity on revolutionaries. In an effort by the then Minister of Justice, Salah al-Marghani, the GNC considered a bill to limit the impact of Law 38/2012. The bill related to the criminalization of torture, enforced disappearance and discrimination, and contained a provision to increase the penalty if the crime was committed in the name of the Revolution. The bill sparked an intense debate in the GNC, and was finally adopted as Law 10/2013 regarding the Criminalization of Torture, Enforced Disappearance, and Discrimination.[1] Although the provision on increased penalty was left out, the revolutionaries protested against the law for it, in their opinion, targeted them while they were the ones who liberated the country. The law, according to some analysts, limited the scope of the amnesty granted by Law 38/2012 to the revolutionaries.[2]

The other example of a law in favour of amnesty is the HoR's Law 6/2015 on Amnesty. This law was widely interpreted to include crimes attributed to supporters of the former regime. This interpretation found its basis in Article 1, which declared amnesty for "all Libyans" regarding any crimes committed "during the period from February 15, 2011." The Revolution, hence the regime's effort to suppress it, began on this day, and by explicitly including it, the law left no doubt about its applicability to the violations involved in the regime's efforts. While some saw the law as conducive to national reconciliation, others argued that it led to impunity and overlooked victims' rights. The impunity and neglect, according to a third group, are the result of an interpretation of the law that is actually implausible. The right interpretation, according to this third group, is that the law excluded serious crimes from its scope of amnesty, and conditioned amnesty, when relevant, on conditions related to repentance for the act and on a decision showing that the person concerned met these conditions.

The argumentation before the ICC in the Saif al-Islam Gaddafi's case provides a clear example of these various perspectives. His defence team protested that his case was inadmissible before the ICC because the Libyan judiciary, the Criminal Division of the Tripoli Court of Appeals, had convicted him on 18 May 2015 for the same alleged acts because of which he was standing before the ICC, and stated that he had been pardoned by Law 6/2015, and was released 12 April 2016. Therefore, according to the defence team, the case was no longer admissible before the ICC, which is complementary to the national criminal jurisdiction.

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1 "Qānūn raqm 10 li-sana 2013 al-ṣādir bi-tārīkh 14 abrīl 2013 bi-shaʾan taḥrīm al-taʿzīb wa al-ikhfāʾ al-qasrī wa al-tamyīz" (Trans. Law 10 of 2013 promulgated on 14 April 2013 concerning the Criminalization of Torture, Enforced Disappearance and Discrimination"). *Official Gazette* 7 (Second year).

2 Wierda, Marieke. 2015. "Confronting Gaddafi's legacy: Transitional Justice in Libya." In: *The Libyan Revolution and its Aftermath*, edited by Peter Cole and Brian McQuinn, 153-175 (169). Oxford and New York: Oxford University Press.

However, the Trial Chamber of the ICC dismissed the appeal of inadmissibility. On the one hand, for the appeal to be approved, the ruling of the national judiciary must be final and *res judicata*. At that point, the ICC would not hear the case, because it would mean trying a person for the same action twice. However, in the Saif al-Islam case, the ICC stated that this condition was not met because the Tripoli court's ruling was still subject to appeal, and since it was issued in absentia, the national judiciary could hear the case again. On the other hand, which is important in the context of transitional justice, the ICC also rejected the allegation that the amnesty law applied to Saif al-Islam because it was inconsistent with public international law. The Court stated that "granting amnesties and pardons for serious acts, such as murder constituting crimes against humanity, is incompatible with internationally recognized human rights. Amnesties and pardons intervene with States' positive obligations to investigate, prosecute, and punish perpetrators of core crimes. In addition, they deny victims the right to truth, access to justice, and to request reparations where appropriate."[1] The court based this conclusion on a review of the rulings of the Inter-American Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and other international courts.[2]

The defence team appealed the case to the Appeals Chamber, but without success. The defence team reiterated the aforementioned defences with the support of the Libyan Cities' and Tribes' Supreme Council, which submitted a memorandum in which they claimed that the amnesty law was enacted to achieve societal reconciliation in Libya, even though it (i.e. the Council) had recognized that "this general amnesty opened the door to reconciliation,..., and yet all the parties refused to engage in it, despite the Council's efforts...". On the other hand, the delegation representing the GNA, which the Court considered a representative of the Libyan State, argued that the amnesty law did not apply to Saif al-Islam because, first, he is accused of crimes such as identity-based murder that this law excludes from its scope, and second, since the law, if applicable to Saif al-Islam, required to grant amnesty conditions that had not been met, namely declaring repentance and the issuance of a reasoned decision by the competent judicial authority. According to the delegation, the law was misinterpreted to grant immunity from accountability. On 9 March 2020, the Appeals Chamber ended up supporting the Trial Chamber's ruling to reject the challenge to the admissibility of the case.

In assessing the aforementioned amnesty laws, the starting point is to determine their impact on transitional justice with its various mechanisms. While amnesty, as per Law 29/2013, is

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1 ICC. "Saif-al-Islam Gaddafi Case: ICC Pre-Trial Chamber I confirms Case is Admissible before the ICC." *Press Release*, 5 April 2019. Accessed online: https://www.icc-cpi.int//Pages/item.aspx?name=PR1446 [last accessed 21 June 2020].

2 ICC. "Prosecutor v. Saif al-Islam Gaddafi: No. ICC-01/11-01/11." *Decision*, 5 April 2019. Accessed online: https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF [last accessed 21 June 2020].

one of the mechanisms of transitional justice (Article 5, paragraph 6), it should not result in making it devoid of its substance.

Regarding the impact of amnesty on criminal accountability, it should, as the ICC reasoned, be rejected whenever it leads to impunity for serious human rights violations. However, some Libyan lawyers argue that if the goal of amnesty is reconciliation, whether with the former regime's loyalists or Islamist and revolutionaries forces allegedly involved in terrorist activities, widely defined, it may require the inclusion of these violations, but in a way that preserves other transitional justice mechanisms, such as revealing the truth, reparations, and institutional reform.[1] As such, the aforementioned amnesty laws are, in their opinion, flawed, since Law 35/2012 excluded the family of Gaddafi and his assistants, with whom reconciliation should be reached, while Law 6/2015 excluded terrorist crimes.[2]

While it would be difficult to accept amnesty for severe violations of human rights, the amnesty laws at hand seem also to impact not only criminal accountability, but other transitional justice mechanisms as well. They exclude the violations that they cover from the mandate of the FFRC, whose procedures are designed so the victim can have a role in revealing the truth, without providing for measures that would sufficiently secure revealing the truth. Law 35/2012 conditions amnesty on reconciliation with the victims or their legal guardians, or pardon by the victims' surviving heirs', and declaring repentance before the competent criminal division (Article 2). These procedures, i.e., reconciliation or pardon and declaring repentance, do not guarantee revealing the truth of violations, or providing the victim an opportunity to have their statements heard, which transitional justice procedures are supposed to secure. While Law 6/2015 reiterates the conditions relating to reconciliation, it merely requires a written pledge of repentance without having to declare it before a judicial authority (Article 2).

While the two laws state that amnesty does not prejudice the right of victims to restitution and compensation (*al-rad wa al-taʿwīẓ*) (Article 5 of Law 35 and Article 10 of Law 6), their negative impact on reparation remains evident. As per transitional justice's mechanisms, reparation includes measures, such as rehabilitation and commemoration, and the effect of these goes beyond mere compensation to preventing the recurrence of the violations.

As for institutional reform, the GNC, apparently content with the Political Isolation Law (PIL), did not address it in Law 29/2013. Consequently, the fact that violations were beyond the scope of the transitional justice law because of the amnesty law does not necessarily mean they

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1 Al-Jumli, Tariq 2020. "Fāʿiliyyat niẓām al-ʿufū al-ʿām fī taḥqīq ahdāf al-ʿadālat al-intiqālīa" (Trans. "The Effectiveness of the General Amnesty System in Achieving the Goals of Transitional Justice"). Benghazi: Centre for Law and Society Studies. Research paper written as part of the RoLLNaR Project (to be published).

2 Ibid.

are beyond a specific organization of institutional reform. The amnesty laws do not restrict any institutional reform measures such as isolating violators of human rights covered by the amnesty. Law 6/2015 explicitly stipulates that amnesty does not prevent the administration from "issuing administrative decisions that correct the unlawful acts, whose doers benefited from the amnesty law, and does not restrain it from taking disciplinary measures against public officials (Article 5)."

While this understanding is based on reading the text of the amnesty laws, the actual practice, however, has sometimes led, in addition to immunity from criminal accountability, to invalidating other transitional justice mechanisms. Saif al-Islam's case provides a clear example of this. Although the law may not apply to violations for which he was tried and convicted, even if in absentia, and although the conditions of declaring repentance and the rendering of a judicial decision were not met, the Ministry of Justice in the east-based Interim Government issued a decree stating that Saif al-Islam was to benefit from the law, hence it requested his release.[1] His defence team relied on this document. In fact, Saif al-Islam's was not the only case, as there were other cases wherein Gaddafi loyalists accused of human rights violations were declared as benefiting from Law 6/2015, and it is doubtful that the conditions relating to reconciliation with victims or their relatives were observed.[2]

3.6. Reparation

There is also the issue of reparation, which leads to different positions. Some believe that there is no need for it in the first place, as the violations spared no one, (no one is more worthy of reparation than another) while others claim it would deplete the State's resources.

In contrast, there are those who agree on the necessity of reparation while differing on the details. Some believe that there was no reason for the monetary compensation that political prisoners, specifically, obtained. Their argument is that political struggle is an individual choice and activists need to accept its consequences. In addition, they had not consulted the Libyan people whose public treasury would be used to pay for the compensation.[3] Following the example of some South American countries, priority, according to this opinion, should be for cities that

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1 Al-Tashani, Marwan. "Fawḍa al-ʿadālat al-intiqālīa fī Lībīā mā baʿad al-thawra: Saif al-Islam Gaddafi nimudhijan" (Trans. "Transitional Justice Chaos in Post-Revolutionary Libya: Saif al-Islam Gaddafi, a Case Study). *Fikrat al-Qānūnīa*, 24 November 2016. Accessed online: https://www.legal-agenda.com/article.php?id=3256 [last accessed 20 May 2020].

2 According to the Deputy Minister of Justice of the Interim Government, she received complaints from supporters of the former regime in 2015 and referred them to the president of the Court of Appeal of al-Jabal Akhdar, Ezz Moussa, who in turn issued amnesties for 90 cases (Sahar Banun, 21 January 2020).

3 Idris al-Tayyib (Political activist and a former prisoner), in-depth interview in al-Bayda, 21 January 2020.

suffered economic, cultural, or ethnic marginalization, especially since the Draft Constitution already includes a provision to this effect.[1]

Still others think that reparation is an inherent and imprescriptible right and an indispensable step towards remedying previous violations but think there should be a distinction between the necessity of compensation and the method of levying it. The holders of this position find that it is possible to schedule compensation in a way that does not strain the state budget. They warn that huge amounts of money were stolen from the state treasury under the Gaddafi regime and that solely retrieving the same amounts would not be just because whoever plundered a million has invested it and made a tenfold profit from it.[2] Therefore, the idea of reconciliation in exchange for returning the exact looted amount without the obtained profit is unfair. Applying the idea of a "relative fine" on the looted funds can be used to finance a compensation fund to be set aside for reparation; hence, this mechanism would not strain the country's resources.[3] This solution might be an appropriate response to those who say that there is nothing that obliges the state at the present time to redress the damage caused by a previous regime, and that it would be better to spend the country's wealth on infrastructure and on a sustainable environment instead. According to another opinion, Libya suffered foreign aggression in 2011 under the pretence of supporting a popular uprising and the countries involved should be required to provide the resources needed for reparation.[4]

The last opinion states that considering the nature and extent of the damage and the large number of victims that resulted from expanding the concept of being a victim, the goal must be to provide adequate compensation that aims at general satisfaction and social harmony, but with overstating the compensation amounts.[5] This will result in reducing the financial burdens that the state will bear in the event of the application of the transitional justice law.

