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## CONFLICT CONSTITUTION-MAKING IN LIBYA AND YEMEN

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## 1. INTRODUCTION

Following the Arab Spring protests in the Middle East and North Africa that spread in 2011, the completion of new constitutions became a hallmark of the political transitions in those countries—Egypt, Tunisia, Libya and Yemen—where authoritarian leaders were toppled. The Arab Spring uprisings began in late December 2010, when Mohamed Bouazizi, a fruit vendor in Tunisia set himself on fire to protest his mistreatment by Tunisian authorities.<sup>1</sup> His action was a flashpoint for longstanding grievances that people within the Middle East and North African (MENA) region held against their governments. In response, protests spread throughout the MENA region. Protesters demanded the removal of authoritarian regimes and economic, democratic, and human rights reforms.<sup>2</sup> The protests led to the toppling of authoritarian leaders in Egypt and Tunisia. As part of their political transitions, Egypt and Tunisia completed new constitutions in 2014, refining their internal social compacts between the citizen and the state. The constitution-making processes unfolded in each country quite differently. In Tunisia, the constitutional re-calibration was broadly participatory and transparent which augured well for constitutional legitimacy and democratic advance, whereas in Egypt the re-calibration was exclusive and closed, risking illegitimacy and a continued lack of accountability for state actors.<sup>3</sup> In Libya and Yemen, the political transitions

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<sup>1</sup> Marc Fisher, *In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World*, WASH. POST (Mar. 26, 2011), [https://www.washingtonpost.com/world/in-tunisia-act-of-one-fruit-vendor-sparks-wave-of-revolution-through-arab-world/2011/03/16/AFjfsueB\\_story.html](https://www.washingtonpost.com/world/in-tunisia-act-of-one-fruit-vendor-sparks-wave-of-revolution-through-arab-world/2011/03/16/AFjfsueB_story.html) [<https://perma.cc/M5XT-JGW9>].

<sup>2</sup> For an overview of the Arab Spring protests, see generally Katerina Dalacoura, *The 2011 Uprisings in the Arab Middle East: Political Change and Geopolitical Implications*, 88 INT'L AFF. 63 (2012).

<sup>3</sup> See generally Darin E.W. Johnson, *Beyond Constituent Assemblies and Referenda: Assessing the Legitimacy of the Arab Spring Constitutions in Egypt and Tunisia*, 50 WAKE FOREST L. REV. 1007 (2015) (highlighting the differences in constitution-making processes resulting from the Arab Spring between Egypt and Tunisia).

heralded by the Arab Spring devolved into civil wars that are ongoing at the time of writing of this article.<sup>4</sup> These civil wars have resulted in over 5,800 deaths<sup>5</sup> in Libya and over 10,000 deaths<sup>6</sup> in Yemen. As a consequence of these devastating civil wars, constitutional reform processes which were intended to cement political transitions from authoritarianism to democracy were instead held hostage by the armed perpetrators of the protracted civil conflicts. As the political transitions in Libya and Yemen devolved into civil war, the constitution-making processes also devolved into conflict over the same outcomes that armed elites sought on the battlefield by force. These armed actors discovered a new battlefield in Yemen and Libya's constituent debates.

Comparative constitutional scholarship has emphasized the importance of participatory constitution-making as a post-conflict tool for political transition. However, ongoing violent conflict frustrates open, transparent, inclusive and participatory processes – the hallmarks of participatory constitution-making.<sup>7</sup> The violent intensity of the civil conflicts in Yemen and Libya undermined the conciliatory objectives of participatory constitution-making in both countries. The undermining of conciliatory processes, in turn, imperiled the creation of consensus constitutional texts and risked the creation of “conflict constitutions” that would prolong, rather than remedy, the sources of conflict.

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<sup>4</sup> The “civil wars” in Libya and Yemen began after the NATO intervention supporting the Libyan opposition's ouster of Mohamed Qaddafi in Libya, and after the UN and US-brokered departure of President Hadi in Yemen. Although civil conflict occurred immediately following the Arab Spring uprisings in both countries, the “civil wars” discussed in this piece began in 2014 when dual governments in each country arose, violently clashing with one another and claiming authority in the wake of the initial Arab Spring political transitions. The civil wars are discussed in detail in Parts III and IV.

<sup>5</sup> *Violent Deaths in 2014, 2015, and 2016 Libya Body Count*, SQUARE SPACE (Feb. 24, 2017, 7:00 PM), <http://www.libyabodycount.org/table> [<https://perma.cc/63X7-SZBA>].

<sup>6</sup> Mohammed Ghobari, *At Least 10,000 Killed in Yemen Civil War*, REUTERS (Aug. 30, 2016), <https://www.reuters.com/article/us-yemen-security-toll/u-n-says-10000-killed-in-yemen-war-far-more-than-other-estimates-idUSKCN11516W> [<https://perma.cc/3RX2-ASRE>] (quoting U.N. Humanitarian Coordinator Jamie McGoldrick's reporting of U.N.-acquired information from medical facilities in Yemen).

<sup>7</sup> See Vivien Hart, *Constitution-Making and the Transformation of Conflict*, 26 PEACE & CHANGE 153 (2001) (examining the constitution-making process and its contribution to the transformation of conflicts).

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The impact of violent civil conflict on concurrent constitution-making processes and the constitutions that they produce has been under-examined in comparative constitutional scholarship and this article seeks to fill that gap. In this article, I develop a conceptual theory of “conflict constitution-making” that assesses the impact of civil war on constitution-making processes and the resultant constitutions, and I apply that theory to the events in Libya and Yemen. My theory of conflict constitution-making draws from comparative constitutional scholarship and posits that civil war transforms constitution-making processes from zones of conciliation into zones of conflict. During civil war, unless a political *détente* can be reached that commits armed actors to a consensual and participatory constitution-making process, armed power brokers exploit the process and drive constitution-makers away from accommodation and into conflict. Such a conflict constitution-making process produces a “conflict constitution” that enshrines rather than ameliorates the sources of conflict.

An exploration of the impact of violent civil conflict on constitution-making is critical because, although best practice calls for the creation of a constitution only after the cessation of hostilities, political transitions are often fluid and constitution-making processes undertaken during periods of relative peace may continue during periods of extreme violence (as seen in Libya and Yemen, discussed *infra*). A better understanding of the impact of violence on constitution-making processes will better enable citizens, scholars and practitioners to assess, and if necessary, reform those processes as well as the constitutions created by them. While participatory constitution-making is the aspirational ideal, conflict constitution-making may increasingly become the reality in transitioning states. Accordingly, an understanding of how to best remedy a “conflict constitution-making” process is one of the goals of this piece.

In examining the events of Libya and Yemen, I conclude that during violent civil war, unless a political agreement is achieved that commits armed actors to a consensual constitution-making process, armed actors will exploit existing constitution-making processes for their own ends, increasing the likelihood that provisions of the resulting constitution will contribute to the persistence rather than the resolution of the underlying conflicts. In Libya, constitution-making processes were stymied by internal conflict but a United Nations (“UN”)-brokered political agreement created renewed space for armed actors to support the constituent assembly and a unified state

under the new constitution. In Yemen, the National Dialogue's failure to achieve political consensus with powerful factions on fundamental issues catalyzed a civil war that undermined the work of constitutional drafters and threatened the long-term viability of the draft constitution. These conflict processes led to draft constitutions that were not accepted by major constituencies in both countries. For the constitutions to contribute to societal cohesion, rather than conflict, peace must be brokered outside of the constitution-making process, and remedial measures must be undertaken to increase broad public engagement and support for the constitutions. Further, the constitutional texts themselves must be modified to include measures that support multiethnic and moderate political representation that can sustain peace over time and prevent relapses into civil war.

Section 2 of the Article provides an overview of approaches to constitution-making in transitioning countries and defines my theory of conflict constitution-making. Section 3 assesses the constitution-making process in Libya in light of this theory of conflict constitution-making. Section 4 assesses the conflict constitution-making process in Yemen. Section 5 discusses constitutional design options for addressing the sectarian and regional divisions that drive intrastate conflict. Section 6 examines the features of the draft constitutions created in Libya and Yemen considering these design options. Section 7 offers recommendations on how the constitution-making processes and draft constitutions in Libya and Yemen can be modified to mitigate future conflict. Section 8 concludes.

## 2. CONSTITUTION-MAKING IN TRANSITIONING STATES

Constitutions are foundational documents that seek to define the social compact between the state and the citizen. Accordingly, constitutional reform in transitioning states frequently signals a transition from authoritarianism to democracy, colonialism to independence, or from conflict to peace. Constitution-making during periods of political transition, brought on by political revolution or civil conflict has been referred to as transitional constitutionalism or transitional constitution-making.<sup>8</sup> Transitional constitution-making seeks

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<sup>8</sup> Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L. J.* 2009, 2052 (1997).

to define state powers and citizen rights, create a national polity and bolster state stability in states where conflict and division have prevented the effective accomplishment of those goals. Much of the scholarship on modern constitution-making during periods of transition has emphasized the importance of a participatory constitution-making process, which involves wide-spread public participation and transparency, as the most effective tool for ensuring legitimate and effective constitutional reform in transitioning states.<sup>9</sup> Transitional constitution-making has been undertaken in a wide range of circumstances, from political revolutions brought on by non-violent protests, to transitions following long-term civil wars, to transitions brought on by military intervention and foreign occupation.<sup>10</sup> Constitutional scholars and practitioners have advocated for participatory constitution-making because it can aid in constitutional legitimacy and effectiveness in transitioning states. However, the hallmarks of participatory constitution-making—open, transparent, public, and inclusive processes—are constrained by violent civil war. In the most extreme instances, civil war can make constitution-making processes another site of battle, where armed actors exploit constitution-making processes to further their aims. When this occurs, the constitution-making process is transformed into a “conflict constitution-making” process more likely to exacerbate rather than reconcile conflict. The attributes of participatory and conflict constitution-making are examined below.

### 2.1. Participatory Constitution-Making

Participatory constitution-making describes a set of transparent and inclusive drafting processes that have been utilized in post-conflict or transitioning states to ensure broad societal acceptance of a new regime or constitutional order that follows a political revolution or the resolution of a civil conflict.<sup>11</sup> Since the late twentieth century,

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<sup>9</sup> Hart, *supra* note 7; Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 663–64 (2006).

<sup>10</sup> Examples of the different circumstances under which transitional constitution-making can occur include Tunisia (non-violent political revolution), South Africa (long-term civil war), and Iraq (military intervention and foreign occupation).

<sup>11</sup> See Hart, *supra* note 7 (describing the importance of constitutions and the process of constitution-making to completing the establishment of a new political order).



constitution-making following conflict has trended towards greater transparency, citizen engagement, and inclusivity.<sup>12</sup> Such participatory constitution-making encourages the inclusive “participation” of a diverse citizenry in the process.<sup>13</sup> Scholars have advocated for participatory constitution-making in post-conflict and transitioning states in order to resolve long-standing disputes by fostering consensus among a diverse array of groups on national principles and by addressing the concerns of previously marginalized citizens.<sup>14</sup> For example, participatory constitution-making was successfully utilized in Tunisia following the Arab Spring and in South Africa following decades-long civil strife between minority groups and the apartheid government.<sup>15</sup> These participatory constitution-making processes were largely viewed as legitimate because they were deliberative, transparent, occurred in phases, and provided opportunity for public feedback, participation, and acceptance (either directly or through elected representatives) among a diverse array of citizens with divergent racial, religious, and ideological backgrounds.<sup>16</sup> Participatory processes have frequently been “post-conflict” tools that have followed or been concomitant with the resolution of a political revolution or violent civil conflict. This approach follows best practice which calls for a cessation of hostilities and political settlement prior to the initiation of an effective participatory constitution-making process.<sup>17</sup>

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<sup>12</sup> For example, transition leaders in an array of countries, including Kenya, Uganda, Brazil, Thailand, Papua New Guinea, and South Africa have utilized participatory constitution-making processes. Jason Gluck & Michele Brandt, U.S. Institute for Peace, *Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring*, 105 PEACEWORKS 5, 5-6 (2015), <http://www.usip.org/sites/default/files/PW105-Participatory-and-Inclusive-Constitution-Making.pdf> [<https://perma.cc/JJ6G-NZVT>].

<sup>13</sup> Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043-1048 (2008).

<sup>14</sup> *Id.* at 1046-1048; Hart, *supra* note 7, at 154; Gluck & Brandt, *supra* note 12, at 5-6.

<sup>15</sup> See generally Johnson, *supra* note 3 (discussing the constitution-making processes in conflicted regions); Ziyad Motala, *Constitution-Making in Divided Societies and Legitimacy: Lessons from the South African Experience*, 15 TEMP. POL. & CIV. RTS. L. REV. 147 (2005) (using South Africa as an example of successful participatory constitution-making).