It can be noted that there were several legislative responses that, while focusing on monetary compensation, set the scope of the compensation differently resulting in discrimination between victims. The responses differed also regarding enforcement. While some got enforced, others were not. Reluctance to enforce legislation seems to be motivated by convictions that the state should not be overburdened with commitments it cannot honour, which may explain a

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1 Amal Buqaiquis (Human rights activist), Benghazi Focus Group, 18 January 2020.

2 There is a popular saying that refers to such a custom: "What is stolen is worth eightfold", meaning that the thief is fined eight times the value of what was stolen.

3 Abd al-Moneim al-Wahishi (Former GNC member), in-depth interview in Benghazi, 7 January 2020.

4 Ibrahim Bukhzam (Supporter of the former regime), in-depth interview in Cairo, 27 February 2020.

5 Buhamra, “Muqadima,” 13.

recent Supreme Court ruling in which the state's responsibility for redressing any damage resulting from events such as revolutions was denied.

Transitional justice issues have received several different legislative responses, and this has an impact on all of them. Yet, it is with regard to the issue of reparation that this impact is more evident. In addition to the general law on transitional justice, i.e., Law 29/2013, there are several other laws dealing with reparation, such as those related to the Abu Salim Massacre, political prisoners, real property ownership, and victims of sexual violence.

These laws differed in their approach towards reparation-forms, scope and mechanisms - in a way that resulted in discrimination between victims. Law 29/2013 stipulates that victims are entitled to material compensation (Article 7), and while this term, legally speaking, refers to monetary and in-kind compensations, this law limits it to the first type. Article 23 of the law states that the compensation covers the loss the claimant has incurred but not the loss of earnings.[1] In addition to monetary compensation, Law 29/2013 envisages other forms of reparation. For example, this law stipulates that the FFRC may take measures related to memorialization, treatment, rehabilitation, and the provision of social services (Article 7). Furthermore, it tasks the Commission with reparation, and, apparently, prohibits resorting to courts unless the Commission makes a final decision or chooses to refer the matter to them.[2] However, besides the Commission, the law adds another independent commission specialized in real property grievances (Article 28). As such, the law establishes for two commissions, which creates undesirable pluralism.[3]

On the other hand, Law 29/2013 is not the only legislation addressing damage caused by transitional justice grievances. For instance, Law 50/2012 is concerned with compensation for political prisoners during the Gaddafi regime from 1 September 1969 to 15 February 2011. It determines a monetary compensation of eight thousand dinars for each month imprisonment. If the person already received compensation during the former regime's era, it should be deducted. In addition, the law annuls conviction verdicts issued against the political prisoners so they no longer count as criminal antecedents.

Law 31/2013 is another example of the laws providing reparation for transitional justice violations. It addresses the Abu Salim Massacre and awards compensations, mostly monetary, besides other forms of reparation, such as memorialization by preserving the Abu Salim prison,

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1 Abuda, al-Kuni. 2019. "Naẓarāt fī ālīat jibr al-ḍarar fī al-musār al-Lībī li-l-ʿadalat al-intiqālia" (Trans. "Contemplations on the reparation mechanism in the Libyan path of transitional justice"). *Majlat dirāsāt qānūnīa*. Benghazi: Benghazi University: 25.

2 Ibid. See infra 9.3.

3 Abuda, al-Kuni. 2017. "Real Property Conflicts and Transitional Justice in the Libyan Approach." In: *Resolving Real Property Disputes in Post-Gaddafi Libya, in the Context of Transitional Justice*, edited by Suliman Ibrahim and Jan Michiel Otto. Benghazi and Leiden: Centre for Law and Society Studies and Van Vollenhoven Institute.

and annexing to it a mosque, a library, a cultural centre, an Islamic university, a park, and a square to be called the Martyrs Square (Article 8). The law also forms a commission to, among other things, investigate the facts related to the massacre and make recommendations related to remedying its effects (Article 6).

The third example relates to real property grievances. It clearly shows the conflict between what Law 29/2013 states and what other legislation related to real property grievances stipulates. In 2006, the former regime established a committee to address the effects of Law 4/1978 on Real Property. Its mandate was to complete the compensation decided by this law. However, this mandate, thanks to the committee's efforts, was extended to restituting property. Still, many saw the committee and its measures as insufficient. Its formation assumed that Law 4/1978 was legitimate; it was only the way it was applied that needed 'correction'. As such, the committee's mandate was limited to addressing the 'misapplications' of this law. Besides, the compensations offered were too low compared with the market value.

Therefore, once Gaddafi's regime fell, several attempts were made to enact a law repealing Law 4/1978 and addressing its effects more satisfactorily. When Law 29/2013 was introduced, it was understood to cover grievances related to Law 4 and to abolish the 2006 compensation committee. The task of reparation was assigned to the FFRC. Later on, however, and under pressure from the former owners, the revived GNC enacted a law (16/2015) that repealed Law 4/1978, and another (Law 20/2015) which addressed the effects of Law 4 in a different way from Law 29/2013. For example, according to Law 20/2015, restituting property to its previous owner is the default method for remedying grievances. If found unattainable, the owner will be compensated in a manner that takes into account, first, the market value of the property at the time when Law 20/2015 entered into force, and, second, the loss owners sustained as a result of being deprived of the property (Article 3). This is different from Law 29/2013, which excludes any lost earnings from compensation. Besides, Law 20/2015 assigns the implementation of its provisions to committees understood to be those established by the former regime in 2006 while these, as mentioned earlier, were abolished by Law 29/2013.

At any rate, Law 20/2015 was never implemented, perhaps because of doubts about the legitimacy of the GNC when it enacted it. This prompted the former owners to pressure the PC of the GNA into issuing resolutions not only reviving the 2006 compensation committee but also strengthening it. The committee's decisions became no longer subject to the approval of a committee chaired by the Minister of Justice. It was authorized to award compensations estimated in accordance with the property's current market value.[1] These resolutions conflict with Law

[1] "Qarār al-majlis al-riʾāsī li-ḥukūmat al-wafāq al-waṭanī raqm 694/2018 bi-taqrīr ḥukm fī shaʾan qarār al-lajnat al-shaʿabīat al-ʿama raqm 108/2008 wa qarārihi raqm 1599/2018 al-muʾrikh 3 dīsimbīr 2018" (Trans. "Resolution

29/2013, which renders them illegal, given that resolutions that the executive makes are bound to adhere to existing laws. In addition, raising what al-Kuni Abuda calls a singular approach to transitional justice grievances,[1] these resolutions treat a specific category of victims in a special way, not only regarding the type and extent of the compensation allocated, but also in how it is to be allocated.

The discrepancy within transitional justice legislation extends to implementation. For example, many political prisoners received the compensation that Law 50 awarded[2] while enforcing Law 29/2013 still awaits the issuance of the executive regulation and the formation of the FFRC. As to some, the HoR's reluctance to take these necessary steps is due to the high financial costs entailed in implementing the law.[3] Salah al-Marghani expressed, when he was Minister of Justice, the dilemma of reconciling reparation for the victims of real property violations without burdening the state with commitments it cannot honour.[4]

The unwillingness to burden the state with such commitments might be the reason behind a recent Supreme Court ruling denying the state liability for any damage caused by events such as revolutions. On 14 January 2020, the Court rejected the compensation for damage to private property caused by the hostilities that accompanied the February Revolution.[5] According to the Court, the state, like other natural and legal persons, can only be ordered to pay compensation if it is proven liable, i.e., it is established that it committed a wrongdoing that resulted in harm, which was not achieved in the present case. According to the Court,

Liability is to be determined only with an express provision in the law that establishes it, (...), and the legislature determines (...) the sources of the obligation exhaustively (...), to which other reasons cannot be added (…). Just like individuals, the government is not to be held liable

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of the Presidential Council of the GNA 684/2018 deciding a Provision regarding the General People's Committee's Resolution 108/2008 and 1599/2018, dated 3 December 2018").

1 Abuda, "Naẓarāt."

2 According to the statements of the president of the Abu Salim Prisoners Association, the government earmarked an amount of 300 million Libyan dinars (around $245 million) to compensate them, and the compensation would exclusively be for political prisoners. See: https://www.ictj.org/node/17865 [last accessed 22 June 2020].

According to some parties, there are those who were fully compensated, perhaps because of their ideological relationship to those in charge of disbursement, and there are those who did not receive any. (Idriss al-Tayyib (Political activist and a former political prisoner), in-depth interview in al-Bayda, 21 January 2020). Some former political prisoners, who are not Islamists, stated that they did not receive any compensation allocated for political prisoners, and one of them explained this by the fact that Islamists had taken control of the Compensation Commission and the Central Bank of Libya, and had excluded others (Abd al-Ghani Khanfar and Rajab al-Hnid, in-depth interview in al-Bayda, 21 January 2020).

3 Jumaʿa Buzid (Former judge, the Supreme Court, in-depth interview in al-Bayda, 22 January 2020.

4 Salah al-Marghani, in-depth interview in Tripoli, 1 December 2012.

5 Civil Appeal 64/ 254.

unless it is established that the harm is a result of its wrongdoing (…); and, accordingly, damages caused by revolutions, such as the February 17 Revolution, the Libya Dawn Revolution or this relentless war in Libya and their ensuing damages, can only be compensated by promulgating a law that expressly stipulates it [compensation] and imposes it in exceptional cases (...). Saying otherwise without a specific provision in the law it is only illusory, as it cannot be founded on the rules of abstract justice, or the argument that the state is required to provide protection and security in all circumstances for every citizen or foreigner in Libya, because of the risk of financially burdening the state treasury to the point of ruin."

The Court acknowledged that the Council of Ministers already issued resolutions obligating the state to pay compensation in cases like the one at hand; still, it deemed such resolutions insufficient. To burden the state with such a liability, the legislature, not the government, must intervene via a law.

While Libyan law empowers the Supreme Court to issue rulings establishing principles binding all courts and institutions, not only the parties involved, the ruling just discussed is, fortunately, limited to these parties.[1] Still, it mirrors a legitimate concern about burdening the state with reparations that may be incalculable; hence, it is necessary to find an approach that takes into account the provision of reparation without burdening the state or affecting its performance of other duties. Transitional justice is supposed to achieve this purpose. It broadens the concept of reparation so it includes, besides monetary compensation, other forms such as rehabilitation, restitution, and guarantees of non-recurrence. It still provides for monetary compensation, but then it does not need to be full, i.e. inclusive of the victim's subsequent losses and lost profits; it can be limited to the former.

Law 29/2013 already includes some of these measures, as it limits compensation to subsequent losses only, indicates the multiplicity of reparations, and stipulates the deduction of previously paid compensations. However, what Law 29 lacks is determining how much is to be spent on monetary compensation by allocating, for example, a certain percentage of the GDP for a specific number of years. The period can be determined according to the time the FFRC is expected to take to complete its work.

However, despite the advantages of Law 29/2013, its effectiveness is limited as it does not have an exclusive mandate over addressing transitional justice grievances. To address this problem, there is a need, first, to review Law 29 to reform its problematic provisions, or to replace it altogether with a new law. There is also need to abolish other laws and regulations providing

[1] Abuda, al-Kuni. "Al-qaḍāʾ wa al-qadar al-qadāʾī" (Trans. "Judicial Fate and Destiny"). *Website Ministry of Justice*, 12 March 2020. Accessed online: https://aladel.gov.ly/home/?p=6072 [last accessed 20 May 2020].

inconsistently for reparation. The reformed Law 29, or its replacement, should provide a uniform framework of reparation.

3.7. Institutional reform

In the question regarding the need for institutional reform, there are two main diverging positions. As to the first, reform is needed in the case of the former regime' security institutions, the judiciary that is accused of corruption,[1] and media[2] that contributed to deepening the social rift, especially in the last five years.[3] As for the second position, all state institutions need reform because they are all affected, and there is no point in reforming only certain institutions.[4]

Our field work shows that institutional reform is largely restricted to isolation, or as it is widely referred to in the Libyan context, political and administrative isolation, *azl.* Opinions in this regard are greatly influenced by the experience of isolation legislation. Therefore, we will first present the legislation and then the opinions observed.

The first general law on transitional justice, i.e. Law 17/2012, did not tackle the issue of institutional reform at all, or even mention it in its objectives. To address this deficiency, the bill of the alternative law, i.e., Law 29/2013, deemed institutional inspection as one of transitional justice's objectives[5] and devoted a whole chapter to achieving it. This chapter addressed isolation but without being limited it to it. According to Article 23 of the bill, the inspection process includes the supervisory personnel, the contracts, legislation in force, and both the institution's performance and regulation. The article also aims to reform the institutions and dismiss any staff proven to be corrupt or incompetent. However, the GNC removed this chapter when enacting Law 29/2013, though it kept the reference to institutional inspection amongst the objectives of the law. According to Issam al-Maoui, who was then the chairperson of the National Council for Civil Liberties and Human Rights, the GNC seemed to assume that the issue of institutional reform was addressed by the provisions of Law 13/2013 on Political and Administrative Isolation, which was issued in the same year.[6]

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1 Abd al-Ghani Khanfar (Ex-political prisoner), in-depth interview in al-Bayda, 21 January 2020.

2 Idris al-Tayyib (Journalist and former prisoner), in-depth interview in al-Bayda, 21 January 2020.

3 Tariq al-Jumli (Assistant Professor of Criminal Law, Benghazi University), Benghazi Focus Group, 18 January 2020.

4 Omar al-Habassi (Human rights activist), Tripoli Focus Group, 26 December 2019; Muhammad Adam Abd al-Qadir (Political activist), Derna Focus Group, 25 December 2019.

5 The ICTJ commented on institutional examination" (*faḥṣ muʾasssī*) noting that it means, according to other provisions of the draft, institutional reform, and not just examination. It recommended that this should be further clarified. See: ICTJ, "Taʿalīqāt."

6 Issam al-Maoui (Lawyer and former president of the National Council for Civil Liberties and Human Rights), in-depth interview, 21 January 2020.

Regarding the issue of isolation, the Political and Administrative Isolation Law (PIL) 13/2013 adopted an approach based on excluding specific incumbents regardless of their conduct when they held office. According to the law, whoever held specific functions under the Gaddafi regime, i.e., since the beginning of his rule on 1 September 1969, is prohibited from holding or keeping a position of leadership, regardless of their behaviour when they occupied those functions. This has led to isolating persons, such as Muhammad al-Muqariaf, head of the GNC, for his position as Ambassador to Delhi in 1981, and Mahmud Jibril, head of the Executive Office (Prime Minister) during the NTC era, for having held the position of Chairman of the National Planning Council in the Gaddafi era. The law received heavy criticism and was immediately challenged before the Supreme Court for being unconstitutional. To date, however, the Court has yet to render a judgement.[1]

However, the law was arguably repealed officially or factually. The HoR enacted Law 2/2015 abolishing the PIL.[2] Despite the fact that the legitimacy of the HoR when the law was enacted is questionable, at least in the west of the country, the GNA broke the PIL by including in its government people who would fall under its provisions, such as Tahir al-Jhimi, the Minister of Planning, who had held ministerial and diplomatic positions during the Gaddafi era.

As for the judiciary, whether the PIL is still in existence is far from conclusive. The isolation of members of the judiciary is a clear example of that. According to Law 13/2013, whoever has previously worked in exceptional courts and public prosecution offices, including People's Courts and People's Prosecution Offices, is isolated. This provision was criticized, first, because it bases isolation on the position *per se* and not on the occupant's conduct, and secondly, it ignores the fact that the application of the laws of the People's Court and Prosecution was not restricted to these two institutions. On the one hand, Law 7/2004 abolished the People's Court and the People's Prosecution Office and transferred their *exceptional* competencies and powers to specialized courts and prosecution offices, which exerted them until the Supreme Court ruled in December 2012 that the transfer provision was unconstitutional.[3] The Supreme Court itself adjudicated cases in accordance with the laws that People's Courts and the People's Prosecution Offices applied. If it is the application of these *exceptional* laws that justified the isolation of those who worked in the People's Courts and Prosecution Offices, this should not be limited to them. It should apply to

1 Supreme Court judges during in-depth interviews, 8 and 15 January 2019; preferred to remain anonymous.

2 Law 2/2015 issued on 8 June 2015. *Official Gazette* 6 (Fourth year)

3 Supreme Court, Constitutional Jurisdiction. "Al-Tuʿun raqm 25 li-sana 59 qaḍāʾīa bi-tārīkh 23 disimbir 2012" (Trans. "Appeal 25 of Judicial Year 59 of 23 December 2012").

anyone who acted on these laws, regardless of their work place, or better yet, restrict isolation to those whose conduct justifies it, regardless of the position held.[1]

However, the Supreme Judicial Council (SJC) applied the PIL, albeit indirectly. When applied to those working in the judiciary, this law had the implication of dismissing the person at hand rather than just preventing them from holding or continuing to hold a leadership position. This prompted a number of those affected to apply for voluntary retirement. However, to avoid this severe outcome, i.e., losing a job, the SJC transferred those affected to judicial institutions other than the courts or office of public prosecution. Later, after the signing of the PA in December 2015, and the entry of the GNA's Presidential Council to Tripoli, and the ensuing violence that affected the Political Isolation Commission's headquarters and suspended its work, the SJC began to overlook the implementation of the PIL. This is evident in the resolutions that the SJC issued during 2017, 2018 and 2019, which reinstated persons who had been subject to isolation to their former positions.[2]

However, we can remark that this disregard does not conclusively translate into recognition of the end of the PIL. The HoR indeed abolished this law; still, when it did so, its legitimacy, and as a consequence its laws, was questioned.[3] In addition, there are recent indications that the SJC's position on the PIL is yet to be resolved, as it invoked this law when protesting against a candidate to the Council's elections in 2019. The question was then posed to the Directorate of Law which opined that the PIL's provisions regarding candidacy for the SJC expired.[4]

As aforementioned, the opinions observed in the research reveal the influence of the experience of political isolation as represented by Law 13/2013. According to a first opinion, isolation should be limited to policymakers. The conventional organization of the institutional structure into top, middle and operational levels should be excluded in favour of one based on the tasks carried out by level units: making policies and implementing them. That way, isolation affects policymakers but not their implementers.[5]

As for the second opinion, isolation should be based on the person's conduct. This opinion criticizes Law 13/2013 because it isolated persons for merely occupying certain posts without distinguishing between those who had used their position of power to wreak havoc and others who did their best to do good. A third opinion adds that it is the interest of Libya to benefit from

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1 Abu Raas, Ali. 2020. "Taḥdīth al-nizām al-qaḍāʾī fī Lībiā" (Trans. "Modernizing the Judicial System in Libya). *Research paper presented in the RoLLNAR project*. Benghazi: Centre for Law and Society Studies (to be published).

2 Ibid.

3 Khaled al-Mishri (Chairman of the HSC), in-depth interview in Tripoli, 24 September 2019.

4 A letter from the head of the Law department addressed to the president of al-Khums Court, No. 1.6.42, dated 20 March 2019. Typed. Quoted by Raas, "Taḥdīth al-nizām al-qaḍāʾī".

5 Abd al-Moneim al-Wahishi (Former GNC member), in-depth interview, 7 January 2020.

the expertise of those who worked under Gaddafi's rule, especially technocrats, as long as they did not partake in crimes or corruption.[1] A fourth opinion goes even further in calling for making use of the expertise of such persons, including those who served in security institutions, to the extent of overlooking their past severe human rights violations. Excluding such persons is the reason behind the current chaotic security condition of the country. Instead of targeting the supporters of the former regime, a sixth opinion believes that other political entities presumed to be part of the February Revolution (the Muslim Brotherhood) should be isolated because of their, according to this opinion, their affiliation with terrorist organizations.[2]

These legislative responses, one should point out, reduce institutional reform to political and administrative isolation. It is true that isolation is an institutional reform mechanism, but it is not the only one. According to the recommendation of the UNHRC, public officials who are personally responsible for human rights violations should be isolated, especially in the security and justice sectors; however, institutional reform should also include comprehensive training programs for officials and employees in the field of human rights.[3] In addition, reform should address the modernization of administrative structures, good governance, and other means of institutional development, and most importantly, it should include legislation, whether in relation to transitional justice or to its other aspects.[4]

The second drawback is that political and administrative isolation, as enshrined in the legislation at hand, is based on occupying certain posts regardless of the person's actual conduct. The research team has previously concluded that this type of isolation is exclusionary, that it would create political division and severe societal polarization, and that it represents evidence of the failure to ensure the right to political participation for all. Therefore, exclusion should be limited to those convicted of crimes or corruption.[5]

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1 Holding leadership positions during the former regime era does not justify his isolation, because he did not take part in assassinations or misappropriations committed against the Libyan people, and he even challenges all parties to find him guilty in any case. Ibrahim Bukhzam, in-depth interview in Cairo, 27 February 2020 (a Professor of Constitutional Law who is a supporter of the former regime under which he held posts such the Minister of Education and Ambassador to Iraq).

2 "Qarār raqm 6 li-sana 2019 al-ṣadir ʿan majlis al-nawāb bi-shaʿan iʿtibār tanẓīm al-Ikhwān al-muslimīn munaẓima irhābīa" (Trans. "Resolution 6 of 2019 of the House of Representatives regarding classifying the Muslim Brotherhood Organization as a Terrorist Organization"); this resolution was distributed to the governmental institutions in the eastern region in order to implement institutional isolation on them.

3 Daham and Dakhil, *Dirāsat janūb afrīqīā wa al-ʿIrāq*, 15

4 See: Raas, "Taḥdīth al-nizām al-qaḍāʾī."

5 Al-Husadi, Nagib et al. 2018. *The Role of Law in Libya's National Reconciliation: Report on National Identity*. Benghazi, Leiden: Centre for Law and Society Studies and Van Vollenhoven Institute.