<sup>16</sup> *Id.*

<sup>17</sup> Samuels, *supra* note 9, at 664. (“It is widely acknowledged that the provision of security is the sine qua non of peace-building, and increasingly that the building or rebuilding of public institutions is key to sustainability; however, the fact remains that a successful political and governance transition must form the core of any post-conflict peace-building mission . . . . Constitution-making after conflict is

Because constitutional reform is an opportunity for warring parties to break with the status quo and to develop new political and governance arrangements, warring parties have often agreed to constitutional reform as a key condition of the cessation of hostilities.<sup>18</sup> Therefore, the promise of constitutional reform is often an effective peacemaking tool. However, comprehensive participatory constitution-making processes may be impossible in countries experiencing ongoing hostilities and violent civil conflict. For example, the initial constitution-making processes undertaken in Iraq and Afghanistan during the U.S. led military interventions and occupations, or in the creation of South Sudan were limited in their scope by the ongoing violent conflict and could hardly be articulated as broadly participatory. Nevertheless, these constitution-making processes were initiated because they served an important role in helping to move the respective countries' political transitions forward. In the extreme circumstance of ongoing violent civil war with competing governments, such as in Libya and Yemen, the pursuit of constitution-making not only frustrates consensus-building with diverse constituencies, it fosters further conflict.<sup>19</sup>

## 2.2. Conflict Constitution-Making

When constitution-making occurs during active violent civil conflict, many of the goals of participatory constitution-making processes are frustrated. Participatory constitution-making encourages deliberative negotiation and public participation in state creation and institutional design, but constitution-makers are unable to pursue these goals when the security environment does not permit widespread public engagement. Further, politically aligned armed actors can use violent civil conflict to manipulate constitution-making processes. Conflict constitution-making occurs when warring belligerents that seek to achieve political objectives through armed force co-opt ongoing constitution-making processes to achieve their political ends under the threat of force. These armed actors effectively transform the constitution-making process into another site of

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an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate.”).

<sup>18</sup> *Id.*

<sup>19</sup> Discussed *infra* in Sections 3 and 4.

battle. The markers of a conflict constitution-making process are (1) extreme conflict amongst constitutional drafters that mirror the positions of warring belligerents, (2) an inability of drafters to reach consensus on these political issues, and (3) boycott and rejection of non-consensual constituent assembly choices by major blocs. The incorporation of these conflicts into constitutional texts risks the creation of “conflict constitutions” with embedded conflicts, rather than embedded consensus solutions. The danger of conflict constitution-making is that it exacerbates and prolongs rather than reduces societal divisions.

A conflict constitution-making process must be rehabilitated in order to serve as an effective tool for peace and reconciliation. In states enmeshed in civil war, a cease fire or peace agreement is frequently the prerequisite for a constitution-making process.<sup>20</sup> A cease fire or peace agreement is intended to halt violent conflict and to create an environment in which warring factions can negotiate longer term political arrangements, including constitutional reform.<sup>21</sup> The cease fire itself can provide for power distribution arrangements between warring factions that ultimately are transferred into constitution-making processes.<sup>22</sup> In order to rehabilitate an ongoing conflict constitution-making process, a peacemaking mechanism can be incorporated into the constitution-making process. The peacemaking mechanism should result in a peace agreement that addresses the sources of conflict between warring parties and commits the parties to support a consensus based constitution-making process free of violent influence. Such an agreement creates space for the incorporation of consensus based solutions into the

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<sup>20</sup> Sujit Choudhry, *Civil War, Cease Fire, Constitution: Some Preliminary Notes*, 33 CARDOZO L. REV. 1915 (2012).

<sup>21</sup> Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT’L L. 373, 377 (2006). Ceasefires and peace agreements may take different forms but they prioritize the cessation of active hostilities and may include de-militarization measures such as de-armament, de-mobilization, and armed forces integration, as well as political measures addressing governance, elections, accountability, and institution building. *Id.*

<sup>22</sup> Choudhry, *supra* note 20, at 1917. In turn, the maintenance of sustained peace between parties in conflict is furthered through constitution-making processes that build long term institutions that contribute to stability. In transitional constitution-making, it is not unusual for the creation of a constitution to be considered part of the peace agreement – or in some instances for the constitution to be viewed as a de-facto peace agreement. *Cf.* Hallie Ludsin, *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, 33 U. PA. J. INT’L L. 239 (2011) (questioning whether constitution-making should also be used for peacemaking).

constitution and reduces the likelihood that a conflict constitution will be created that exacerbates societal divisions.

Parts 3 and 4 assess the impact of violent civil war upon the constitution-making processes in Libya and Yemen.

### 3. CIVIL WAR AND CONSTITUTION-MAKING IN LIBYA

The transition governments in Libya and Yemen each initiated constitution-making processes before the countries devolved into civil war. The declining security environment in each country prevented broad-based, inclusive participatory constitution-making. Warring political blocs began to press for their political aims within constitution-making bodies. The constitution-making processes themselves were inappropriate fora for much needed peacemaking, as they did not allow for timely political negotiation and bargaining among key stakeholders.<sup>23</sup> External internationally backed peace negotiations became necessary to open space for meaningful constitutional reform. In Libya, a UN peace agreement facilitated the completion of a constitution backed by a new unity government. In Yemen, discussed *infra* Section 4, the completion of a nonconsensual constitution fomented a new more divisive phase of the civil war.

#### 3.1. Pre-Arab Spring Libya

The civil war that followed the Arab Spring was the result of decades-long regional and sectarian divisions extending back to Libya's formation. Libya has historically been a federal state comprised of three regions – Cyrenaica, Tripolitania, and Fezzan. Each region was occupied by Italy early in the twentieth century and in 1929, Italy began to administer the entire area under one governor.<sup>24</sup> Following Italy's defeat in World War II, French forces took control

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<sup>23</sup> Jason Gluck, *Constitution-Building in a Political Vacuum: Libya and Yemen in 2014*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 43, 44 (2015), <http://www.idea.int/publications/annual-review-of-cbp-2014/upload/annual-review-of-cbp-2014-c2.pdf> [<https://perma.cc/996F-5GAC>].

<sup>24</sup> NADINE SCHNELZER, LIBYA IN THE ARAB SPRING: THE CONSTITUTIONAL DISCOURSE SINCE THE FALL OF GADDAFI 1, 31 (Springer VS, 2016).

of Fezzan, and the British occupied Cyrenaica and Tripolitania.<sup>25</sup> In 1951, Libya was declared independent by the United Nations.<sup>26</sup> The post-independence 1951 Constitution established the United Kingdom of Libya as a hereditary monarchy with a federal, partly representative form of government.<sup>27</sup> In 1963, the Libyan Kingdom was divided into ten governorates and federal provisions were removed from the Constitution.<sup>28</sup> In 1969, Qaddafi led a military coup against the king, took control of the country, and abolished the 1951 Constitution.<sup>29</sup> Qaddafi issued a 1969 Constitutional Proclamation that established his Revolutionary Command Council as the supreme authority in the Libyan Arab Republic.<sup>30</sup> In 1975, Qaddafi issued the Green Book which provided his political philosophy for the organization of the “Great Socialist People’s Libyan Arab Jamahiriya,” his term for the Libyan state.<sup>31</sup> The Green Book was not a constitution, as it did not create state institutions nor define their authorities, nor define the rights of the Libyan people in relation to the state—instead it laid out the philosophical underpinnings of Qaddafi’s view of government.<sup>32</sup> Qaddafi manipulated historic regional and tribal divisions and the lack of state institutions and enforceable individual rights to maintain his authoritarian grip on power.<sup>33</sup> The people

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<sup>25</sup> See Al Arabiya, *Libya’s Historic Divisions Foreshadow Political Complexities in Post-Qaddafi Era*, AL ARABIYA NEWS (Mar. 8, 2012, 1:53 PM), <https://english.alarabiya.net/articles/2012/03/08/199397.html> [https://perma.cc/M2UH-P2LV] (revisiting the history of Libya’s different regions to better understand possible political conflicts and expected separatist movements).

<sup>26</sup> See *Country Guide: LIBYA*, WASH. POST, <http://www.washingtonpost.com/wp-srv/world/countries/libya.html> (last visited Feb. 22, 2017) [https://perma.cc/7SW4-KMMX] (summarizing Libya’s land and people, economy, government, and history).

<sup>27</sup> Jorg Fedtke, *Eur. Union, Comp. Analysis Between the Situations in Egypt and Tunis. – Lessons Learnt – Overview of the Const. Situation in Libya*, 22 (Apr. 2014), [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET\\_NT\(2014\)433840\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/433840/EXPO-AFET_NT(2014)433840_EN.pdf) [https://perma.cc/A3YP-WPFU].

<sup>28</sup> *Id.*

<sup>29</sup> INT’L COMM’N OF JURISTS, *THE DRAFT LIBYAN CONSTITUTION: PROCEDURAL DEFICIENCIES, SUBSTANTIVE FLAWS* 15 (2015), <https://www.icj.org/wp-content/uploads/2016/07/Libya-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf> [https://perma.cc/7TA9-FFNY].

<sup>30</sup> Fedtke, *supra* note 27, at 22.

<sup>31</sup> INT’L COMM’N OF JURISTS, *supra* note 29, at 15.

<sup>32</sup> *Id.*

<sup>33</sup> E.g., Jackson N. Maogoto & Andrew Coleman, *Changing the Guard—The Price of Democracy: Lessons from the Arab Spring on Constitutionalism*, in *THE ARAB SPRING: NEW PATTERNS FOR DEMOCRACY AND INTERNATIONAL LAW* 1, 11-12 (Carlo Panara &

of Libya existed without clear constitutional rights or proper state institutions for the duration of Qaddafi's 42-year regime, which ended with the Arab Spring Libyan revolution of 2011.

### 3.2. 2011 Constitutional Declaration

On August 3, 2011, two months before Qaddafi was killed by the military arm of the National Transitional Council ("NTC")<sup>34</sup>, a leadership body for the coalition of rebels, opposition activists, and expatriates that had come together to militarily defeat the Qaddafi regime, the NTC issued a Constitutional Declaration ("Interim Constitution").<sup>35</sup> The Interim Constitution defined the NTC and interim government's authorities during a twenty-month transition process that would culminate with the election of a new president and legislature in early 2013. Elections for a new parliament, known as the General National Congress ("GNC") were scheduled for July 7, 2012. Upon the GNC's election, the NTC would dissolve and pass its authority to the GNC, which would then appoint the new interim government.<sup>36</sup> The GNC would serve as a temporary legislative body until a Constitutional Drafting Assembly ("CDA") completed a new constitution defining the authorities of the new parliament and president.<sup>37</sup>

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Gary Wilson eds., 2013) (describing Qaddafi's dismantlement of state institutions to consolidate his power).

<sup>34</sup> See S.C. Res. 1973, ¶ 4 (Mar. 17, 2011) (authorizing an international coalition of military forces to use military force against Qaddafi and his forces in protection of Libyan civilians).

<sup>35</sup> See THE CONSTITUTIONAL DECLARATION Aug. 3, 2011 (Libya) (declaring the collapse of Qaddafi's regime).

<sup>36</sup> See *id.*, art. 30 ("The Interim Transitional National Council shall be dissolved upon holding the first meeting of the National Public Conference.").

<sup>37</sup> See *id.* ("The National Public Conference shall ratify and announce the results of the elections, and shall convoke the Legislative Authority for meeting within a period not exceeding thirty days. In the first session thereof, the National Public Conference shall be dissolved and the Legislative Power shall fulfill its legislative tasks.").

### 3.3. *Beginnings of Constitutional Conflict – CDA Formation*

After Qaddafi's defeat, fissures in the opposition coalition became apparent. Various groups began to oppose the NTC's plans for constitutional reform. Libyans from less-populous regions, minority groups, and women all expressed concern about their planned representation within the CDA. Under the Interim Constitution, the NTC tasked the GNC with selecting the sixty CDA members that would draft the new Constitution.<sup>38</sup> On the eve of the July 2012 elections for the GNC, the NTC made a concession to the less populous Tripolitania and Fezzan regions whose citizens threatened to boycott the GNC elections out of fear that the GNC would not adequately represent their regions when appointing members to the CDA. The NTC amended the Interim Constitution so that the CDA would be elected directly by voters instead of appointed by the GNC.<sup>39</sup> The amendment also determined that twenty members of the constituent assembly would come from each of Libya's three historic regions—Tripolitania, Cyrenaica, and Fezzan.<sup>40</sup> The formula was modeled after the sixty-member constituent assembly that created the post-independence 1951 Libyan Constitution.<sup>41</sup> The concession reflected one of the enduring conflicts in post-Qaddafi Libya, determining who would have a seat at the table for determining how power would be allocated in the new Libyan state.

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<sup>38</sup> See CONSTITUTIONAL DECLARATION amend. No. 1-2012 (Libya) ("The CDA shall be composed of sixty members after the model of the Committee of Sixty, which was established to draft the constitution of Libya's independence in 1951"); see also Fedtke, *supra* note 27, at 22 ("The 2011 Constitutional Declaration itself, finally, sets out a basic system of government . . . but was not intended to provide more than the most essential transitional arrangements for a limited period of time.").