3.8. Cultural specificity

The issue here concerns whether Libya has a cultural specificity, and whether there exists an environment favourable to transitional justice values and an experience unique enough to merit special mechanisms. As is the case concerning other issues, positions diverge on this issue. There is first a group considering the prevailing values as an opportunity to achieve transitional justice, but within this group some distinguish the prevailing values at a regional level while others deny this. On the other hand, there is another group seeing the prevailing values as an impediment to achieving transitional justice.

On the one hand, some believe that the local environment is favourable to transitional justice and inclined to amnesty. Tribal elders and religious leaders play, as to this opinion, a major role in this regard. To prove their point, this group refers to the charters concluded in the past, and the reconciliation agreements reached in the post-February 2011 period. The most prominent past example is the Harabi Charter. It was concluded in April 1946, a few years after the defeat of the occupying force, i.e., Italy, whose rule left a weighty legacy of grudges and reprisals. According to Salim al-Owkali,

> For over thirty years, fascism ruled Libya, tortured, murdered, and executed its opponents, and set up the strongest mass detention camps in history. Throughout this period, many Libyans cooperated, forcibly or enthusiastically, with this occupying force, which led to having Libyans fighting each other, tribes declaring, entirely or partially, their loyalty to fascism, Libyan brigades affiliated with the Italians chasing the Libyan resistance, many Libyans working as informers in favour of the invaders, some executing their Libyan countrymen, and some seizing property that was not theirs.[1]

At that time and in the face of such a legacy, Prince Idris al-Sanusi called to stop the disputes and in response to his call the elders of the al-Harabi tribes and the dignitaries of the city of Derna announced a charter that suspended all conflicts until the establishment of a national government to which legitimate rights holders could submit their complaints. The charter considered every violation of the commitment as obstructing the nation's efforts and thwarting the struggle for independence.

While the charter did not waive rights, but rather postponed claiming them until the establishment of the state, what actually happened, according to some, is that everyone respected the charter, and there was no record of acts of violence or recourse to force to solve disputes. Even when the state was established, the courts were not overcrowded with cases. According to Salim al-Owkali, “Reconciliation and forgiveness were among the traits of Libyan character, (...)

[1] Al-Owkali, Salim. “Kam nuḥim aḥfād buʾasāʾli-ajdād ʿaẓām!!” (Trans. “Miserable progeny of great ancestors!!”). *Al-Wasat*, 23 August 2014. Accessed online: http://alwasat.ly/news/opinions/30065?author=1 [last accessed 22 May 2020].

Forgetting was the recipe for progress, and the charter's slogan '*Ḥatḥāt ʿala mā fāt*' (trans. 'Let bygones be bygones') represented the Libyans' wisdom at that time"[1] The traditional leaders, such as tribal elders and dignitaries, supported the Harabi Charter; they also played a major role in the post-February 2011 period in quelling disputes that broke out across the country.[2]

While sharing the belief that there is indeed a local environment favourable to transitional justice, another view argues this varies from one region to another. The tribes in the east tend to reconcile more than those in the west. This finds its explanation, according to some, in that the Sanusi Order, with its clearly tolerant nature, had deeper and more lasting impact in the east. The Sanusi lodges, *zawaya,* spread in the east, settled tribal disputes with peace. In the west, however, the old tribal conflicts were still alive, which enabled successive rulers to invest in the inherited grudges in a quest for extending their hegemony.[3] The disparity between the east and the west finds its explanation, according to another group, in that the people in the west are more obedient to the state law. Moreover, criminal responsibility there is limited to the individual(s) committing the crime(s). As such, the role of customs and tribes is limited.

On the other hand, others hold that the prevailing values in Libyan society hamper transitional justice and national reconciliation. Granting amnesty used to be considered as courteousness, or as a favour that earned its doer praise, but that is no longer the case. According to these people, society no longer sees the act of granting amnesty as an ethical and religious value. Thus, to them, a social upbringing that is more favourable to the values of transitional justice is much-needed.[4]

Another group sees no regional disparity in holding values hampering transitional justice and reconciliation. The fact the Harabi Charter was a success was due to the role of King Idris al-Sanusi's spiritual authority rather than the easterns' tendency to forgive. Even this authority was not sufficient, as the need for legislative measures became clear four years after signing the

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1 Ibid.

2 Bughandura, Azza. 2020. "Al-Irth al-thaqāfī wa taḥqīq al-ʿadalat al-intiqālīa" (Trans. "Cultural Heritage and Transitional Justice"). *Research paper presented in the RoLLNAR project.* Benghazi: Centre for Law and Society Studies (to be published); Al-Obeidi, Amal. 2017. "Al-muṣālaḥa al-maḥallīa fī Lībīā: dirāsat istikshāfīa li-ʿamalīāt wa ālīāt al-muṣālaḥa al-taqlīdīa mundhu ʿām 2011" (Trans. "Local Reconciliation in Libya: An Exploratory Study of Traditional Reconciliation Operations and Mechanisms since 2011". *Unpublished paper*; Al-Obeidi, Amal. 2019. "Al-muṣālaḥa al-maḥallīa fī Lībīā, taqyīm ʿām" (Trans. "Local Reconciliation in Libya: A General Assessment). *Al-mufikra al-qānūnīa* 14: 46. Accessed online: https://www.legal-agenda.com/uploads/LA_TUNIS_ISSUE14_PRESS.pdf [last accessed: 22 May 2020].

3 Salim al-Owkali (Journalist and poet), Derna Focus Group, 25 December 2019; Jumaʿa Buzid (Judge), in-depth interview in al-Bayda, 22 January 2020.

4 Issam al-Maoui (Lawyer and former president of the National Council for Civil Liberties and Human Rights), in-depth interview, 21 January 2020

Charter. Indeed, the Tribal Dispute Adjudication Law (No. 15 of 1950) was put in place and ended all disputes related to paying blood money over killing or causing any bodily harm, or compensating damage resulting from pillage and plunder, and it sanctioned anyone who filed a complaint related to such disputes.[1] In addition, some discuss the appropriateness of the "forgiving and forgetting policy" that is expressed by the phrase *ḥaṭḥāt ʿala mā fāt*, as it had led, according to them, to denying people's rights.[2]

As for the local reconciliation agreements concluded since February 2011, they have only a limited impact. While they have proven instrumental in achieving peace on many occasions, their effect is limited and unsustainable as they do not address the roots of the conflict. An UNSMIL report on transitional justice stated that the outbreak of local conflicts in many parts of Libya reveals the need for a comprehensive approach to dealing with the past, and that while various delegations initiated conciliations on these conflicts, their initiatives fell short of addressing the roots of injustices based on recognition of rights.[3] Amal al-Obeidi conducted recently a study on local reconciliation agreements that showed that these agreements generally lacked reparation measures, except for those held under the auspices of international/external parties, and the reconciliation agreement between Misrata and Tawergha. Furthermore, while stipulating a comprehensive and lasting peace, these agreements did not specify its concept or the mechanisms necessary to achieve it.[4] As aforementioned, achieving this reconciliation is conditioned upon unveiling and addressing the roots of the conflict, which traditional leadership's approaches fall short of doing.

As for the legislative responses, those adopting amnesty did not claim to be based on domestic support. Both laws, Law 35/2012 and Law 6/2015, were not based on community consultations, and, as aforementioned, were not generally accepted.[5] The Supreme Council of Libyan Tribes and Cities, as previously mentioned, declared in the memorandum submitted to the ICC in the Saif al-Islam case that all parties had refused to engage in the reconciliation that Law 6/2015 allegedly made possible.[6] What matters in this context is that amnesty, as stipulated by

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1 Ibid.

2 Najat al-Arabi (Legal counselor to the Prime Minister in the Interim Government), in-depth interview, 26 January 2020; Ashraf al-Qataʿani (Human rights activist), Ajdabiya Focus Group, 14 January 2020.

3 UNSMIL. 2012. "Transitional Justice: Foundation for a New Libya." Accessed online: https://www.tawergha.org/docs/libya-unsmil-transitional-justice-foundation-for-a-new-libya.pdf [last accessed 22 June 2020].

4 Al-Obeidi, "Al-muṣālaḥa al-maḥallīa"

5 See supra 5.3.

6 See supra 5.3. It is noteworthy that some felt that Amnesty Law 6/2015 was greatly welcomed by tribes in the east of Libya (Issa al-Sughair (Deputy Minister of Justice in the Interim Government), al-Bayda Focus Group, 26 December 2020).

these laws, not only risks preventing criminal accountability and the ensuing punishment, but may also hinder revealing the truth, which is a basis for other transitional justice mechanisms such as reparation and institutional reform.

As for Transitional Justice Law 29/2013, it noted the important role traditional leaders play in achieving reconciliation. However, it treats it as a supportive role rather than a central one. The Law requires the Arbitration and Reconciliation Directorate, which is part of the FFRC, to communicate on a regular basis with the reconciliation committees and regional elders in order to restore national cohesion and achieve the preconditions for reconciliation between the regions (Article 8/6). It also allows the FFRC to seek the assistance of "tribal leaders and elders who are known for their active role in solving local disputes through customary methods (Article 16)."

3.9. Mandate of the national judiciary, shared or exclusive?

The question here revolves around the role of the national judiciary in addressing transitional justice violations. Does it have an exclusive mandate, or should it be shared with a fact-finding commission? If shared, could this commission have priority over it? Is it conceivable, or desirable, that an international court shares, or even, takes over this role?

As for the role of the national judiciary vis-à-vis the FFRC, the law is ambiguous, to say the least. This was not the case under Law 17/2012, as it provided for the choice between resorting to the judiciary or to the FFRC: "None of the provisions of this law shall prejudice the right of the victim or the representative thereof to seek judicial justice for the damage resulting from the violations committed against them, or prevent the Public Prosecution from filing a criminal action against the persons accused of such violations (Article 12)."

However, the issue became different with the enactment of Law 29/2013. On the one hand, the law is understood to give jurisdiction to the FFRC, and it is only when the Commission decides on the case or refers it to the judiciary that the latter can address it. As to al-Kuni Abuda, the *prima facie* meaning of this law's provision, despite its imprecise wording, the Commission has precedent jurisdiction, and it can decide to refer the case to the judiciary. The Commission can award compensations (Article 20), and it makes referrals to civil or criminal courts, or to arbitration, reconciliation and amnesty committees (Article 20).[1] Accordingly, the judiciary is required to stop adjudicating on any transitional justice grievances, and this is indeed what certain courts did regarding grievances related to real property.

However, some disagree with this interpretation. To them, the judiciary shares jurisdiction with the FFRC, hence, recourse can equally be made to each. According to Otman al-Kaf, a judge who worked with the FFRC, this is the position already upheld by some courts like the Misrata

[1] Abuda, "Naẓarat."

Court of Appeal. According to him, this position finds support in a Supreme Court ruling which states that the judiciary has shared jurisdiction with the specialized compensation committee vis-à-vis grievances caused by Law 4/1978 on Real Property. The issue, al-Kaf notes, is, however, far from settled, and judges are still debating it.

The dispute is certainly not merely theoretical - it has a dire impact on transitional justice grievances. If it is the FFRC that has a prior jurisdiction over the judiciary while it, as explained earlier, is still to be formed, this can result in denying victims justice: they can then neither turn to the FFRC nor to the judiciary. If, on the other hand, the jurisdiction is shared, a question arises as to the way it is shared: how, for instance, should courts deal with the FFRC's decisions and vice versa?

It is noteworthy that the transitional justice draft law prepared by the Ministry of Justice, which was the basis for Law 29/2013, was clearer in this regard. According to Article 11 of the draft, except for criminal articles, the person concerned may have recourse to the judiciary or the FFRC. If the dispute is submitted to the latter, the judiciary has to declare it inadmissible if it has not examined the case yet, or suspend the proceedings if the case is already brought before it. However, this provision, as the ICTJ rightly observed, did not clarify whether the judiciary was bound by the Commission's findings. A balanced solution, the ICTJ advised, would be for the judiciary to take into account the Commission's findings, but without being bound by it, as the judiciary should enjoy the right to adjudicate independently, and the victims should, as a general rule, be able to resort to the court if the Commission does not provide them with justice.[1]

The other question is whether it is appropriate that the national judiciary shares jurisdiction with international courts: the ICC or special tribunals. While the ICC has already been empowered by Security Council resolutions to address the crimes happening in Libya within its jurisdiction,[2] its role is only complementary to the role of the Libyan judiciary. It is only when the latter is unable or unwilling to adjudicate such crimes that the ICC assumes jurisdiction. So far, Libya has asserted its ability and willingness to try these crimes, but the question is whether that is appropriate.

It is worth noting that the debate on this issue, and the divergence of views about it, erupted early after the February Revolution. In September 2012, al-Hadi Buhamra published an article calling for expanding the ICC jurisdiction or forming a special tribunal to investigate and prosecute severe crimes in Libya. To him, it was unrealistic to expect the Libyan judiciary to function independently and impartially given the state's incompetency and the proliferation of

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1 ICTJ, "Taʿalīqāt"

2 UNSC. 2011. "Resolution 1970." *S/RES/1970*, dated 26 February 2011. Accessed online: https://www.undocs.org/S/RES/1970%20(2011) [last accessed 22 June 2020]. It imposes an arms embargo, a travel ban and an assets freeze in connection with the situation in Libya.

armed groups with different political and regional agendas. Al-Hadi sees as invalid the argument against resorting to an international judicial body based on the concept of sovereignty; establishing the state on a basis of justice warrants, in his opinion, such a recourse. Besides, resorting to an international court will be based on an agreement between the Libyan State and the UN, followed by a resolution from the UN Secretariat, as was the case with the Special Tribunal for the Rafiq Hariri case. This agreement will define the tribunal's jurisdiction, composition, and the applicable law. It can be formed of international and Libyan judges, but its prosecutor must be appointed by the UN Secretary-General.[1] This proposal seems to have been heeded by the then Minister of Justice, Salah al-Marghani, as a proposal for a mixed court was prepared and presented to the GNC in 2013. However, as Buhamra mentioned, "the process was resisted by influential people who thought they were targeted, and they succeeded in completely obstructing it in the GNC."[2]

Subsequent developments have revived the debate. For example, the ruling of the Tripoli Court of Appeal against defendants, including Saif al-Islam, provoked significant criticism in Libya and abroad. His death sentence *in absentia* was issued after sessions that did not meet the criteria for a fair trial, and gave reason to say that it was delivered under the influence of the powerful parties in Tripoli.[3] Meanwhile, the HoR enacted Law 6/2015 on Amnesty that the Ministry of Justice in the Interim Government relied on it to pardon Saif al-Islam for the crimes he was accused of.[4] If the only choice is total impunity or a trial before the ICC, some may prefer the latter.

Questioning the ability of the national judiciary to prosecute those responsible for severe, politically sensitive, crimes has resurfaced when the Tripoli Court of Appeal ruled the crimes related to the Abu Salim Massacre to be time-barred. Thus, the court refrained from considering the case despite its gravity; its hundreds of victims (estimated to be more than 1269 prisoners); its symbolism in the February Revolution; and the existence of Law 29/2013 (Article 27), which excludes it and its ilk from the statute of limitations. While Ahmed al-Jahani, a Professor of Criminal Law and Libya's representative to the ICC, was convinced of the ability of the national judiciary to

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1 "Al-qaḍāʾ al-dawalī ka-jizʾ min al-ḥal fī Lībīā" (Trans. International Jurisdiction as Part of the Solution in Libya." *Al-mufikrat al-qānūnīa*, 3 September 2012. Accessed online: https://www.legal-agenda.com/article.php?id=166 [last accessed 22 May 2020].

2 "Ārā hawl al-daʿawa ila tashkīl maḥkamat dawalīa khāṣa bi-Lībīā" (Trans. "Views on calling for the Formation of an International Court for Libya). *Al-Wasat*, 10 November 2017. Accessed online: http://alwasat.ly/news/libya/149053 [last accessed 22 May].

3 "Lībīā: aḥkām bi-iʿdām ʿala Saif al-Islam Gaddafi wa thamānīa musūlīn sābiqīn" (Trans. "Libya: Death sentences for Saif al-Islam Gaddafi and Eight Former Officials). *Al-Hurra*, 28 July 2015. Accessed online: https://www.alhurra.com/libya/ [last accessed 22 May 2020].

4 Al-Tashani, "Fawḍa al-ʿadālat al-intiqālīa."

address grave human rights violations,[1] this ruling prompted him to rethink his position and to consider establishing a criminal court for Libya similar to the Hariri Tribunal. This ruling, in his opinion, was the result of pressure exerted on the judges considering the affiliation of some of the accused to powerful tribes. This is also the reason, according to him, why the Supreme Court finds it difficult to assign judges to handle the appeal against this ruling.[2]

The views on the issue, however, are still far from uniform. There are those, especially judges, who adamantly reject resorting to other than the national judiciary. According to Saʿad Aquila, former justice of the Supreme Court, "calling for internationalization is inappropriate and offensive towards the country, it is enough that there is already a political internationalization."[3] Also, Hussayn al-Buaishi, former president of the SJC and Chairman of the FFRC, is "against the ICC and any mixed court, since no one knows the country and its people better than the Libyan people themselves."[4]

In contrast to these views, there are those who do not mind, and even prefer, resorting to international courts. Salah al-Marghani, a jurist and former Minister of Justice, believes that "it is time to consider establishing a special court like the Rwanda's tribunals to investigate and prosecute crimes against humanity and war crimes in Libya between 2011 and 2017."[5] This opinion was shared by Fadhil al-Amin, a member of the Political Dialogue Committee.[6] Issam al-Maoui, former president of the National Council for Public Liberties and Human Rights, argues that the Libyan judiciary is currently incapable in administering justice, and it would be better to resort

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1 Al-Jahani expressed this conviction in an interview with *al-Wasat* newspaper. He thinks that "the best solution for achieving criminal justice and limiting impunity (...) is to support the national judiciary and enable it to fully exercise its role, especially as it does not lack the human or professional resources needed to understand and interpret the law in order to achieve a fair and impartial trial in accordance with the international standards; and the ICC itself confirmed this. The problem lies in obstructing the Libyan judiciary from playing its role, because the obstacles that impede it are the same for any court, regardless of its type or name. While the Libyan judiciary does not lack the technical capability, its operational side is hampered." See: al-Husayni, Hamdi. 2017. "Ahmad al-Jahani li-al-Wasat: Al-janāʾīa al-dawalīa tanāzaʿ Lībīā fī ikhtiṣāṣihā wa titmisik bi-l-taḥqīq maʿa al-maṭlūbayn ḥaḍūrīan" (Trans. "Conflict of Competence over investigating the defendants in praesentia between the ICC and the Libyan judiciary"). *Al-Wasat*, 22 December 2017. Accessed online: http://alwasat.ly/news/libya/153061 [last accessed 22 May 2020].

2 Benghazi Focus Group, 18 January 2020. It is worth noting that some judges indicated that the court did not have any choice but pass this judgement, because it is bound by the provisions concerning the statute of limitations (and other provisions, such as the non-retroactivity of laws, especially the criminal ones). (Ali Abu Raas (Judge, Tripoli Court of Appeal), personal communication, 14 May 2020.

3 Benghazi Focus Group, 18 January 2020.

4 In-depth interview in Tripoli, 3 February 2020.

5 @SalahMtlc (30 October 2017). It is time to think about setting up a special court along the lines of the Rwanda courts to investigate and prosecute crimes against humanity and war crimes in Libya between 2011 and 2017. Twitter: https://twitter.com/SalahMtlc/status/925123408026681345 [last accessed 22 May 2020].

6 "Ārā hawl al-daʿawa ila tashkīl maḥkamat dawalīa khāṣa bi-Lībīā."

to a special criminal tribunal to be formed by the UN Security Council. Its provisions would be closer to justice, and Libyans will be expected to approve its composition.[1] Views such as these have been reiterated in interviews and focus groups in Benghazi, Tripoli, Ajdabiya and Derna, and some of them call for recognition of the ICC's jurisdiction, while others prefer to resort to a special tribunal for Libya. In the context of supporting the latter option, people like Bashir Zaʿabia, the editor-in-chief of *al-Wasat*, proposed to organize a campaign to collect signatures of the supporters of the initiative and present them to the relevant international bodies.[2]

It can be noted that the opinions expressed by officials of the parallel authorities went hand in hand with their political positions. The Minister of IDP Affairs of the GNA, Youssef Jalala, refuses to recognize the ICC's competence although he does not mind creating a mixed special tribunal.[3] As for the Deputy Minister of Justice of the Interim Government, Sahar Banoun, she is for the creation of special chambers for Libya within the ICC, specialized in violations committed by people residing outside Libya, hence beyond the reach of the Interim Government, such as Haitham al-Tajouri and Salah Badi. She does not expect Interpol to cooperate with the Interim Government to apprehend and extradite such people. However, she expresses a different opinion regarding the violations attributed to people whom the Interim Government is supposed to be able to apprehend, such as Mahmud al-Werfalli, an officer in the Libyan National Army.[4] She argues that the institution he is affiliated with has already opened an investigation, has held him in custody and will prosecute him.[5]

3.10. Existing transitional justice law - is it worth implementing?

Five years after enacting Law 29/2013 (enacted on 2 December 2013), most of its provisions still await implementation. The ongoing political crisis, of which the first signs appeared immediately following its enactment, has undoubtedly contributed to this, but so has the way the law is designed. Implementing the law is conditional upon the issuance of its executive regulation and the formation of the FFRC, and both tasks are assigned to the legislature. In assigning the legislature the task of issuing the executive regulation (Article 33), Law 29 is said to contravene the constitutional rule that such regulations, being executive, fall within the competence of the

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1 Issam al-Maoui (Former president of the National Council for Public Liberties and Human Rights), in-depth interview in al-Bayda, 21 January 2020.

2 Zaʿabia, Bashir. "Fikrat li-muzīd al-athrāʾ" (Trans. "An Idea to be developed"). *Facebook post*, 4 November 2017. Accessed online: https://www.facebook.com/bzabiya/posts/10155243065964576 [last accessed 22 May 2020].

3 Youssef Jalala, in-depth meeting in Tripoli, 23 December 2019.

4 The court has issued arrest warrants for him (15 August 2017 and 4 July 2018) on charges of war crimes. See: ICC. "Al-Werfalli Case: The Prosecutor v. Mahmoud Mustafa Busayf al-Werfalli." *ICC-01/11-01/*17, July 2018. Accessed online: https://www.icc-cpi.int/libya/al-werfalli [last accessed 22 June 2020].

5 Sahar Banun (Deputy Minister of Justice for Human Rights), in-depth interview in al-Bayda, 21 January 2020.

government (Article 26 of the Constitutional Declaration). The legislative assembly, the GNC and then its successor, the HoR, failed to issue this regulation or to form the FFRC.