<sup>39</sup> See CONSTITUTIONAL DECLARATION amend. No. 3-2012, art. 1 (Libya) ("Elect a constituent assembly of a non-GNC members by direct free vote to draft the country's permanent constitution, to be called the Constitutional Drafting Assembly (CDA)"); see also CONSTITUTIONAL DECLARATION amend. No. 5-2013 (Libya) (re-promulgating the election of the CDA by direct free ballot as the result of a court decision); see also INT'L COMM'N OF JURISTS, *supra* note 29, at 15 ("The requirement for the CDA to be elected was initially provided for by Constitutional Amendment No. 3, but later replaced by Constitutional Amendment No. 5 following a Supreme Court ruling that Constitutional Amendment 3 had not been legally promulgated.").

<sup>40</sup> See Fedtke, *supra* note 27, at 20 ("Seats for the GNC were distributed nationally on the basis of population numbers . . .").

<sup>41</sup> *Id.*

Following these amendments to the Interim Constitution, the GNC was elected in July 2012. The GNC contained sixty members from Cyrenaica in Eastern Libya, 100 members from Tripolitania in Western Libya, and forty members from Fezzan in southern Libya.<sup>42</sup> This representation mirrored the population of the country: 30% in Cyrenaica, 60% in Tripolitania, and 10% in Fezzan.<sup>43</sup>

Another conflict surrounding CDA formation concerned the scope of minority and female representation in the CDA. The Amazigh, Touareg, and Tebu minority groups expressed concern that they would not obtain adequate representation within the CDA.<sup>44</sup> The Amazigh had been among the groups that were early opponents of Qaddafi because Qaddafi's brand of Arab nationalism had long oppressed their cultural and linguistic expression.<sup>45</sup> The minority groups wanted to ensure that they had consequential voting power within the CDA and thus pushed for a voting framework that required that any decision involving minority rights must have their agreement.<sup>46</sup> Similar concerns were expressed about the scope of female representation. The head of the GNC Human Rights Committee noted that the committee advocated for a 35% representation of women in the CDA.<sup>47</sup> A 2013 law enacted by the GNC reserved 10% of the CDA seats (six) for women and two seats each for the Amazigh, Touareg, and Tebu.<sup>48</sup> The Amazigh, who consisted of nearly 10% of the Libyan population, were dissatisfied with the two seats that they were allocated.<sup>49</sup> They were also dissatisfied with the

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<sup>42</sup> See *id.* ("The TNC was dissolved with the election of the General National Congress on 7 July 2012 . . . [giving] districts in Tripolitania (western Libya) 100 seats, districts in Cyrenaica (eastern Libya) 60 seats, and districts in Fezzan (southern Libya) 40 seats.").

<sup>43</sup> See *id.* ("The three parts of the country account for roughly 60, 30, and 10 percent of the population respectively.")

<sup>44</sup> See INT'L COMM'N OF JURISTS, *supra* note 29, at 16 (detailing the controversy arising over sufficient representation of minorities).

<sup>45</sup> The Amazigh are also known as the Berbers.

<sup>46</sup> Fedtke, *supra* note 27, at 21.

<sup>47</sup> INT'L COMM'N OF JURISTS, *supra* note 29, at 16.

<sup>48</sup> See Law Number 7 of 2013 (Libya); see also Fedtke, *supra* note 27, at 20 (describing how the law attempted to secure representation of women and ethnic groups).

<sup>49</sup> See Ronald Bruce St. John, *Libya's Draft Constitution: Compromise or Compromised?*, ATLANTIC COUNCIL (Mar. 3, 2016), <http://www.atlantic-council.org/blogs/menasource/libya-s-draft-constitution-compromise-or-compromised> [<https://perma.cc/FB85-MTDK>] (discussing how based on proportional representation the Amazigh should have been allocated six seats).



voting framework adopted for the CDA, which was a two-thirds plus one majority – a framework which would require coordination across regions but which could still result in minority groups being overruled on issues.<sup>50</sup> The Amazigh found the GNC’s attempt to ameliorate their concerns by (1) naming the minority groups “cultural and linguistic” components of Libyan society, and (2) alluding that CDA members should reach an agreement with minorities on the issues of concern, to be unsatisfactory.<sup>51</sup> Ultimately, the Amazigh boycotted the CDA election and its work.<sup>52</sup> The Touareg and Tebu minorities, which received two seats each, soon followed the Amazigh into a boycott of the body. The boycott arose out of minority group members’ belief that the CDA was not operating in a consensus-based manner, as called for by the Constitutional Declaration.<sup>53</sup>

The CDA was elected by national referendum in February 2014.<sup>54</sup> Six hundred forty-nine candidates ran for the CDA, including sixty-five women.<sup>55</sup> Two rounds of voting were held on February 20 and February 26 because of violence at eighty polling stations on the first day of voting.<sup>56</sup> Ongoing violence prevented successive polling at several stations, resulting in thirteen seats on the CDA remaining unfilled initially.<sup>57</sup> Although the Amazigh, Touareg, and Tebu minorities initially boycotted the CDA, two months after the CDA began its work, the Touareg and Tebu representatives joined the assembly.<sup>58</sup> Ultimately all but four seats on the CDA were filled. The unfilled seats belonged to the boycotting Amazigh community

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<sup>50</sup> Gluck, *supra* note 23, at 46.

<sup>51</sup> See CONSTITUTIONAL DECLARATION amend. No. 7-2014, art. 1 (Libya) (“taking into account the distinct linguistic and cultural components of Libyan society (Amazigh–Tuareg–Tebu)”); see also INT’L COMM’N OF JURISTS, *supra* note 29, at 16 (describing how the Amazigh still decided to boycott the elections and constitutional drafting process even after the GNC adopted Constitutional Amendment No. 7).

<sup>52</sup> See INT’L COMM’N OF JURISTS, *supra* note 29, at 16 (commenting how the Amazigh boycotted the elections and continued to boycott the constitutional drafting).

<sup>53</sup> See St. John, *supra* note 49 (detailing the boycott after the GNC ignored demands for official recognition of Amazigh language, cultural identity, and contribution to Libyan history).

<sup>54</sup> Fedtke, *supra* note 27, at 20-21.

<sup>55</sup> INT’L COMM’N OF JURISTS, *supra* note 29, at 16.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

and representatives of the Derna community, unable to attend the CDA due to ongoing violence.<sup>59</sup>

The CDA produced its first draft proposals in December 2014 and its first draft constitution in October 2015.<sup>60</sup> A revised draft was released in February 2016 and a final draft was adopted in April 2016.

### 3.4. *Civil Conflict*

Two months after the CDA held its first meeting in April 2014, parliamentary elections were held. Two-thousand candidates competed for seats in Libya's new House of Representatives.<sup>61</sup> On June 26, 2014, about 630,000 people, less than half of the 1.5 million Libyans who had registered to vote, showed up at the polls.<sup>62</sup> This number was a fraction of the 2.8 million Libyans who had registered to vote for the GNC in 2012.<sup>63</sup> The low voter turnout was caused by ongoing violence between government security forces and militias that had broken out after Qaddafi's removal, and the fracturing of some members of the opposition coalition that had joined forces to topple him. Five people were killed in the fighting that broke out between Islamist militias and government security forces in Benghazi.<sup>64</sup> Human rights activist, lawyer, and former NTC member Salwa Bughaighis was shot dead at her home in Benghazi shortly after returning from voting.<sup>65</sup> Benghazi became a flashpoint for fighting between Islamist militias and the government, as dramatically demonstrated by the death of U.S. Ambassador Chris Stevens during a militia attack on a U.S. compound in Benghazi on September 11, 2012.

The elections for the House of Representatives were called by the transition government out of fear that Libyan National Army

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 4 (providing a timeline of the constitutional drafting process).

<sup>61</sup> *Libyan Elections: Low Turnout Marks Bid to End Political Crisis*, BBC NEWS (June 26, 2014), <http://www.bbc.com/news/world-africa-28005801> [<https://perma.cc/H66K-VRN>].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

General Khalifah Haftar was plotting a coup.<sup>66</sup> Haftar denied the allegations, but still embarked on a military campaign called “Operation Dignity” against Islamist militias that he believed were holding Libya hostage to violence.<sup>67</sup> The Islamist coalition that he fought included Ansar al-Sharia, the group accused of killing Ambassador Stevens.<sup>68</sup> The government and militia fighting led to seventy deaths and the storming of the GNC by armed men.<sup>69</sup> The House of Representatives elections were held in the midst of the escalating violence.<sup>70</sup>

Liberal and nationalist politicians won the majority of seats in the House of Representatives, as they had two years earlier during the GNC elections. Islamist politicians were bitterly defeated.<sup>71</sup> Violent clashes broke out between the Islamist militias, calling themselves the Libya Dawn coalition, and General Haftar’s Operation Dignity government forces at the Tripoli International Airport.<sup>72</sup> The fighting destroyed the airport and the Libya Dawn militias took control of Tripoli. Libya Dawn then conducted a coup d’état in Tripoli in support of the Islamist parties that had lost the elections.<sup>73</sup> The elected House of Representatives, Prime Minister Adbullah al-Thinni, and his cabinet all fled east to the cities of Tobruk and Beidi.<sup>74</sup> They are backed by General Haftar’s Operation Dignity forces.<sup>75</sup> The Tobruk-based government was recognized by the European Union, United States, Egypt, and the United Arab Emirates.<sup>76</sup> The Libya Dawn Coalition took over Tripoli and appointed its own

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Rebecca Murray, *Libya: A Tale of Two Governments*, AL JAZEERA (Apr. 4, 2015), <http://www.aljazeera.com/news/2015/04/libya-tale-governments-150404075631141.html> [<https://perma.cc/KNZ4-4Y5N>].

<sup>69</sup> BBC NEWS, *supra* note 61.

<sup>70</sup> *Id.*

<sup>71</sup> Murray, *supra* note 68.

<sup>72</sup> *Id.*

<sup>73</sup> Justin Salhani, *The Forgotten Conflict in Libya, Explained*, THINK PROGRESS (Feb. 25, 2016), <https://thinkprogress.org/the-forgotten-conflict-in-libya-explained-4ffc134b0a9a#.z2nh7pqv1> [<https://perma.cc/E5VM-HL6G>].

<sup>74</sup> *Id.*

<sup>75</sup> Murray, *supra* note 68.

<sup>76</sup> *Id.*

government, reinstating a new GNC as its legislature and appointing a Tripoli-based government, initially headed by Prime Minister Omar al-Hassi.<sup>77</sup>

Since June 2014, Libya has had dueling governments in Tripoli and Tobruk, and the country has fallen further into political and security chaos. The political and security vacuum created space for ISIS to infiltrate Libya and to engage in violent fighting with both governments.<sup>78</sup> The war has left five thousand dead, half a million Libyans homeless, ruined the Libyan economy, and caused diplomats, foreign investors, and countless Libyans themselves to leave the country.<sup>79</sup>

### 3.5. *United Nations-Brokered Peace Deal*

United Nations-brokered peace talks first began in September 2014. On December 17, 2015, representatives from both Libyan governments signed a UN-brokered peace deal in Morocco that called for the creation of a unity government and for forces supporting the rival governments to cease hostilities.<sup>80</sup> The agreement created a Government of National Accord run by a Presidency Council as the unified governing executive authority in Libya, and gave it responsibility for organizing the next phase of Libya's political transition.<sup>81</sup> In signing the peace deal, the separate governments agreed to cede authority to this body and to encourage their militia forces to do so as well. The agreement also called for the shoring up of the national army and police force under the new government. The objective of the peace deal was that a unified government, with the backing of the international community, would be able to politically stabilize the country and initiate joint operations against ISIS. Under the

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Chris Stephen, *Five Years After Gaddafi, Libya Torn by Civil War and Battles with ISIS*, THE GUARDIAN (Feb. 16, 2016), <http://www.theguardian.com/world/2016/feb/16/libya-gaddafi-arab-spring-civil-war-islamic-state> [<https://perma.cc/SY5G-CWSA>].

<sup>80</sup> *Rival Libyan Factions Sign UN-backed Peace Deal*, AL JAZEERA (Dec. 17, 2015), <http://www.aljazeera.com/news/2015/12/libya-rival-parliaments-sign-backed-deal-151217131709056.html> [<https://perma.cc/8H5P-5D6K>].