To address this problem, the GNA's Ministry of Justice took an initiative aimed at implementing Law 29. It established a committee to prepare the draft executive regulation[1] and submitted it for issuance by the GNA.[2] This raises the question about whether it will be appropriate for the GNA to issue the regulation from a procedural, political, and substantive standpoint.

As for the question on the procedural soundness of the GNA issuing the regulation, a first possible answer is negative. It is the HoR, according to Law 29, that is competent to issue the regulation upon a proposal by the FFRC. Therefore, the government can neither prepare the draft nor issue it. Besides, issuing the regulation is not sufficient to enforce Law 29; the FFRC also needs to be formed, and this also falls within the competence of the HoR. Will the GNA also form the Commission if the HoR continues to abstain from forming it?

As for the drafting committee, and those within the GNA's Ministry of Justice, the initiative is legally sound. First, one of the governing principles (number 26) of the PA is to implement transitional justice and reconciliation mechanisms. Also, the issuance of executive regulations is an inherent competence of the government (Article 26 of the Constitutional Declaration). As such, Law 29's provision assigning this task to the legislature is unconstitutional. Anticipating a reply that takes the stance that matters of constitutionality should be decided only by the Supreme Court, the committee referred to the fact that the chamber within the Court entrusted with adjudicating claims of constitutionality is at present suspended. To wait for the chamber to resume work and decide on who actually has competence to issue the regulation is to prolong the suffering of the victims. Left with no option, the victims might then resort to violence or foreign courts or arbitration tribunals, thus threatening to inflict heavy losses on the state, like what happened in

[1] Al-Kuni Abuda (Law Professor at the University of Tripoli). The committee included Ali Abu Raas and Otman al-Kaf among its members, both judges at the Court of Appeal in Tripoli. The American Bar Association (ABA) organized a roundtable on 19-20 February 2020, to discuss the draft regulations prepared by the committee. This part of the report refers to the discussions between the members of the committee and the experts who attended this meeting.

[2] On the other hand, it seems that the approach of the Interim Government regarding national reconciliation and transitional justice goes beyond Law 29/2013. Its approach is derived from a vision that tolerates the supporters of the former regime, which is attested by a return of these displaced supporters from Egypt. The Minister of Foreign Affairs of the Interim Government, Hadi al-Hwij, has also taken the initiative to develop a vision for national reconciliation. To this end, he has entrusted Ashur Burashed, an advisor to the Ministry, with writing a strategic plan for this vision. The latter has composed a committee of jurists and others with the aims of developing a draft law for transitional justice to be submitted to the HoR along with a charter defining the foundations and principles of national reconciliation. The committee held its first meeting on 22 April 2020 (Jazia Shayteer (Committee member), written statement, 16 May 2020).

the Hanna Case in which an Egyptian court issued a ruling obliging the Libyan government to pay $261 million.[1]

Even if the GNA has the competence to issue the executive regulation, the question remains whether it would be appropriate, from a political perspective, to do so. The GNA has control only over a part of the country; therefore, its actions (including issuing the regulation) will not be recognized in areas where the GNA has no control. The committee argued that the part under the GNA's control, which includes the capital Tripoli, is home to around two thirds of the population. Its population includes many victims of transitional justice violations such as those related to real property. This is good enough, according to the committee, to justify issuing the regulation, hence implementing the law. However, a possible counterargument is that many other victims live in areas beyond the area of control of the GNA. Moreover, it is possible that courts within the GNA area can object, on legal grounds, to recognizing its mandate to issue the regulation. Courts in Tripoli refused in more than one occasion to recognize laws that the GNC enacted after 2014, and treating the GNA's legally questionable executive regulation in the same way is perfectly possible. Furthermore, the GNA's issuance of this regulation, in an ostensible contravention of Law 29, can worsen the political rift.

Even when assuming that the procedural and political hurdles that might be overcome, another important question is whether issuing the regulation is substantively sound. This is because Law 29 is flawed in many respects, and it may be better to replace it with a new law instead of enforcing it. Besides, since its enactment in 2013, many laws related to transitional justice have been enacted and have abrogated some of the essential provisions therein, thus emptying them of their essence.

The drafting committee acknowledges that Law 29 is in several aspects flawed. It unjustifiably distinguishes between human rights violations according to the perpetrator, and several provisions suffer substantive and formal irregularities. Still, the committee argues that it sought, through the draft regulation, to address these flaws where possible. They admitted that the matter is arduous because the regulation enforces the law and therefore is bound by its provisions.

The committee acknowledges also that laws subsequent to Law 29 have abrogated and/or amended several of its important provisions. For example, Law 6/2015 on Amnesty precluded to hold a large number of perpetrators criminally accountable while Law 16/2015 and 20/2015 on real property drew a specific path in addressing the violations of this right. Nevertheless, the committee considers that the Amnesty Law does not prevent other transitional justice mechanisms even with regard to the violations this law encompasses. Fact-finding and reparation

[1] "Maṣdar: maḥkamat al-naqaḍ tistishaʿra al-ḥaraj fī al-ṭuʿun al-Lībī ʿala taʿawiḍāt ʿāʾilat ʻḥannā'" (Trans. "The Court of Cassation feels embarrassed about the Libyan Appeal against the Hanna Family Compensation"). *Al-Wasat*, 29 August 2019. Accessed online: http://alwasat.ly/news/libya/255764 [last accessed 22 May 2020].

are still possible, if not obligatory. As for the real property laws, the committee questions their legal character for they were enacted by the GNC after the election of the HoR. Even if they were deemed to be valid as laws when the GNC enacted them, the HoR abrogated, via Law 1/2020, all the laws that the GNC enacted after August 2014.[1] Most importantly, the committee considers that the situation in Libya requires the enforcement of the largest possible number of transitional justice provisions. What cannot be completely attained should not be completely left, as the Arabic proverb goes.

In this respect, addressing the infringements related to real property is of paramount importance. If the draft regulation is issued, it will ensure the revival of committees in charge of the compensation for such violations. This time, they will perform their work within the framework set by Law 29 rather than that defined by the resolution of the GNA in 2018, i.e., Resolutions 684 and 1599. These resolutions, as earlier mentioned, discriminate in favour of the victims of Law 4/1978 on real property. When addressed within the Law 29's framework, these victims will be treated similar to other transitional justice victims. Reparations offered will not be limited to monetary compensation and this compensation, when awarded, needs not be complete.

Reviewing the draft regulation reveals that the committee made a remarkable effort to rectify the flaws of Law 29. However, the variation, in a number of cases, between the draft regulation and the law cannot be legally justified, given that the former has, being an executive regulation, to adhere to the latter. For example, Article 1a of the draft regulation defines gross violations of human rights in contravention of Article 2 of Law 29. Contrary to the latter, the regulation drops the description "systematic". Unlike the law, it also does not require the violation to be politically motivated. In addition, it includes the nationalization of funds among transitional justice violations. In the same vein, when defining missing persons, Article 1g of the draft regulation requires the act of missing to be politically motivated. In this, the draft conforms to what Law 29 requires. Yet, the draft limits this requirement to the cases of missing persons under the former regime rather than being applicable to these cases and others occurring during or after the February Revolution. Similarly, Article 4 of the draft organizes the Commission's directorates in somehow a different manner from Article 8 of the Law. Besides, Article 5 of the draft grants the Commission's governing board the competence of preparing and presenting the Commission's draft budget to the legislative authorities, whereas Article 13 of the Law provides that this budget must be presented first to the Council of Ministers before the approval of the legislature.

If anything, the previous debate shows how difficult it is to decide whether it is appropriate to issue the executive regulation of Law 29. Weighing the option of getting the regulation issued by the GNA against the alternative, i.e., maintaining the status quo and hoping to have an

[1] Law 1/2020, dated 15 January 2020, abrogated all the laws and decisions issued by the GNC after the end of its mandate.

alternative law overcoming Law 29's flaws, it seems that the merits of issuing the regulation outwork its defects. This can result in enforcing a significant part of the Law such as that related to real property violations as well as truth telling and reparation with respect to other infringements in which the Amnesty laws have precluded criminal accountability. Besides, it may lead to bringing transitional justice again to the interest of policy makers and the public opinion and may engender other steps culminating in the enactment of a better new law on transitional justice.

4. Transitional justice's contexts and issues: a summary

Transitional justice constitutes one of five major areas of contestation in today's Libya with the others being national identity, national governance, decentralization and security forces. Such contestations are the root causes of the political crisis that Libya has witnessed since the second half of 2014. As such, any attempt to end this crisis has to take these contestations and the efforts aimed at addressing them into account, in order to lead to sustainable national reconciliation. Law is key amongst the efforts exerted to address transitional justice and the other major areas of contention. The transitional authorities in post-Gaddafi era have introduced a large body of legislation addressing, directly and indirectly, major disagreements over transitional justice. The question is whether they have achieved any success, and if not, what needs to be done.

For a better understanding of the ten issues of transitional justice and an accurate assessment of the legislative responses given to them, the report examined their socio-cultural, historical, and politico-legal contexts (see 4.1.). It then proceeded to address ten issues it identified as the key transitional justice controversies in Libya (see 4.2.).

4.1. Context and conditions matter

To understand transitional justice issues, it is important to understand their historical and politico-legal contexts as well as their socio-cultural conditions.

In regards to historical context, the report discussed the merit of initiatives the Gaddafi regime took in the 2000s to address human rights violations caused to, e.g., political prisoners, former owners of real property, and members of ethnic minorities forbidden from using their own language and given names. While not entirely dismissing these initiatives and the redress they provided, the report affirmed a widely held conviction that they were largely limited. They involved no explicit admission of guilt, but rather an attempt to purchase the victims' acceptance and silence.

As for the politico-legal context, the report detected that in the aftermath of February 2011, in the early years of 2011-2014, a revolutionary fervour manifested in legislation that, while targeting the former regime's atrocities and those responsible for them, overlooked violations committed by revolutionaries. Later years, 2014 - present, have seen a political split into, on the

one hand, the HoR in the east increasingly becoming more sympathetic to the former regime's loyalists, and on the other, the GNC/HSC and GNA in the west acting to various degrees as protectors of the February Revolution. That is why these bodies enacted different, and not infrequently contradictory, legislative responses to transitional justice issues.

The politico-legal context distinguishes Libya's transitional justice experience from other comparative, variably successful, experiences, such as those of Colombia and South Africa. In these experiences, there was already a transition from post-conflict or post-dictatorship while Libya is not there yet. The conflict is still ongoing, and Gaddafi's dictatorship has not yet given way to a stable democratic state. On the contrary, the ongoing conflict shows repressive tendencies among those vying for power. Other countries were no longer divided and had a transitional justice project based on a social contract, whether in the form of a peace agreement, like in Colombia, or a new constitution as in South Africa. Libya, however, has become politically divided and the constitution making process once envisaged to yield a social contract faces huge difficulties. This raises the question whether the necessary pre-conditions for transitional justice exist in Libya and if the earlier efforts can be picked up again, or rather, a new start is needed once the time is right. In answering this important question, the report, while acknowledging the immense challenges facing Libya's transitional justice process, saw the merit of the already existing efforts and argued that they can be built upon (see 4.3.).

As for the socio-cultural conditions, the report argues that for the success of transitional justice efforts, values such as forgiveness and favouring the common good over one's self-interest are needed. It acknowledged that, while it can be hard for victims to forgive, good national role models can provide an inspiration. The question is whether, and to what extent, such values are present in Libyan society. This question is addressed when discussing the issue of cultural specificity (see 3.8).

4.2. Ten controversial issues

4.2.1. The first issue focuses on the question whether transitional justice rather than regular justice is seen by Libyans as justifiable. As the interviews and FGDs showed, there are two positions. The first rejects transitional justice for it sees justice as one, and so it cannot be divided into regular and transitional. In addition, it is argued that transitional justice can worsen the already existing social rift. Moreover, transitional justice can be costly. Finally, it violates long established principles such as non-retrospectivity of laws especially criminal ones (unless favourable to the accused, which is not the case with transitional justice laws), prescription, *res judicata* or claim preclusion. The second position deems transitional justice necessary because it enables acknowledging and addressing the suffering of the victims in ways unattainable by regular justice. Importantly, transitional justice, by revealing the truth behind human rights violations, especially their root causes, enables the introduction of measures aimed at preventing the

reoccurrence of such violations. As such, transitional justice is a prerequisite for sustainable reconciliation and peace. While all transitional authorities-NTC, GNC, HoR, GNA- have opted, as reflected in their legislative responses, for this position, they have approached transitional justice issues differently (see below).

4.2.2. The second issue concerns the feasibility of transitional justice given Libya's political present bifurcation and armed conflicts. Two positions are held. The first, while acknowledging the need for transitional justice, questions its feasibility for the time being. Transitional justice presupposes ending the bifurcation, which is not yet the case in Libya. The ongoing conflict has debilitated already weak state institutions rendering them unable to enforce whatever transitional justice legislation is introduced. The conflict involves parties who, because of their vested interests, would like to halt transitional justice as they might be targeted by its mechanisms; hence, they will ensure that transitional justice is either not introduced or not enforced. Thus, realistically speaking, the conflict needs to end before embarking on transitional justice. The second position calls for immediate implementation of transitional justice because it is a precondition to permanent peace. It is only when the truth is unveiled about the human rights violations - those responsible and the immediate and deeper causes behind them - that proper redress, including measures aimed at preventing reoccurrence, becomes possible. Besides, awaiting the end of the conflict would fuel old and new conflicts and lead to a further increase of unaddressed violations. Recourse to regular justice mechanisms can prove pointless and even counterproductive as the recent ruling by the Tripoli Appellate Court on the 1996 Abu Salim Massacre shows. The Court effectively acquitted those accused of murdering more than 1,200 political prisoners in cold blood, based on the expiry of the statute of limitations. Libya's transitional governments opted for the second position, not only prior to the 2014 political bifurcation but also following it as evidenced by the introduced transitional justice legislation. The GNA, in particular, is currently contemplating enacting the executive regulation needed to implement Law 29/2013 on transitional justice (see below).

4.2.3. The third issue is about which human rights violations should be targeted, timewise and substance-wise. Diverse positions exist. For some, there should be no timeframe - all injustices deserve redress. Others see the effect the violation at hand has on reconciliation, rather than the time when it occurred, as the sole criterion for being included under transitional justice. A third position restricts the coverage of transitional justice to Gaddafi era violations: 1969-2011. A fourth one adds to those violations those committed, in the aftermath of February 2011. A fifth position sets the beginning during the Monarchy era (1951-1969), for that period also witnessed violations such as banning political parties and imprisoning people for their political opinions. A sixth position goes even further to include the Italian occupation era (1911-1943), since that is needed for addressing violations such as those related to real property. This position's argument is that people then were granted titles as a reward for collaborating with the colonizer; therefore, they should

not be entitled to compensation or restitution if the property became subject to ownership restriction such as those Gaddafi regime imposed, e.g., Law 4/1978. A seventh position calls for limiting the scope of transitional justice to the aftermath of February 2011. Previous violations, it says, were already addressed. Besides, such a limitation is the appropriate way to deal with Islamists who, while they were indeed victims of the Gaddafi regime, became the torturers in its aftermath.

Law 29/2013 on transitional justice opted for a timeframe extending from 1 September 1969, when Gaddafi came to power, until the end of the post-2011 transitional period. Violations under both the Gaddafi era and the subsequent one are thus included. Yet, the law qualifies its application to the latter. Besides, there are indications that limiting its scope to systematic violations was meant to exclude violations committed by revolutionaries.

The report finds the position enshrined in Law 29/2013 with regard to the timeframe appropriate. Yet, its position concerning the type of violations covered is problematic. A better way would perhaps regard what the International Centre for Transitional Justice (ICTJ) once advised the GNC: to include violations to international humanitarian law (IHL) and international human rights law (IHRL) and leave it to the FFRC to decide on its priorities. It could, for example, focus on the most severe atrocities such as those violating on the right to life.

4.2.4. The fourth issue concerns fact-finding or 'forgetting', and here too, two positions emerged. The first calls for drawing a veil over what happened so that wounds are not reopened. In support of this argument, history is invoked. This is exactly what the forefathers did in 1946 via the Harabi Covenant, which King Idris encouraged and later endorsed as a permanent policy of forgetting towards past violations. This is expressed in the famous saying "*ḥathāt ʿala mā fāt",* "let bygones be bygones," which means, figuratively, 'let's forget the past atrocities.' This covenant proved instrumental in the struggle for Libya's independence and construction.

Conversely, the second position sees truth finding as essential for addressing injustices, holding perpetrators accountable, repairing the victims' damage and reforming institutions. In this view, the success of the Harabi Covenant was only due to, then, Prince Idris' religious and moral influence rather than people's, inherent, forgiving nature. No such a figure exists today. Some even question the success of the Covenant and the following policy of forgetting, since it resulted in depriving people of their rights. As for the legislative responses, the report concluded that while Law 29/2013 has opted for truth-finding and established a commission to this end, amnesty laws (Law 35/2012, Law 38/2012 and Law 6/2015, see below) greatly limited such a mandate; these laws did not only exempt perpetrators from criminal accountability but did so in a way rendering fact finding hardly possible.

The report deemed fact-finding necessary for it constitutes the basis for transitional justice, hence it praises Law 29/2013's position on the issue. As explained below (4.2.5), while

amnesty can be an effective tool of transitional justice, it should not come at the expense of fact-finding.

4.2.5. The fifth issue is about amnesty. While there exists a position that sees amnesty as the way towards reconciliation and peace, there is another that perceives it, at least in the way implemented in Libya, as a denial of justice to the victims. In 2012, the National Transitional Council (NTC) introduced legislation aimed at granting amnesty to the revolutionaries and denying it to Gaddafi loyalists (Law 35/2012 and Law 38/2012). In contrast, three years later, the HoR introduced amnesty legislation explicitly aimed at the latter (Law 6/2015). Even Saif al-Islam who is wanted by the ICC for crimes against humanity is said to benefit from this law. While realizing that amnesty is a transitional justice mechanism, the report argued that it should not come at the expense of other mechanisms. The laws introduced obstructed fact-finding, which is a prerequisite for reparation and institutional reform. Law 6/2015 in particular is said to grant amnesty for serious human rights violations such as those tried before the ICC; this is at least what the defence team of Saif al-Islam recently tried to advocate. The report argues that such impunity should not be accepted.

4.2.6. The sixth issue concerns reparation. Two broad positions are recorded. The first rejects repairing any damage. Everyone, not only the victims of specific human rights violations, suffered, and there is no basis for favouring the latter; besides, reparation programs will exhaust state resources. The second position argues in favour of reparations, but opinions here differ over whose damage is to be repaired, to which extent, and how. While transitional justice laws and regulations established for reparation, their approaches differ in a way that resulted in discrimination between victims. Also, while some of them got implemented, e.g., Law 50/2012 on Compensating Political Prisoners, others are not yet, notably, Law 29/2013 on transitional justice. Not all political prisoners received compensation - only Islamists, it is claimed. One aspect transitional justice laws and regulations share, is an excessive focus on monetary compensation. Understandably, many feared that this could result in draining the state resources. Such fear could explain a recent ruling, issued on 14 January 2020, in which the Supreme Court decided that the state cannot be held liable for compensating damage caused by events such as the February Revolution, Operation Libya Dawn or the ongoing armed conflict. However, Law 29/2013, which the Court did not mention at all, explicitly, deems the state liable for reparation in transitional justice cases. It does so in a praiseworthy way by diversifying and limiting it; when monetary compensation is provided for, the law sets a limit on what can be paid. However, such provisions are ineffective because, first, they still await implementation and, second, other legislation has regulated transitional justice reparation differently.

4.2.7. The seventh issue regards institutional reform. Both the interviewees and the legislation seem to equate institutional reform with isolating persons associated with the former regime from

power. Understood this way, isolation according to some should apply only to policy makers rather than those who only implement policies. Others argue that isolation should be based on one's behaviour rather than one's position. As for Law 29/2013, the GNC left out an entire chapter devoted to institutional reform. It was felt, well-informed persons explained, that Law 13/2013 on Administrative and Political Isolation would be sufficient. The latter adopted a radical approach by isolating a great many of those who served under Gaddafi, presuming they are loyalists, *azlam*. As it was largely based on their positions rather than their actual conduct, the law eliminated many experienced politicians who had supported the 2011 Revolution. Hence this law received wide condemnation. So the HoR enacted Law 2/2015 that abolished Law 13/2013. Though the HoR's laws are not always recognized in the west of the country, especially those enacted prior to the 2015 PA, Law 13/2013 has there been effectively abolished as could been seen from the presence of Gaddafi regime ministers (e.g., Foreign Affairs, Planning) in the GNA. Abandoning Law 13/2013 and its approach, the report concluded, is a step in the right direction: one's conduct rather than affiliation should be the basis for isolation. Besides, attention needs to be paid to other aspects of institutional reform, e.g., restructuring institutions to promote integrity and legitimacy, establishing oversight bodies, reforming legal frameworks, training public officials and employees on human rights standards.

4.2.8. The eighth issue is whether Libya has a cultural specificity, one that is supportive of forgiveness as a means to reconciliation, and in which traditional leaders can play an important role. If so, such a specificity ought to be considered when assessing existing transitional justice mechanisms and/or devising new ones. To some, the answer is affirmative. They argue that in the past and present political practice has shown instances of forgiving and reconciliation; the 1946 Harabi Covenant and the numerous reconciliation agreements concluded since 2011 bear testimony to that. Others disagree. They dismiss the merit and feasibility of the Harabi Covenant (see 4.2.4). As for post-February 2011 reconciliation agreements, they have indeed been instrumental in maintaining provisional social peace, but they often stop short of tackling root causes of conflicts. Thus, their results may be unsustainable in the long run. Law 29/2013 recognizes the importance of local heritage and the role of traditional leaders; it makes it optional for the FFRC to solicit the assistance of traditional leaders known for their effective role in solving local conflicts via customary methods.