<sup>81</sup> LIBYAN POL. AGREEMENT art. 1.3 (Dec 17, 2015), <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf> [<https://perma.cc/GU8E-FXT3>].

peace agreement, the Government of National Accord was empowered to exercise executive authority in Libya for up to two years, or until a new Libyan Constitution was finalized and a new executive authority was instituted pursuant to that Constitution.<sup>82</sup>

The peace agreement prioritized the completion of a constitution as a key element of the transition. The peace deal also provided that the parties would agree to respect the independence and impartiality of the CDA, and that the unity government would guarantee the security of the Assembly, and create an environment that would enable it to work independently and have unhindered access and communication with all sectors of Libyan society.<sup>83</sup> The peace agreement gave both support and direction to the CDA. The agreement stated that the unity government would provide the necessary financial and logistical support for the CDA to complete its work.<sup>84</sup> It also directed the CDA to provide a roadmap with a timeline for the completion of its work, to involve all cultural communities in its work, and to complete its work by March 24, 2016, within three months of the completion of the brokered agreement.<sup>85</sup> If the CDA did not complete its work within that three month period, responsibility for constitutional reform would revert to a committee of five representatives, each from the House of Representatives and the State Council (the former GNC, acting as a consultative body), with the participation of the Presidency Council.<sup>86</sup>

### 3.6. *The CDA Conflict Zone*

The CDA ultimately met the deadline called for by the National Accord agreement by releasing a draft constitution in February 2016; however, that result was threatened by significant conflict throughout the CDA's term.<sup>87</sup> The CDA electoral rules required that elected members receive a simple majority rather than an absolute majority

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<sup>82</sup> *Id.* at art. 1.4.

<sup>83</sup> *Id.* at art. 48.

<sup>84</sup> *Id.* at art. 49.

<sup>85</sup> *Id.* at arts. 50, 52.

<sup>86</sup> *Id.* at art. 52.

<sup>87</sup> DRAFT LIBYAN CONST. (2016), [http://www.constitutionnet.org/sites/default/files/draft\\_constitution\\_of\\_libya\\_april\\_2016\\_unofficial\\_english\\_translation.pdf](http://www.constitutionnet.org/sites/default/files/draft_constitution_of_libya_april_2016_unofficial_english_translation.pdf) [<https://perma.cc/MZE2-LKVC>].

of all those voting.<sup>88</sup> As a consequence, only ten of the fifty-one members initially elected to the CDA received more than fifty percent in their respective electoral districts, and nine of the members were elected with less than twenty-five percent of the vote in their respective districts.<sup>89</sup> The fact that a majority of CDA members represented a minority of their districts increased the potential for fractious disputes and deadlock within the body.<sup>90</sup> The CDA members were also deeply divided by the competing agendas of Libya's three historic regions. The representatives battled over issues such as the system of government, national identity, the role of religion, the distribution of resources, federalism vs. decentralization, and the location of the capital and sovereign institutions.<sup>91</sup> The civil war and external pressure from the competing governments in Tobruk and Tripoli, their political backers, and the broader government, increased the tensions and conflict within the CDA over these issues.<sup>92</sup>

Libya's political factions attempted to draw the CDA into their disputes from its inception. The CDA resisted calls by the Libyan National Army under General Haftar to take over legislative control from the GNC in May 2014 (one month prior to the election of the HOR), or calls from the Supreme Council of the Judiciary to help

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<sup>88</sup> Dirk Vandewalle & Nicholas Jahr, *Libya's Unexpected Strength*, N.Y. TIMES (May 8, 2014), <http://www.nytimes.com/2014/05/09/opinion/libyas-unexpected-strength.html> [<https://perma.cc/P5N5-KDSS>].

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See *In Depth: Over a Year Late Libya Struggles to Finish Constitution*, LIBYA CHANNEL (Feb. 9, 2016), <https://web.archive.org/web/20161109074013/http://en.libyaschannel.com/2016/02/09/in-depth-over-a-year-late-libya-struggles-to-finish-constitution> [<https://perma.cc/7ESX-ZXU9>] (describing variety of the issues in contention within the CDA); see also, Omar Ould Dedde O. Hammady & Michael Meyer-Resende, *Saving Libya's Constitution-Making Body*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Dec. 18, 2014), <http://carnegieendowment.org/sada/?fa=57565> [<https://perma.cc/K7JR-SLFT>] ("After all, it is the democratically elected body tasked to find constitutional solutions to Libya's major problems, including the management of oil resources, decentralization, minority rights, the role of religion, and the system of government.").

<sup>92</sup> See LIBYA CHANNEL, *supra* note 91 (stating that increasing tensions have manifested in the form of resignations and delayed results); see also, Hammady, *supra* note 91 (stating that competing claims of legitimacy by two governments raises the tension for the CDA).

mediate political disputes between General Haftar and the GNC.<sup>93</sup> The CDA resisted both calls saying that it was an independent body which exclusively had the limited mandate of constitutional reform.<sup>94</sup> Nonetheless, political issues influenced and divided the body from within. In the committee's early work, members staked out maximalist positions and battled over preferred positions on a number of issues.<sup>95</sup> The committee publicly released a series of articles on key issues rather than a promised first draft in December 2014.<sup>96</sup> The assembly was unable to reach agreement on issues such as the structure of the state and the scope of decentralization—key issues in dispute between the two competing governments in Tobruk and Tripoli, and their militia backers who had become engaged in protracted and intense armed conflict.<sup>97</sup>

### 3.7. Strategic Withdrawal

The CDA members battled over process as well as substance, and numerous boycotts and withdrawals by CDA members undermined consensus on the constitutional text. Unlike the Amazigh who never joined the assembly, the Tebu and Touraeg took their reserved seats in the assembly in June 2014, two months after the CDA began its work.<sup>98</sup> However, they later boycotted the assembly again over the assembly's procedures established to resolve contentious issues.<sup>99</sup> In June 2015, Ali Tarhouni, the assembly president, formed a 12-member working group to resolve outstanding issues that the

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<sup>93</sup> Suliman Ibrahim, *Will Libya's Constitutional Drafting Assembly Survive the Turbulent Times?*, IDEA (June 6, 2014), <http://www.constitution-net.org/news/will-libyas-constitutional-drafting-assembly-survive-turbulent-times> [<https://perma.cc/8KM8-8TXP>].

<sup>94</sup> *Id.* (recounting that the CDA was not given a governance mandate).

<sup>95</sup> Michael Meyer-Resende & Omar O. Hammady, *These 56 People Have a Chance to Save Libya*, FOREIGN POLICY (Apr. 21, 2015), <https://foreignpolicy.com/2015/04/21/these-56-people-have-a-chance-to-save-libya> [<https://perma.cc/29HU-CA2N>] (describing the CDA's disagreement over a number of issues at the heart of Libya's political struggles).

<sup>96</sup> Gluck, *supra* note 23, at 48 (addressing the important constitutional questions but failing to address the most contentious).

<sup>97</sup> *Id.*

<sup>98</sup> INT'L COMM'N OF JURISTS, *supra* note 29, at 16.

<sup>99</sup> *Id.* at 17.

CDA had been unable to reconcile in a final draft text.<sup>100</sup> The Tebu and Toureaeg objected to the fact that the working group was slated to have only one member to represent the views of both minority groups.<sup>101</sup> Both groups found the suggestion that both groups' views were interchangeable to be patronizing, and they promised to never accept any document that came out of the working group.<sup>102</sup> They resigned the commission on August 19, 2015 and asked the international community to put pressure on the assembly to respect its prior commitments to reach agreement with minority groups on any final text.<sup>103</sup>

The tensions over Tarhuni's leadership and his formation of the Working Group grew so great that in November 2015, a number of assembly members demanded that Tarhouni resign from his position.<sup>104</sup> Tarhouni remained but the attrition from the CDA continued. On January 18, 2016, two members of the Working Group from Western Libya resigned over what they described as the "federalist inclinations" of the working group.<sup>105</sup> Ten days later on January 28, eleven members of the CDA resigned, complaining that the Working Group was dividing Libya with "regional quotas."<sup>106</sup> On January 30, 2016, the Amazigh community, along with the boycotting Tebu and Toureaeg CDA members, declared that they would not accept any constitution not agreed upon by the minority communities.<sup>107</sup> The increasing conflict within the body threatened the completion of the CDA's work, and Tarhouni rushed to complete a second draft, announcing its release on February 3, 2016.<sup>108</sup> Two weeks later, an appeals court ruled on a complaint filed by a CDA member in January and determined that CDA President Tarhouni

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<sup>100</sup> LIBYA CHANNEL, *supra* note 91.

<sup>101</sup> Mustafa Khalifa, *Tuareg and Tebus Threaten to Walk Out of the Constitution Drafting Assembly*, MARSAD (Jun. 28, 2015), <http://www.marsad.ly/en/2015/06/28/tuareg-and-tebus-threaten-to-walk-out-of-constitution-drafting-assembly> [<https://perma.cc/CB8C-CA59>].

<sup>102</sup> *Id.*

<sup>103</sup> Mustafa Khalifa, *Tebus and Tuareg Members Walk Out of Constitution Drafting Assembly*, MARSAD (Aug. 20, 2015), <http://www.marsad.ly/en/2015/08/20/tebus-and-tuareg-members-walk-out-of-constitution-drafting-assembly> [<https://perma.cc/6ZQF-ZYJV>].

<sup>104</sup> LIBYA CHANNEL, *supra* note 91.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*



would have to leave his position in the CDA because of his dual American citizenship.<sup>109</sup> CDA members pledged to continue their work to produce a final draft constitution by March 24, irrespective of Tarhouni's status.<sup>110</sup>

Further conflict erupted within the CDA when 32 members accepted an offer by the Sultanate of Oman, under the auspices of the UN, to host international consultations in Oman with foreign legal advisers on the draft text.<sup>111</sup> The UN took a particular interest in facilitating completion of the constitution because the peace agreement that it had brokered between Libya's competing governments had called for the completion of the constitution, as a key outcome.<sup>112</sup> Nonetheless, nine constituent assembly members viewed the sessions as inappropriate foreign interference and, consequently, boycotted the CDA.<sup>113</sup> On April 23, 2016, the CDA announced that it adopted the amended text of the Working Group after its consultations in Oman, and that it would forward the document to Libyan authorities for next steps, including a public referendum.<sup>114</sup> This announcement was made notwithstanding the fact that nearly half the CDA had not participated in the Oman sessions and that the Amizigh, Tabu, and Touraeg communities continued in their objections to the final text of the draft constitution.<sup>115</sup> The status of the draft constitution was thrown into further doubt when an Appeals Court purported to annul the draft constitution, because it was not adopted by a quorum under the CDA's original procedural

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<sup>109</sup> *Libya in Flux as Constitution and Unity Government Face Yet More Delays*, LIBYA CHANNEL (Feb. 18, 2016), <http://web.archive.org/web/20160429225551/http://en.libyaschannel.com/2016/02/18/libya-in-flux-as-constitution-and-unity-government-face-yet-more-delays> [https://perma.cc/GQ2X-3QWT].

<sup>110</sup> *Id.*

<sup>111</sup> *In Depth: Libya's Constituent Assembly Divided Over Oman Sessions*, LIBYA CHANNEL (Mar. 22, 2016), <http://web.archive.org/web/20170330072731/http://en.libyaschannel.com/2016/03/22/in-depth-libyas-constituent-assembly-divided-over-oman-sessions> [https://perma.cc/339K-VNG8].

<sup>112</sup> LIBYAN POL. AGREEMENT, *supra* note 81, arts. 47–52.

<sup>113</sup> *In Depth: Libya's Constituent Assembly Divided Over Oman Sessions*, *supra* note 111.

<sup>114</sup> *CDA: Constitution Draft Is Ready, A Poll Is to Follow*, LIBYAN EXPRESS (Apr. 23, 2016), <http://www.libyanexpress.com/cda-constitution-draft-is-ready-a-poll-is-to-follow> [https://perma.cc/E2ZK-RFW8].

<sup>115</sup> *Id.*

rules.<sup>116</sup> Despite the appellate court ruling and boycotting CDA members' opposition, the United Nations continued to view the draft constitution as legitimate and encouraged the House of Representatives to put the draft to a public referendum as soon as possible to meet the strictures of the December 2015 National Accord Agreement, which called for the transition of power from the temporary unity government to a permanent executive authority elected pursuant to a new constitution.<sup>117</sup> At the time of writing, the status of the adoption of the draft constitution remains as uncertain as the question of whether the provisions of the constitution, adopted in the midst of significant conflict in the CDA, will foment or ameliorate divisions in Libya society. The draft text is analyzed *infra* Section 4.

### 3.8. Leveraging the Peace Deal

In the midst of a violent civil war, the CDA completed a draft constitution but its ability to engage in widespread participatory constitution-making was significantly impeded by the ongoing violence.<sup>118</sup> The civil war led various ethnic, political, and tribal group factions to contest one another over issues that were constitutional in nature, such as the form of government, federalism, security arrangements, and the role of religion.<sup>119</sup> Further, in the midst of civil war, the CDA was unable to carry out national consultations about the constitution-drafting process and did not have sufficient interaction with the political elites in Tripoli and Tobruk to confirm that the opposing governments would recognize the new constitution.<sup>120</sup>

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<sup>116</sup> Abdulkader Assad, *Al-Bayda Appeals Court Annuls the Constitution Draft*, LIBYA OBSERVER (May 9, 2016), <http://www.libyaobserver.ly/news/al-bayda-appeals-court-annuls-constitution-draft> [<https://perma.cc/6RJ4-FD8A>].