4.2.9. The ninth issue is whether the national judiciary should have an exclusive mandate to address transitional justice violations or if other bodies could also be involved, such as a national commission for fact-finding and reconciliation, an international body such as the ICC, or a special mixed tribunal. As for sharing the mandate with national institutions, the report recorded different opinions prompted by Law 29/2013's vague provisions on the issue. These provisions could be read as giving precedence to the FFRC over courts in addressing transitional justice cases; it is only when the FFRC decides to refer matters to courts that these can adjudicate them. Law 29/2013 is

silent though on how, once the FFRC exhausted its jurisdiction, courts are to deal with the Commission's decisions. In another reading of the provisions, recourse can equally be made to the FFRC or courts. The Misrata Court of Appeal opted for this view. While courts should always be able to adjudicate matters related to transitional justice, important questions need to be addressed: will they apply transitional justice laws such as Law 29? The Supreme Court ruling mentioned earlier, (see 4.2.6), as well as the Tripoli Appellate Court's ruling in Abu Salim Massacre, (see 4.2.2), show that these courts overlooked this law. If they apply it, as they should, do they have the capacity needed to deal with transitional justice cases? As of now, judges are only trained to address regular justice issues. When transitional justice laws and regulations are overlooked, the alternative will be laws and regulations unfit for transitional justice. Against this backdrop it is unsurprising that the Tripoli Appellate Court effectively acquitted persons accused of murdering more than 1,200 political prisoners due the expiry of statute of limitations.

As for resorting to international court(s), in addition to or instead of, the national judiciary, opinions differ. Especially judges find that the national judiciary has an exclusive mandate to address transitional justice cases. However, prompted by recent rulings this judiciary made, notably, the Abu Salim ruling and the older ruling in the case of Saif al-Islam, there is growing support for resorting to international courts. While acknowledging this increased acceptance within the legal community in Libya of this option, the report notes that such a step still requires more scrutiny and a careful assessment of pros and cons.

4.2.10. The tenth issue concerns how to assess the steps taken by the GNA in 2019/2020 to instrumentalise Law 29/2013 by issuing the required executive regulation and then forming the FFRC. The GNA's Ministry of Justice has already prepared a draft for the executive regulation that is being considered by the GNA. Such a move raises, first, a question on whether the GNA can, legally speaking, issue the regulation. According to Law 29/2013, it is the HoR that is entrusted with this task. Also, given that Law 29/2013 suffers major drawbacks, is it wise to instrumentalise it now? The executive regulation, being only executive, cannot 'fix' these drawbacks. Additionally, if the GNA indeed issues the regulation, it will be confined to the area where the GNA is recognized. On the other hand, as the drafting committee members argue, implementing Law 29, despite its drawbacks, still has its merit. The law, first, has many sound provisions, such as those addressing real property grievances, and while the GNA does not control the entire country, its area of control, which includes the capital Tripoli, is home to around two thirds of the population. A considerable number of transitional justice grievances occurred there, e.g., Law 4/1978 grievances about confiscated property. Besides, instrumentalising the law could bring, once more, attention to transitional justice and be an initial step leading to a new, better, transitional justice law.

It is evident that each of these issues has raised disputes and rivalries, the severity of which may vary, but all remain in need of political and social compromises. The fact that transitional justice in Libya is highly complex should not result in standing by idly, but should rather encourage us to accelerate its application. Our research can safely confirm that there is consensus, albeit not total agreement, that transitional justice is an inevitable option, and that the main societal polarization is not about the necessity of its application, but rather about how best this application can accommodate for circumstantial and cultural specificities.

5. Transitional justice's challenges and opportunities: concluding remarks

The report highlights major challenges facing the implementation of transitional justice in Libya some of which can turn into opportunities if dealt with appropriately.

5.1. The first challenge is the absence of effective state institutions. The state has a key role in any effort to unveil the truth of human rights violations, holding perpetrators accountable, repairing victims' damage and reforming institutions. Hence, for the success of the transitional justice process it is necessary to have effective state institutions, and therefore to end their current divide. But this does not mean that, until then, everything is to be put on hold.

5.2. The existing transitional justice laws and regulations constitute another challenge. While there are many, they do not depart from a unified vision, lack societal support, and are used as a tool to antagonize political opponents. As a result, there exists a problematic distinction between them regarding perpetrators (e.g., Gaddafi loyalists or 2011 revolutionaries), victims (e.g., political prisoners and other victims on both sides) and institutions (the FFRC and special committees).

Yet, these laws and regulations can also constitute a reliable asset, and herein lies the opportunity. It is true that Law 29/2013 is marred by several faults, the most prominent of which is its focus on certain categories of perpetrators and its overthrow of the institutional reform mechanism. Still, the law contains provisions that can be of great help when conducting the transitional justice process. It provides a basis for transitional justice, creates a Fact-Finding and Reconciliation Commission (FFRC), diversifies reparations, and removes the statute of limitations obstacle in order to hold perpetrators of serious human rights violations accountable. Although important provisions, notably those concerning the formation of the FFRC and the issuance of an executive regulation, still await implementation, steps have already been taken in this regard. Although it suspended its activities, the Fact-Finding Commission formed in accordance with Law 17/2012 is still in place, and proposals have been made to reconfigure it. Also, a draft of an executive regulation has already been prepared, as mentioned above. It might be preferable to build on these efforts to implement Law 29/2013.

Admittedly, implementing Law 29/2013 will not be the ideal solution, given its faults, and the fact that it is not, currently, the sole law regulating transitional justice. Thus, it is necessary to also amend it so that its drawbacks are addressed. Moreover, other parallel transitional justice

legislation should be abolished. In the present political context, either course of action might not yet be feasible or even currently preferable. Still, implementing the law remains a worthwhile step as it will help address urgent disputes; for example, those related to real property. It will also help to begin uncovering the truth and provide reparations for other violations provided that this has not been made impossible by the amnesty laws. Moreover, such a step might result in reviving the debate on transitional justice amongst both policymakers, law-makers, and the general public, and lead to other steps towards enacting a new, better, transitional justice law.

5.3. On a relevant note, establishing a mixed special court to try those responsible for grave human rights violations may provide a substitute for a purely national judiciary. Some court rulings, such as those issued against Saif al-Islam Gaddafi and those accused in the Abu Salim massacre, have put into question the national judiciary's ability to address such violations. While there is increased acceptance within the legal community in Libya of this option, such a step still requires more scrutiny and a careful assessment of pros and cons.

5.4. Ideally, addressing the problems surrounding the current framework of transitional justice should start from the prospective constitution. For Libya, getting its constitution up and running, however, has proved to be a huge political challenge. Having said that, the 2014-2017 constitution making process, despite its drawbacks, has resulted in several drafts, the latest of which, announced in July 2017, is quite credible in its approach to transitional justice. As such, continuation of this process would create an opportunity for transitional justice. The 2017 draft enshrines the principle of transitional justice and obliges the state to enact a transitional justice law that regulates fact-finding, reparation, criminal accountability and institutional reform. Adopting these constitutional provisions would thus provide the needed transitional justice legal base, overcome legal obstacles such as the non-retroactivity of laws, especially criminal ones, the statute of limitations, and problematic amnesty laws. Also, given that a constitution needs to be approved in a public referendum, the constitution making process can provide an opportunity for societal participation in setting the foundations of transitional justice. If people reject the draft, it may be modified to satisfy them. But for voting to be prudent, there is need to address another challenge, i.e., poor social awareness, which, as explained below, is a key challenge.

5.5. If indeed the draft constitution is adopted as the constitution, there will be a need to translate its principles into detailed provisions. A new, or thoroughly revised, transitional justice law will thus be needed. It will be important, then, to draw guidance from both Libya's own experience and other international experiences. In assessing which aspects of these experiences are worthy of upholding, guidelines developed by international organizations, especially the UN's, can provide a reference. For example, our report highlighted that revealing the truth is a right of victims, and that domestic claims for amnesty should not lead to ignoring this right, nor to impunity for grave human rights violations. Such guiding principles can also provide a framework

for reparations: what types, to what extent, how to strike a balance between various interests, private as well as public. The prospective law should build, when addressing institutional reform, not only on the guidelines and comparative experiences, but also on Libya's painful experience of excluding (in Libyan jargon 'isolating') political and administrative office-bearers. Accordingly, it should not limit institutional reform to such exclusion (isolation), and it should exclude people based only on their individual behaviour rather than their belonging to a certain political or administrative category.

5.6. While securing a better legal framework for transitional justice in the constitution and ordinary legislation is essential, it is not enough. It is important also to address the challenge of poor social awareness of transitional justice. The report shows that the general public and many of the leaders in the political and media landscape know too little about transitional justice's goals, mechanisms and measures.

Perhaps the response to the challenge of social awareness is an appropriate approach to addressing transitional justice issues and other transitional justice challenges in Libya. In this regard, it would be useful to start awareness campaigns led by civil society organizations and research centres, presenting transitional justice's global experiences and lessons, and national transitional justice issues in an accessible manner to the general public. The campaigns should aim at clarifying the underlying values, and the legal and socio-political dimensions of transitional justice, notably its importance for building the nation. It should also uncover transitional justice issues, positions taken on them and the rationale employed to enact such positions in legislation. As such, these campaigns will facilitate an informed national dialogue and enable taking positions informed by solid knowledge instead of raw emotions or polarizing ideology. This report can be considered a step in this endeavour and should be presented and discussed via various media to assist various segments and groups of society in forming informed views and positions on transitional justice issues. Such views should then feed into the debate on whether to reform the existing transitional justice legislation, and how, or enact new legislation, and how. This will help to develop a sense of ownership of the transitional justice project and give Libyans an incentive to actively participate in its implementation.

5.7. Emphasizing the uniqueness of the Libyan transitional justice experience may present an opportunity for the actualization of the transitional justice process. To achieve this, it is necessary to highlight the specificity granted by local heritage: religion and custom, and concordances and charters, ancient and present, built thereon. It is also necessary to hold dialogues between various experts and actors to identify which transitional justice mechanisms suits Libya's experience the best. This can help create a sense of national ownership of the transitional justice process and encourage different segments of society to participate in its success.

5.8. Any success in addressing the challenge of poor social awareness will help address other challenges too. For instance, media often play a destructive role in Libya's crisis, e.g., inciting violence and promoting hate speech. If citizens are more aware of its detrimental nature, such destructive roles can be countered. This in turn can heighten the chances for a successful transitional justice process. It is perhaps fortunate that many Libyans have now become more aware of the fact that certain satellite channels have divisive agendas that only serve the entities/countries sponsoring them. Therefore, besides adopting a transitional justice process, attention should be given to an upbringing based on values supportive of transitional justice as a real, fundamental, and lasting solution, albeit a long term one.

5.9. Related to the development of social awareness is the revival of the national memory, which some consider one of the goals of transitional justice, while others consider it one of its mechanisms. It is true that there is polarization in society about the identity of the people most worthy of being commemorated, but it may be possible to honour the victims thought to be worthy of commemoration in each region, for example, by planting trees named after them, in the city or village in which the person was born or lost, or in the prison where they passed away. This will serve to satisfy justice, psychological, environmental, and even aesthetic needs. It is imperative that the various segments of society contribute to financing such projects, either by making payments, allocating agricultural land, securing shrubs, or erecting monuments, so that they can tell the stories of these victims for generations to come, and give them another life that perpetuates their memory and perpetuates the gratitude of their fellow citizens for their sacrifices.

5.10. Lastly, it is important to emphasize that, while adopting measures to address the aforementioned challenges, attention should also be paid to the reasons that compelled us to apply transitional justice in the first place. After the issuance of fatwas legitimizing terrorism and exhuming shrines and graves, and after the failure of political elites and social leaders to reach permanent settlements, and after the outbreak of wars in which internationally prohibited weapons were used, and after nearly a decade of grave human rights violations resulting in hundreds of thousands of widows, orphans, IDPs and refugees, it is of paramount importance to address the prevailing values that allowed all that to happen. In the end, it is undoubtedly the society's value system that constitutes the real test of any envisaged transitional justice process: its legitimacy, suitability, chances of success.