<sup>117</sup> Article 1(4) of the National Accord Agreement called for the transition of power from the unity government to an executive authority elected pursuant to the new constitution, prior to or at the expiration of the unity government's one-year term. The unity government may be continued for an additional year if the constitution is not completed during its first year. This provision appeared to give the CDA until the end of 2016, or the end of 2017 at the outer limit, to pass the constitution by national referendum. LIBYAN POL. AGREEMENT, *supra* note 81, art. 1.4.

<sup>118</sup> INT'L COMM'N OF JURISTS, *supra* note 29, at 18-21.

<sup>119</sup> Gluck, *supra* note 23, at 47.

<sup>120</sup> *Id.* at 48.

The constitution-making process in Libya exhibited the classic markers of conflict constitution-making: extreme conflicts between drafters mirrored tensions between the Libyan-Dawn backed Islamist government in Tripoli and the Operation-Dignity backed nationalist government in Tobruk over local representation and central authority, and the Amazigh, Touraeg and Tebu minority groups boycotted the assembly and rejected non-consensus constituent assembly solutions regarding minority rights.<sup>121</sup> The UN-brokered peace agreement helped to ameliorate one of the markers of conflict constitution-making – a lack of consensus over divisive issues. The UN peace agreement committed the governments in Tripoli and Tobruk to support the consensus solutions adopted by the CDC across a range of divisive issues. The peace deal opened up political space that kept the constitutional reform process on track. The peace deal detailed the conditions for the formation of a unity government and committed the unity government to support the work of the CDA financially and logistically, and to provide for its security. Although the peace deal did not resolve nor prevent all of the CDA's internal conflicts, it enabled constitutional reform to move forward and committed the competing governments to support the work of the body. It remains to be seen whether the Libyan people will support the draft constitution produced by the CDA when it is put forward for a public referendum. I recommend measures to shore up public support for the text *infra* Part 7.

#### 4. CONSTITUTION-MAKING IN YEMEN

Just as in Libya, Yemen's constitution-drafting process unfolded against the backdrop of an expanding civil war. Constitution-makers were pressured by the competing interests of multiple constituencies and were unable to achieve consensus on core issues involving the structure of the state. The divisions in Yemen date back to the formation of the country.

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<sup>121</sup> As discussed in Section 2, the markers of a conflict constitution-making process are (1) extreme conflict amongst constitutional drafters that mirror the positions of warring belligerents, (2) an inability of drafters to reach consensus on these political issues, and (3) boycott and rejection of non-consensual constituent assembly choices by major blocs.

#### 4.1. Pre-Arab Spring Yemen

Yemen, the poorest state in the Middle East, has, in many ways, been two states for much of its modern history. In 1904, the Ottoman Empire and the British agreed on a demarcation line delineating their control over the territory of Yemen.<sup>122</sup> The demarcation line created an Ottoman North and a British South in Yemen. When the Ottoman Empire fell at the end of WWI, the northern part of the country became an independent kingdom run by a Zaidi imam.<sup>123</sup> In 1962, Arab Nationalists toppled the ruling imam and founded a republic with Egypt's assistance, but the new government fell into a ten-year civil war with former royal regime loyalists backed by Saudi Arabia.<sup>124</sup> Southern Yemen remained a British protectorate until 1967, when insurgents forced the British out.<sup>125</sup> Marxists took over the government in 1970, and the People's Democratic Republic of Yemen was formed with the support of the Soviet Union and communist states.<sup>126</sup> Twenty years later, North and South Yemen formed a united republic, ruled by the former North Yemeni President Ali Abdullah Saleh.<sup>127</sup> Southern leaders attempted to declare a separate state in 1994 because of disputes over power-sharing. Saleh led a military campaign that quashed the rebellion in the South.<sup>128</sup> Over the next two decades, Saleh continued to build his political power, but did not address the rampant poverty, corruption and weak rule of law in the country, which enabled Al Qaeda to infiltrate.<sup>129</sup> In 2000, Al Qaeda bombed the USS Cole off the coast of Aden. The United States has engaged in drone attacks and covert CIA operations against Al Qaeda in Yemen on an ongoing basis since 2009.<sup>130</sup> The country is still largely divided along tribal lines

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<sup>122</sup> Ishaan Tharoor, *A Brief History of Yemen: Rich Past, Impoverished Present*, TIME (Nov. 1, 2010), <http://content.time.com/time/world/article/0,8599,2028740,00.html> [<https://perma.cc/XG4V-7478>].

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> The first US drone strike against terrorist individuals in Yemen occurred in 2002. The drone attacks were resumed under President Obama in 2009. To date there have been 172 drone strikes in Yemen that have killed over 1,100 people. *Drone Strikes: Yemen*, NEW AMERICA, <https://www.newamerica.org/in->

and it has continually faced separatist movements, including one from the Iranian-backed Shiite Zaidi Houthis.

#### 4.2. Arab Spring Protests in Yemen

In early 2011, the wave of Arab Spring protests that began in Tunisia and spread through the Middle East and North Africa region reached Yemen. Unemployed Yemeni youth and political activists were joined by opposition parties and some members of the government in protest of the Saleh government. The protesters demanded an end to pervasive corruption, better economic opportunities, political reform and the protection of human rights.<sup>131</sup> The ten month conflict between the protesters and the government resulted in 250 deaths, 1,000 injuries, and 100,000 displaced people.<sup>132</sup> Government defections, armed violence, and potential economic collapse caused Saleh to step down from his presidency in November 2011 under a deal brokered by the Gulf Cooperation Council (GCC)<sup>133</sup> and supported by the United States.<sup>134</sup> Under the terms of the deal, Saleh ceded power to his Vice President Abd Rabbo Mansour Hadi until elections could be held three months later in February 2012.<sup>135</sup> The GCC deal called for the formation of a transitional unity government under Hadi, composed of members from Saleh's party and from opposition stakeholders, and granted Saleh and his family immunity from prosecution for human rights violations that occurred during

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depth/americas-counterterrorism-wars/us-targeted-killing-program-yemen/  
[<https://perma.cc/ZVA8-DJX2>].

<sup>131</sup> Alma Abdul Hadi Jadallah, *Conflict Assessment of the Republic of Yemen*, SCH. FOR CONFLICT ANALYSIS & RESOL. (2015), [http://activity.scar.gmu.edu/sites/default/files/Yemen\\_CDA\\_Final\\_July.13.2015-2.pdf](http://activity.scar.gmu.edu/sites/default/files/Yemen_CDA_Final_July.13.2015-2.pdf) [<https://perma.cc/77XB-RW4D>].

<sup>132</sup> *Id.*

<sup>133</sup> The GCC is a regional, intergovernmental economic and political union whose members include all of the Arab states on the Persian Gulf, i.e., UAE, Qatar, Oman, Bahrain, Kuwait and Saudi Arabia, except Iraq.

<sup>134</sup> Jadallah, *supra* note 131, at 11.

<sup>135</sup> Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC), Dec. 5, 2011, [https://peacemaker.un.org/sites/peacemaker.un.org/files/YE\\_111205\\_Agreement%20on%20the%20implementation%20mechanism%20for%20the%20transition.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/YE_111205_Agreement%20on%20the%20implementation%20mechanism%20for%20the%20transition.pdf) [<https://perma.cc/K58T-URP8>] [hereinafter GCC Agreement].

his presidency and against protesters during the 2011 uprising.<sup>136</sup> Saleh went into exile and Hadi was elected President of Yemen in an uncontested election held in February 2012.<sup>137</sup>

#### 4.3. *The Seeds of Civil and Constitutional Conflict – National Dialogue*

The 2011 GCC-brokered transition agreement also called for a National Dialogue consisting of stakeholders from diverse political parties and civil society to monitor the agreement and to develop recommendations for the interim government on the transition.<sup>138</sup> The first National Dialogue Conference (NDC) was held in March 2013 and 565 delegates focused on issues critical to the political transition, including the threat of secession in the South, armed rebellion in the North, national reconciliation and redress for human rights abuses, security sector reform, and the drafting of a new constitution.<sup>139</sup> The National Dialogue completed its work on January 24, 2014 and issued a comprehensive report with nearly 1,800 recommendations.<sup>140</sup> Key political organization recommendations included that Hadi's presidency should be extended for another year, parliament should include equal representation between the North and the South, and that Yemen should become a six region federation, with four regions in the north, two regions in the South, and an independent capital city – Sanaa.<sup>141</sup> While the international community was generally laudatory about the NDC outcome document, certain Yemeni groups were critical of the result, including the Zaidi Shiite (Houthi) Movement, and the Southern Hiraak Movement, which each expressed concern that the six region federation would subsume the autonomy of their territory in the South.<sup>142</sup> Much of

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<sup>136</sup> *Id.*

<sup>137</sup> Jadallah, *supra* note 131, at 11.

<sup>138</sup> GCC Agreement, *supra* note 135, at para. 20.

<sup>139</sup> ERICA GASTON, U.S. INST. OF PEACE, PROCESS LESSONS LEARNED IN YEMEN'S NATIONAL DIALOGUE 3 (Feb. 2014), [https://www.usip.org/sites/default/files/SR342\\_Process-Lessons-Learned-in-Yemens-National-Dialogue.pdf](https://www.usip.org/sites/default/files/SR342_Process-Lessons-Learned-in-Yemens-National-Dialogue.pdf) [<https://perma.cc/7FVT-89W2>].

<sup>140</sup> *Id.* at 4.

<sup>141</sup> Jadallah, *supra* note 131, at 12.

<sup>142</sup> *Id.* at 14.

the leadership of the Southern secessionist Hiraak Movement refused to participate in the NDC and those that did participate favored a two region federation and a referendum on outright secession from the North in three years.<sup>143</sup> The Houthis, the armed militia of the Zaidi Shiite sect, also preferred a two region split.<sup>144</sup> While the NDC agreed that the state would be comprised of a federal structure, the specific proposal for a six region federation was tabled and excluded from the NDC's Outcome Document due to opposition from southern delegates.<sup>145</sup> Two weeks after the NDC concluded its work, President Hadi appointed an unrepresentative special committee that adopted the six region federation that southern delegates had rejected during the NDC.<sup>146</sup> The National Dialogue's inability to achieve a consensus solution regarding the structure of the state sowed the seeds of the ensuing civil and constitutional conflict that Yemen faced.

#### 4.4. Conflict Over the Formation of the Constitutional Drafting Committee

The GCC-brokered Transition Plan and the NDC Outcome Document called for the creation of a thirty-member constituent assembly to draft a new constitution.<sup>147</sup> The membership of the constituent assembly was to mirror the NDC's political, regional, and civil

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<sup>143</sup> *Id.*; INT'L CRISIS GRP., YEMEN'S SOUTHERN QUESTION: AVOIDING A BREAKDOWN (Sept. 25, 2013), <https://d2071andvip0wj.cloudfront.net/yemen-s-southern-question-avoiding-a-breakdown.pdf> [<https://perma.cc/3AGY-PR25>]. See also Gluck, *supra* note 23, at 50 (listing Hiraak's refusal to participate as one of the reasons why the NDC could not come to an agreement).

<sup>144</sup> *Yemen's Houthis Reject Draft Constitution*, PROJECT ON MIDDLE EAST DEMOCRACY, <http://pomed.org/blog-post/political-process/political-transition/yemens-houthis-reject-draft-constitution> [<https://perma.cc/R4HR-JX5N>].

<sup>145</sup> See GASTON, *supra* note 139, at 3-4 (noting that the compromise agreement on Yemen's future as federal state did not settle the issue of the number of subnational regions).

<sup>146</sup> *Id.* at 4.

<sup>147</sup> GCC Agreement, *supra* note 133, at para. 22; see also Ashraf Al-Falahi, *Yemen's Fraught Constitution Drafting Committee*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 2, 2014), <http://carnegieendowment.org/sada/?fa=55496> [<https://perma.cc/E89R-8N3F>] ("In his announcement, Hadi specified that the CDC would have seventeen members; this contradicts the agreement reached by the nation-building team at the National Dialogue Conference, which recommended that the CDC be comprised of 30 members selected according to their area of expertise.").

society representation.<sup>148</sup> On March 8, 2014, President Hadi appointed a seventeen-member Constitutional Drafting Committee (CDC). The CDC lacked the full representation of the NDC stakeholders called for in the GCC and NDC plans.<sup>149</sup> Several groups, including the Socialist party, youth groups, and the southern secessionists, expressed concern about their lack of representation in the CDC and the representatives' lack of expertise about constitutional matters or federalism.<sup>150</sup> Concern about how the CDC would approach the creation of a federal state within the constitution was a significant concern for numerous stakeholders, as the NDC decision to create a federal state had been contentious.<sup>151</sup>

#### 4.5. *Civil War Erupts and the Peace and National Partnership Agreement Fails*

The CDC was given only one year to complete a momentous task—incorporating many of the NDC's 1,800 outcomes into a constitution. Its work was frustrated by political conflict within the body as well as civil conflict in Sanaa where it was based. In August 2014, Houthi rebels, who had long been opponents of President Saleh's regime, attacked Yemeni forces and took near control of Yemen's capital, Sanaa.<sup>152</sup> The Houthi attacks bolstered calls by Southern separatist groups for independence, and further threatened the viability of the CDC's incorporation of the NDC's proposals regarding the division of political power into a new constitution.<sup>153</sup> Armed Houthis took control of several government ministries in Sanaa in September 2014 following protests that demanded the formation of a new government and the restoration of fuel subsidies.<sup>154</sup> The UN mediated discussions between Hadi's

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<sup>148</sup> GCC Agreement, *supra* note 135, at para. 20.

<sup>149</sup> Al-Falahi, *supra* note 147.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.* (noting the "fragile unity" of the Yemeni population in the state building process).

<sup>152</sup> Gluck, *supra* note 23, at 52.

<sup>153</sup> *Id.*

<sup>154</sup> Arafat Madabish, *Yemen: Uncertainty Over New Constitution Continues Following Kidnapping*, ASHARQ AL-AWSAT (Jan. 18, 2015), <https://eng-archive.aawsat.com/arafat-madabish/news-middle-east/yemen-uncertainty-over-new-constitution-continues-following-kidnapping> [<https://perma.cc/6ZHU-4YUP>].



transition government, the Houthis, and Southern leaders throughout late 2014, but they were unable to reach agreement on divisive issues that could be incorporated into the CDC's work.<sup>155</sup>

The Houthi military incursion into the capital forced the Hadi regime to negotiate with them. Both parties agreed to a cease-fire on the condition that Hadi form a technocratic transition government, with greater representation from the Houthis, Southern Hiraak Movement, and other groups that had been excluded from the post-Arab Spring GCC-led transition plan.<sup>156</sup> In September 2014, Yemen's major political parties (excluding the Southern separatists) entered into a cease-fire agreement called the Peace and National Partnership Agreement (PNPA) with the Houthi government, which was intended to bolster Houthi support for the Hadi transitional government, constitutional reform, and national elections.<sup>157</sup> With respect to constitutional reform, the PNPA required the Hadi government to work towards consensus support for the draft constitution and to expand representation within a body tasked with overseeing the CDC and implementation of the NDC outcomes.<sup>158</sup> The PNPA also tasked Hadi with the formation of a technocratic government with diverse representation from Yemen's diverse political parties.<sup>159</sup> Although Hadi followed the agreement and established a technocratic government with Houthi and diverse political party representation, the government was unable to fulfill its mandate for reform and to move the political transition forward due to ongoing violence, corruption, and political division.<sup>160</sup>

The Houthis signed the PNPA as it gave them a greater role in government ministries and legitimized their efforts to take control

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<sup>155</sup> Gluck, *supra* note 23, at 52.

<sup>156</sup> Mareike Transfeld, *The Failure of the Transitional Process in Yemen*, GERMAN INST. INT'L & SEC. AFF. 2-3 (Feb. 2015), [https://www.swp-berlin.org/fileadmin/contents/products/comments/2015C06\\_tfd.pdf](https://www.swp-berlin.org/fileadmin/contents/products/comments/2015C06_tfd.pdf) [<https://perma.cc/9P8B-5EAF>].

<sup>157</sup> Gluck, *supra* note 23, at 52.

<sup>158</sup> Peace and National Partnership Agreement arts. 8-9, Sept. 21, 2014, [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/darp/dv/darp20141204\\_05\\_/darp20141204\\_05\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/darp/dv/darp20141204_05_/darp20141204_05_en.pdf) [<https://perma.cc/WM85-MVWH>] [hereinafter PNPA].

<sup>159</sup> PNPA, *supra* note 158, at art. 1.

<sup>160</sup> Transfeld, *supra* note 156, at 4.

of the government.<sup>161</sup> Although the PNPA called for the Houthis to put down their arms, the Houthis continued their armed expansion across Yemen, arguing that it was necessary to combat a growing threat from Al Qaeda in the Arabian Peninsula (AQAP) and the Islamic State of Syria and Iraq (ISIS), both of which had taken advantage of the security vacuum in Yemen to expand.<sup>162</sup> The Houthis also continued their military aggression in Sanaa against President Hadi.<sup>163</sup> As they expanded their military campaign and took greater territory, the Houthis ultimately ignored their commitment under the PNPA to politically support the transition government and the constitutional reform process.<sup>164</sup> The declining security situation forced the CDC to move to Abu Dhabi in November and December to complete its work.<sup>165</sup>

The conflict within the CDC mirrored the civil conflict outside of it. The NDC had produced over 1,800 outcomes with the intention that they would be incorporated into a new constitution by the CDC. Many of the outcomes were incompatible and some issues had not been resolved by the NDC. As a consequence, the CDC was responsible for resolving divisive issues such as the federal structure of the state, the allowance of regional constitutions, the division of power between the national and regional governments, the treatment of sharia, women's political participation, and transitional justice measures.<sup>166</sup> This undertaking was made more difficult by Saleh, his allies, and Southern separatists who consistently delayed work within the CDC, seeking to undermine its legitimacy and the broader transition.<sup>167</sup> The Houthis were also spoilers and they limited their involvement in the CDC as they began to accomplish their

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<sup>161</sup> INT'L CRISIS GRP., YEMEN: IS PEACE POSSIBLE? 2 (Feb. 9, 2016), <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemen-peace-possible> [<https://perma.cc/97X5-Z4YL>] [hereinafter ICG-Yemen].

<sup>162</sup> Gluck, *supra* note 23, at 52-53

<sup>163</sup> *See id.* (describing the ongoing siege of Sanaa and the Houthi abduction of President Hadi's Chief of Staff).

<sup>164</sup> *See id.* (discussing that the Houthis ignored the PNPA agreement and instead increased their military presence in the regions south and west of the capital).

<sup>165</sup> *Id.*

<sup>166</sup> Helen Lackner, YEMEN'S 'PEACEFUL' TRANSITION FROM AUTOCRACY: COULD IT HAVE SUCCEEDED?, INT'L IDEA 56 (Mar. 2016), <https://www.idea.int/sites/default/files/publications/yemens-peaceful-transition-from-autocracy.pdf> [<https://perma.cc/Q4MR-CMXX>].

<sup>167</sup> *See id.* at 57 (discussing the tension between Saleh and Southern separatists that delayed efforts to solve problems).

political objectives through military means.<sup>168</sup> Unlike the Houthis, the Southern separatists did not pursue their objectives militarily while the CDC was active; rather, they sought to undermine the CDC's work by using delaying tactics and rejecting negotiated solutions to difficult issues.<sup>169</sup>

#### 4.6. *Constitutional Conflict Deepens Civil Conflict*

On January 15, 2015, the CDC finalized a draft constitution and released it to the public. The very same day, armed Houthis kidnapped Ahmed Awad Bin Mubarak, President Hadi's Chief of Staff and the CDC Secretary-General, as he was headed to a meeting with President Hadi to discuss the recently-released Constitution.<sup>170</sup> The Houthis acknowledged that they kidnapped Mubarak in order to prevent him from attending the meeting.<sup>171</sup> On television, the Houthis claimed that they had become aware of irregularities in how the constitution had been drafted in the CDC and in how the government was attempting to make it law.<sup>172</sup> The Houthis believed that the draft constitution violated the spirit of the PNPA on federalism.<sup>173</sup> After kidnapping Mubarak, the Houthis surrounded and bombed the presidential palace five days later on January 22, 2015, forcing President Hadi and his government to resign.<sup>174</sup> Hadi fled to Saudi Arabia and the Houthis formed a Revolutionary Command Council, and by declaration, claimed control of the country.<sup>175</sup> The

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<sup>168</sup> See *id.* (explaining that the Houthis were focused on advancing their military objectives during the CDC period).

<sup>169</sup> *Id.*

<sup>170</sup> Madabish, *supra* note 154.

<sup>171</sup> Mohammed Ghobari, *Gunmen Hold Yemeni Official to Try to Derail New Constitution*, REUTERS (Jan. 17, 2015), <http://www.reuters.com/article/us-yemen-security-idUSKBN0KQ0AI20150117> [<https://perma.cc/K244-TGSS>].

<sup>172</sup> *Id.*

<sup>173</sup> See INT'L CRISIS GRP., *supra* note 161, at 3 (discussing the Houthis' rejection of Hadi's version of the constitution due to its violation of PNPA's spirit and their turning to violence instead).

<sup>174</sup> *Id.*; Menan Khater, *Houthis Burn Presidential Palace Opposing Proposed Constitutional Draft*, DAILY NEWS EGYPT (Jan. 21, 2015), <http://www.dailynewsegyp.com/2015/01/21/houthis-bomb-presidential-palace-opposing-proposed-constitutional-draft> [<https://perma.cc/8CN9-4NVJ>].

<sup>175</sup> See INT'L CRISIS GRP., *supra* note 161, at 3 (discussing the Houthis' formation of a "revolutionary council" with support from the U.N. and expansion of their military presence southward).

Houthis formed a military alliance of convenience with their former foe, President Saleh, and his military allies.<sup>176</sup>

Hadi returned to the southern Yemen city of Aden and renounced his prior resignation.<sup>177</sup> President Hadi reestablished his government in Aden with the backing of Saudi Arabia, the UAE, and southern Yemeni factions concerned about Houthi aggression into their territory.<sup>178</sup> On March 26, 2015, Saudi Arabia began an air campaign against the Houthi government with the goal of establishing Hadi as President. After a year of fighting, by early 2016, the civil war between the Houthi government in Sanaa, backed by Iran, and the Hadi government in Aden, backed by Saudi Arabia, had resulted in 6,000 deaths, including over 2,800 civilian deaths.<sup>179</sup> At the time this article was written, the draft constitution had not yet been submitted to the Yemeni public for a referendum and, given the opposition of the Houthi government to its provisions, the likelihood of consensual support for the draft text is minimal.

#### 4.7. Failure to Consolidate Diverse Support for the CDC

A constitutional process that does not take into account the views of competing political factions runs the risk of exacerbating civil conflict. In Yemen, where the CDC's work failed to reflect the views of the Houthis and the Southern Hiraak Movement, the release of the draft constitution precipitated civil war. Yemen's CDC had a mandate to constitutionalize the consensus positions of the diverse political participants in the National Dialogue. The NDC Outcome Document called for the CDC to implement NDC political agreements regarding the constitution and submit its draft constitution to a "National Body" oversight committee for confirmation that the text aligned with the NDC political agreements.<sup>180</sup> Because the NDC did not arrive at a consensus regarding the political agreement on the federal structure of government, any text produced by the

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at ii.

<sup>180</sup> See Gluck, *supra* note 23, at 50 (describing the National Body as an 88-member committee tasked with assessing the consistency of the draft constitution with NDC solutions).

CDC was subject to opposition from the Houthis.<sup>181</sup> Unfortunately, the NDC did not include many of the key stakeholders and political leaders that could arrive at a political agreement that the factions would honor.<sup>182</sup>

Further, the Houthi military takeover of parts of Sanaa in September 2014 altered the political dynamic between the Houthis and the Hadi government, requiring a new political consensus on aspects of constitutional drafting.<sup>183</sup> The parties tried to reach a consensus with their signing of the PNPA. However, the PNPA was ultimately an ineffective agreement—Houthis failed to abide by their commitment to end their military incursion and to support the CDC draft constitution. Despite the NDC and PNPA, the constitution-making process in Yemen exhibited all of the markers of conflict constitution-making. These markers include the internal battles in the CDC over the structure of the state, which mirrored the conflict between the Houthi and Hadi governments, the CDC's inability to reach an agreement with key blocs such as the Houthis and Southern Hiraak movement regarding the structure of the state, and, ultimately, the Houthis' rejection of the final draft constitution due to this lack of consensus. All of this led to their full takeover of the Yemen capital. The Houthis have prevented any further action on the draft constitution as they have seen their political objectives more readily achieved through military force. In Section 7 of this article, I recommend measures to move constitutional reform in Yemen forward, building upon the significant work already undertaken.

##### 5. CONSTITUTIONAL DESIGN IN MULTIETHNIC TRANSITIONING STATES

In multiethnic sectarian societies such as Libya and Yemen, intergroup conflicts are frequently a source of civil discord (hereinafter, I will refer to such conflicts as interethnic conflicts). Transitioning states have sought to address the problem of interethnic conflicts in various ways. Some states have done so through constitutional

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See id.* at 52 (emphasizing that the unstable political environment at the time made political bargaining and negotiations critical to the process of drafting a stable constitution).

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structures expressly designed to accommodate ethnic cleavages. Since interethnic conflicts are frequently regional in nature, states have also sought to address such conflict through various forms of federalism and decentralization. In Section 5.1, I discuss various constitutional design approaches that address interethnic conflicts through ethnic accommodation and ethnic moderation. In Section 5.2, I discuss models of constitutional design that address interethnic regional conflicts through federalism and decentralization.

### 5.1. *Models for Multiethnic Governance*

Comparative constitutional scholarship refers to two constitutional design approaches for addressing interethnic conflicts in highly divided societies: consociationalism and centripetalism.<sup>184</sup> Consociational and centripetal design features are incorporated into constitutions and electoral laws in order to secure multiethnic support for a state's democratic institutions of governance. Consociationalism focuses on the accommodation of ethnic groups through guaranteed group representation in governing bodies. Centripetalism focuses on the moderation of ethnic group views through the election of moderate officials that represent multiethnic constituencies.

#### 5.1.1. *Consociationalism – Ethnic Accommodation*

Under consociational democracy, ethnic groups are granted a fair amount of autonomy over their affairs, a veto or partial veto over the central government's decisions, and proportional representation in government institutions.<sup>185</sup> Consociationalism is designed to protect ethnic groups from harm by other ethnic groups or by the central government.<sup>186</sup> Because consociationalism seeks to protect

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<sup>184</sup> See Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 WM. & MARY L. REV. 1213, 1216–17 (2008) (explaining the difference between the consociationalism design, which is centered on a “regime of guarantees,” and the centripetalism design, which focuses on electoral incentives).

<sup>185</sup> See Karol Edward Soltan, *Constitution-Making at the Edges of Constitutional Order*, 49 WM. & MARY L. REV. 1409, 1423–24 (2008) (elaborating on the defining characteristics of a consociational democracy).

<sup>186</sup> *Id.* at 1424.

competing groups, one scholar has described consociationalism as “a peace treaty extended into the workings of government.”<sup>187</sup> Consociationalists recognize and accommodate ethnic group identity and give them status *qua* ethnic groups within democratic institutions. Consociationalists advocate for multiethnic governing coalitions—parliamentary, executive, and administrative positions are allocated on a proportional group basis through proportional parliamentary electoral systems, multiethnic cabinets that operate by consensus, and proportional hiring in the civil service and the military.<sup>188</sup> Consociationalists guarantee multiethnic outcomes through multiethnic “seats” in bodies. Under consociational models, a majoritarian democracy accommodates ethnic diversity through the explicit guarantee of ethnic representation in political bodies. Some have critiqued consociationalism by saying that it accommodates ethnic extremists because group representatives represent “their” ethnic group exclusively.<sup>189</sup>

Within the MENA region, consociational democratic features have been attempted in highly divided multiethnic states. Lebanon was a consociational democracy from its independence in 1943 until its civil war in 1975.<sup>190</sup> In the mid-twentieth century, Lebanon was 30% Maronite Christian, 20% Sunni Muslim, 18% Shiite Muslim, and 11% Greek Orthodox. Lebanon had smaller sects of either Christian or Muslim background.<sup>191</sup> Lebanon had a quasi-presidential system that included a Maronite president, a Sunni prime minister, a Shiite chairman of the legislature, and a Greek Orthodox deputy chairman and deputy prime minister.<sup>192</sup> The cabinet was also a grand coalition in which all of the sects were proportionately represented.<sup>193</sup> A plurality and multimember electoral system resulted in a parliament that consistently had a ratio of six Christian members to every five

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<sup>187</sup> *Id.*

<sup>188</sup> See Horowitz, *supra* note 184, at 1216 (emphasizing that the consociationalist design is rooted in the principle of proportional inclusion and a group culture).

<sup>189</sup> *Id.* at 1216–17.

<sup>190</sup> See Samuel Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT’L L. 86, 97 (2001) (citing Arend Lijphart, *DEMOCRACY IN PLURAL SOCIETIES* (1977)) (discussing an example of a plural society that successfully incorporated the features of a consociational democracy).

<sup>191</sup> AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 147 (1977).

<sup>192</sup> *Id.* at 148.

<sup>193</sup> *Id.*

Muslim members.<sup>194</sup> This system worked effectively for more than thirty years.<sup>195</sup> Iraq also adopted consociational democratic features following the passage of its 2004 interim transitional constitution and its 2005 permanent constitution to address significant political tensions among the Sunni, Shia, and Kurdish communities. The interim constitution created a tri-partite Presidency Council, consisting of a President and two Vice Presidents and the 2005 constitution created a Speaker and two Deputy Speakers.<sup>196</sup> Both the interim and permanent constitutions authorized a Prime Minister and Council of Ministers.<sup>197</sup> During the transition period, the Prime Minister routinely selected two Deputy Prime Ministers. By political agreement, each of the positions within these tri-partite leadership bodies was filled by a Shiite, Sunni, and Kurdish official.<sup>198</sup>

### 5.1.2. Centripetalism – Ethnic Moderation

Centripetal democracies are designed to reward moderate behavior at the expense of extremists. Centripetal design features in constitutions and electoral laws incentivize moderate politicians within ethnic groups to compromise with moderate politicians in other ethnic groups.<sup>199</sup> Centripetal democracies contain mechanisms to elevate moderate ethnic representatives and parties, such

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See IRAQ: LAW OF 2004 OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD Mar. 8, 2004, art. 36, <http://www.refworld.org/docid/45263d612.html>

[<http://web.archive.org/web/20171030192021/http://www.refworld.org/docid/45263d612.html>] [hereinafter TAL] (establishing the Presidency Council). TAL was adopted by the Iraq Governing Council while Iraq was administered by the U.S.-led Coalition Provisional Authority and served as a post-Saddam interim constitution; see also *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005, art. 54 (establishing a Speaker and two Deputy Speakers).

<sup>197</sup> TAL, art. 38 *supra* note 196; Article 76, *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005, *supra* note 194.

<sup>198</sup> See Sean D. Murphy, ed., *Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT’L L. 601, 604 (2004) (recounting the appointment of Sheik Ghazi al-Yawar, a Sunni Muslim, to the position of Iraqi interim president, along with a Kurd and a Shia Muslim as his deputy presidents).

<sup>199</sup> See Soltan, *supra* note 185, at 1424 (explaining that the centripetal approach focuses on collaboration among moderate politicians at the expense of excluding extremists).



as multiethnic electoral districts and interethnic coalitions.<sup>200</sup> Centripetalists believe that these approaches support moderation because individual representatives and coalition members must represent a multiplicity of views, rather than the views of their ethnic group exclusively. Centripetalists apply a wide range of tools to support moderates such as the alternative vote—a system that allows for the interethnic exchange of second and subsequent voting preferences, and requiring electoral victors to receive a plurality of the vote across an ethnically diverse territorial area.<sup>201</sup>

Centripetal arrangements that encourage the election of moderates with a multiethnic perspective can take many forms. Nigeria adopted electoral reforms that required presidential candidates to obtain not only a plurality of the national vote, but also 25% of the vote in two thirds of its provinces, to encourage candidates with a moderate multiethnic outlook.<sup>202</sup> Papua New Guinea adopted the alternative vote system which required candidates to obtain support from multiple groups in their constituencies in order to pass the majority vote threshold; after the country dropped alternative voting, candidates were elected based upon their ethnic group pluralities and interethnic group conflict increased.<sup>203</sup> Centripetalism is most effective in states that have heterogeneous electoral districts where the interethnic pooling of votes can occur.<sup>204</sup>

## 5.2. Models for Allocation of State Power in Divided States

The civil conflicts in Libya and Yemen reflect significant ethno-regional tensions (discussed *supra* Sections 3 and 4). The allocation of state power between the central and local governments was a driver of civil conflict in both countries. Comparative constitutional scholars have suggested various models of allocating state power to

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<sup>200</sup> See Horowitz, *supra* note 184, at 1217 (explaining that the underlying mechanism of the centripetal approach consists of politicians compromising on ethnic issues in order to appeal for voter support from disparate ethnic groups).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1224.

<sup>203</sup> *Id.* at 1224-5.

<sup>204</sup> See *id.* at 1225 (explaining that without interethnic vote pooling, legislators, who represent smaller and more ethnically homogenous areas, have smaller incentives to appeal to other ethnic groups for support).

address ethno-regional conflict. These models include ethnic federalism and political decentralization, which focus on the devolution of state power in a manner intended to reduce ethnic divisions.

### 5.2.1. *Ethnic Federalism*

Federalism refers to the sharing of state power between a national authority and subnational or regional authority.<sup>205</sup> Ethnic federalism is “a term used to describe a particular set of governmental arrangements specifically designed to ameliorate conflict among or between [ethnic] subgroups in a sharply divided state.”<sup>206</sup> Ethnic federalism is a form of consociationalism as it reflects the elements of that system: (1) executive power-sharing among the representatives of all significant groups; (2) a high degree of internal autonomy for groups that wish to have it; (3) proportional representation and proportional allocation of civil service positions and public funds; and (4) a minority veto on the most vital issues.<sup>207</sup> As with other forms of consociationalism, some scholars have questioned whether ethnic federalism exacerbates or ameliorates ethnic conflict.<sup>208</sup> Ethnic federalism has been part of the transitional constitution-making process in several states that have experienced ethno-regional conflicts such as South Africa, Ethiopia, and Iraq.<sup>209</sup> While systems of federalism often differ, some of the characteristics of a constitutional system premised on ethnic federalism are as follows:

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<sup>205</sup> See Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT'L L. 51, 56-58 (2003) (explaining that federalism contains two essential attributes: (1) dispersion of power among many centers of authority and (2) existence of constitutional mandates that legitimize the various centers of authority's claims of rights against the central government).

<sup>206</sup> *Id.* at 54 (internal citations omitted). See e.g., Ludsin, *supra* note 22, at 290 (describing the insertion of ethnic federalism clauses into Nepal's 2006 Interim Constitution, which led to the signing of the Comprehensive Peace Accord later that year).

<sup>207</sup> David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 TEX. INT'L L. J. 141, 173 n.220 (1996).

<sup>208</sup> See Selassie, *supra* note 205, at 86 (asserting that ethnic federalism exacerbates ethnic distrust and social discord because it deliberately and openly highlights ethnic differences that might otherwise fade with time).

<sup>209</sup> See Horowitz, *supra* note 184, at 1218 (discussing how both consociationalists and centripetalists support federal approaches to governance, although for different reasons).

*5.2.1.1. Protections for Cultural and Linguistic Identity*

The protection of an ethnic group's distinct cultural and linguistic identity within a broader national culture frequently underlies an ethnic group's desire for political autonomy. The South African Constitution recognizes ethnic groups' rights to their own languages and cultures, and reinforces those rights through a federal form of government that empowers provinces to protect those rights.<sup>210</sup>

*5.2.1.2. Ethnicity-Based "Self-Rule"*

Some states have permitted subnational "self-rule" on the basis of ethnic identity to address ethnic groups' desire for cultural, linguistic and political autonomy. For example, the Ethiopian Constitution provides for a model of ethnic federalism that allows subnational groups to have self-governing status on the basis of their ethnic identity.<sup>211</sup> The entire Ethiopian state is organized along an ethnic federal form of government that consists of nine ethnic based federal states.<sup>212</sup> Most Sub-Saharan African (SSA) states have avoided Ethiopia's model of constitutional recognition of federal self-rule, but ethnic groups have continued to press for ethnic-based federal self-rule in a number of SSA countries, often because of their historic presence and concentration in particular regions of a country.<sup>213</sup>

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<sup>210</sup> Selassie, *supra* note 205, at 54.

<sup>211</sup> *See id.* (discussing the inclusive approach to ethnic identity that the Ethiopian Constitution provides).

<sup>212</sup> *See id.* at 54–55 (noting that eight of the nine provinces were organized along ethnic lines to make the province the principle vehicle for aggregating major ethnic groups' political, cultural, and linguistic identity). The Ethiopian model of ethnic federalism goes much further than South Africa's model which does not organize provinces primarily along ethnic lines.

<sup>213</sup> *See id.* at 60 (highlighting the fact that many ethnic groups within African countries have staged uprisings against the central government to demand official recognition of their separate social identities).

### 5.2.1.3. Subnational Constitutions

Some, but not all, federal systems permit subnational units to create their own constitutions. Some subnational constitutional scholars have argued that merely the authority to create a subnational constitution, even if it is not exercised, can serve important conflict reduction goals.<sup>214</sup> The transition constitutions of South Africa and Iraq both included provisions which allowed for regional governments to develop subnational constitutions as part of the power-sharing arrangement negotiated among major ethnic groups.<sup>215</sup> In some circumstances, difficult issues that could not be resolved during national constitution-making processes, can be deferred to the regional constitution-making process.<sup>216</sup>

### 5.2.1.4. Political and Legal Autonomy

Federal systems are designed to provide a degree of autonomy to regional governments to resolve legal and political and governance matters left to their competency by the national constitution. Though rare, some federal arrangements, such as the Ethiopian Constitution, provide an option for a region to secede.<sup>217</sup> However, it is more typical for negotiators to grant significant autonomy, short

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<sup>214</sup> See Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transnational Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT'L L. 585, 589-90 (2008) (discussing how, although certain provinces did not create their own subnational constitutions, gaining the authority to do so was an important part of the political settlement to mitigate inter-ethnic conflict).

<sup>215</sup> See *id.* (describing the strategic provisions in transition constitutions that help create a smooth transition of power); see generally Michael J. Kelly, *The Kurdish Regional Constitutional within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707 (2010) (discussing the creation and adoption of the Kurdish regional constitution).

<sup>216</sup> See Kelly, *supra* note 215, at 746 (discussing that one such issue left unresolved in the federal constitution was the status of the oil rich city of Kirkuk in Iraq, wherein both Baghdad and the Region of Kurdistan wanted to maintain control of Kirkuk and the Iraqi constitution deferred resolution of the issue to a referendum; ultimately, the regional Kurdish constitution defined Kirkuk as part of the Kurdish region).

<sup>217</sup> See Selassie, *supra* note 205, at 54 (discussing how the ethnic-federal system of government in Ethiopia enables it to accommodate ethnic groups' cultural, linguistic, and political decisions).

of secession, to ethnic groups, such as the Kurds in Iraq, in order to keep the regional ethnic group within the state.<sup>218</sup>

### 5.2.2. Political Decentralization

Whereas federal governments share political power with regional governments, unitary states decentralize administrative authority to local governments, as an extension of unitary national power.<sup>219</sup> Federal systems create subnational (regional) governance structures such as governors, regional parliaments, and regional courts that exercise exclusive or concurrent powers with the central government. Unlike federalism, unitary state decentralization does not require the creation of subnational regional governance structures to share power with the central government. Decentralization is an administrative delegation of central authority to subordinate geographic or functional units.<sup>220</sup> Unitary states may engage in decentralization by devolving central authority to the local level.<sup>221</sup>

The objectives of federalism and decentralization may also differ. As discussed *supra*, federalism can ease tensions in highly divided societies with ethnic groups centered in different regions by providing a degree of ethno-regional autonomy.<sup>222</sup> In a democratic system, decentralization serves important objectives beyond the mere administration of central authority – decentralization fosters democratic stability by supporting individual rights and collective self-government.<sup>223</sup> One scholar argues that democratic decentralization gives people better incentives, more opportunity to exercise

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<sup>218</sup> See Kelly, *supra* note 215, at 726 (explaining that the Kurds settled for a federal structure of autonomy and regionalism).

<sup>219</sup> CTR. FOR CONST. TRANSITIONS ET AL., DECENTRALIZATION IN UNITARY STATES: CONSTITUTIONAL FRAMEWORKS FOR THE ARAB STATES REGION 11 (2014) [hereinafter DECENTRALIZATION IN UNITARY STATES].

<sup>220</sup> Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on A National Neurosis*, 41 UCLA L. REV. 903, 910 (1994).

<sup>221</sup> See Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 2 (2002) (arguing that in some circumstances unitary governments devolve even more power to local governments than federal systems).

<sup>222</sup> See DECENTRALIZATION IN UNITARY STATES, *supra* note 219, at 12 (noting that one goal of a federal system of governance is to ease tensions between different groups in society).

<sup>223</sup> See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 190–91 (2005) (critiquing Rubin and Feeley for

their rights, and less reason to oppress one another.<sup>224</sup> These are the precise interests that individuals in highly divided ethno-regionally diverse societies have in a reconstructed state—the ability to exercise their rights free of oppression.

In examining the different forms by which democratic decentralization may occur, it is helpful to use Professor Hills' rubric of federalist, unitary, and localist democracies.<sup>225</sup> The attributes of a federalist democracy were discussed *supra*. A unitary democracy exists where the central government may devolve power and responsibilities to a subnational local entity but that entity or subnational unit receives no protections in the national constitution or law—its authority and existence are at the whim of the central government. In a unitary democracy, the local subnational unit exists merely as an instrumentation of the central government and carries out national law in accordance with local conditions.<sup>226</sup> In a localist democracy, the local government is granted authority under the national constitution, which protects it from interference by the national government (or regional government, if one exists) in its areas of competency.<sup>227</sup>

In ethno-regionally divided societies, a federalist or localist democracy may each be beneficial, as both approaches comprise constitutional guarantees that ethnic groups will have control over their affairs at the regional and/or local level. In some circumstances, a decentralized localist democracy might be preferred to a federalist democracy. For example, national governments might fear that an ethnically-defined regional government in a highly divided state might seek to declare independence from the state—a recurring fear of the national governments of Iraq, Iran, Syria, and Turkey, regarding Iraq's Kurdish Region.<sup>228</sup> Devolving power to local authorities

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characterizing the value of decentralization as primarily being administrative efficiency, and stating that it serves fundamental purposes crucial to democracy).

<sup>224</sup> See *id.* at 191 (arguing that decentralization feeds into the goals of self-government).

<sup>225</sup> See *id.* at 195–99 (distinguishing decentralized regimes into “federalist,” “unitary,” or “localist” based on the central government's power to regulate and interfere with local governments).

<sup>226</sup> See *id.* at 198 (discussing how subnational governments in a unitary democracy don't receive legal protection, and thus function to carry out national law).

<sup>227</sup> *Id.* at 199.

<sup>228</sup> See Kelly, *supra* note 215, at 726 (noting Syria, Iran, and Turkey's concern that an independent Kurdistan may lead to secessionist movements among their own Kurdish populations). This fear of ethnic secession is not unfounded. As the

rather than to regional governments is an alternative constitutional design option that supports local autonomy, without empowering a regional government that might compete with the state. In divided multiethnic states, such as Kosovo, the creation of decentralized local governments across ethnic lines helped to prevent the partition of the state along ethnic lines by creating local institutions in which Kosovar Serbs and Albanians cooperated. In such environments, local decentralization fosters national unity and stability to a greater degree than regional federalism.<sup>229</sup>

The MENA region has a history of highly centralized and authoritarian state structures, with weak democratic practices and very little decentralization.<sup>230</sup> Over the past decade, Saudi Arabia, Bahrain, Jordan and Oman have held local government council elections. However, the councils have had little to no authority delegated to them from the central government.<sup>231</sup> In Egypt, local people's councils elected under Mubarak had no authority over local executive officials who were representatives of central government ministries.<sup>232</sup> The Arab Spring transitions opened up political space for the devolution of power away from the central government throughout the MENA region. However, the quality and nature of the political decentralization in a specific state will determine whether it fosters greater democratic accountability and local citizen engagement. The models of political governance and state power allocation that Libya and Yemen adopted in their draft constitutions are assessed in Section 6.

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International Court of Justice determined in its Advisory Opinion regarding Kosovo's Unilateral Declaration of Independence, such declarations of independence by ethnically defined regions are not violations of general international law and may represent a people's appropriate exercise of their right to self-determination; see also Elena Cirkovic, *An Analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence*, 11 German L.J. 895, 900 (2010) (discussing the dialogue surrounding the right to external self-determination and the recognition of states that do break off within the broader arena of international law).

<sup>229</sup> See DECENTRALIZATION IN UNITARY STATES, *supra* note 219, at 30 (explaining that decentralization preserves national stability by broadening citizenship participation and fragmenting central power).

<sup>230</sup> See *id.* at 14 (noting that political elites within the region have traditionally exploited nationalism and regional conflicts to preserve the need for strong, centralized states).

<sup>231</sup> Out of these four governments, Jordan is the only one that has delegated some of its central authority to the local government councils, although it revoked it shortly after. See *id.* at 35–36 (characterizing recent waves of decentralization within the MENA region as “primarily cosmetic.”).

<sup>232</sup> *Id.* at 36.

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## 6. CONFLICT CONSTITUTIONS IN LIBYA AND YEMEN

Despite their ongoing civil wars, both Yemen and Libya produced draft constitutions in 2015 and early 2016. Both countries addressed regional and sectarian divisions in distinct ways. Libya opted for unitary decentralization, concentrating power at the national level and devolving limited authorities to the governorate and local level. Yemen adopted a federal structure with consociational design features at the national level and significant allocation of power to the regions. Both constitutions, however, contained elements that promised to prolong the conflicts that sparked the civil wars and impacted the constitutional drafting processes.

### 6.1. *Libya's 2016 Draft Constitution*

Libya's draft constitution fails to include consociational or centripetal design features that explicitly accommodate or moderate ethnic group divisions. And rather than designing a federal system that empowers Libya's three historic regions as political entities, the CDA instead drafted a constitution that creates a "unitary" state system by concentrating power in the central government and devolving more limited authorities to local councils. This unitary decentralized state design is referenced in the constitution's preamble, where the drafters exhort the preservation of the country's unity by continuing "with the establishment of the Libyan State in 1951 with the three provinces (Cyrenaica, Tripolitania, and Fezzan), then their transition into a united states as of 1963."<sup>233</sup> The 1963 transition refers to the removal of federal provisions from the 1951 constitution and the formation of ten governorates and local municipalities.<sup>234</sup> The drafters appear to avoid the creation of regional organizational structures that might be perceived as competition to the central government. Article I of the constitution makes this clear by stating that

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<sup>233</sup> DRAFT LIBYAN CONST., *supra* note 87, pmbl.

<sup>234</sup> See Schnelzer, *supra* note 24, at 32 (recounting that rapid economic changes, which were spurred by the 1959 discovery of vast oil reserves in Libya, created social conflicts between the Libyan people and their political leadership and motivated the 1963 administrative transition).



Libya shall be an “indivisible state” and that “it shall not be permissible to relinquish any part of its sovereignty nor its territory.”<sup>235</sup> The fact that drafters opted for a unitary state without competing regional power structures is not surprising given Libya’s history of regional tensions and the desire of nationalists in the CDA to continue the concentration of power in the central government.

The draft constitution, however, did not sufficiently address the underlying tensions that led to civil war between the Libyan Dawn and Operation Dignity forces, or that led minority groups to boycott the CDA’s constitution-drafting process. The Libyan Dawn coalition’s pursuit of political power through arms was catalyzed by the defeat of Islamist politicians in the parliamentary elections for the House of Representatives. The constitution favorably addressed an issue of importance to Islamists by providing that sharia shall be the source for legislation and creating a council of Islamic experts to opine on the requirements of Islamic law.<sup>236</sup> The constitution also prohibits the existence of paramilitary organizations or security forces outside of the state run army – a provision likely to lead to significant opposition from the Islamist affiliated Libyan Dawn forces and Libya’s many extensive paramilitary organizations.<sup>237</sup> The enforcement of the provision by state security forces will likely lead to significant armed opposition from Libya’s militia groups, as occurred during General Haftar’s Operation Dignity efforts to quell militia activity.

The constitution also failed to sufficiently address the concerns of minority groups, which raises the potential for minority opposition to the constitution and sustained conflict. The CDA, whose minority group members left in boycott as discussed *supra* Section 3.3., enshrined a specific preference for Arabic identity and Arabic language into the constitution, by declaring Libya to be an Arabic State and declaring Arabic as Libya’s official language.<sup>238</sup> The CDA also limited the offices of President and Prime Minister exclusively to Muslims.<sup>239</sup> While minority languages are given some protection under various provisions, Arabic and Muslim identity are clearly favored statuses under the constitution.<sup>240</sup> The provisions adopted by

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<sup>235</sup> DRAFT LIBYAN CONST., *supra* note 87, art. 1.

<sup>236</sup> *Id.* at art. 8, 172.

<sup>237</sup> *Id.* at art. 192.

<sup>238</sup> *Id.* at art. 2.

<sup>239</sup> *Id.* at art. 110, 125.

<sup>240</sup> *Id.* at art. 2, 64, 117.

the CDA would have faced opposition from minority groups if they had continued their involvement within the CDA. Because the CDA developed language addressing minority group rights without minority group input, the CDA risked long term minority group opposition to the constitution and sustained conflict over its provisions. The CDA could have opted for a consociational model of governance and allocated reserved seats in parliament and in executive institutions to minority groups in order to secure their support. However, they missed this opportunity.

The draft Libyan constitution also provides the foundation for continued conflict between local authorities and the central government. The constitution states that local authorities will have autonomous, transferrable, and shared powers with the central government but it does not define how those shared powers will be exercised in concert with the central government.<sup>241</sup> As such, the constitution is a unitary democracy, rather than a localist democracy. As discussed *supra* Section 5, a localist democracy grants and protects local competencies, whereas in a unitary democracy, the authorities of the local entity are at the whim of the central government. Undefined political decentralization in the constitution can lead to the national government granting and revoking limited authorities, as occurred in Jordan. The lack of defined local authority will lead to disputes when local concerns conflict with national priorities. The constitution also provides that in addition to receiving centralized resources, local governments will have the authority to raise local taxes and the central government will ensure financial balance among local government units.<sup>242</sup> This provision along with a provision giving the central government control over natural resources and the ability to redistribute those resources among regions is likely to lead to local and regional conflicts surrounding the distribution of resources.<sup>243</sup>

Many of the conflicts embedded in the draft constitution were foreseeable given Libya's sectarian divisions but the conflict-ridden drafting process ensured non-consensual results. Minority groups opposed certain provisions because they were effectively excluded from the process and the Islamist Libya Dawn coalition opposed an elected constituent assembly in which Islamists were not significantly represented. Despite these tensions surrounding the CDA,

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<sup>241</sup> *Id.* at art. 158.

<sup>242</sup> DRAFT LIBYAN CONST., *supra* note 87, art. 159.

<sup>243</sup> *Id.* at art. 185.

the United Nations was able to garner consensus political support for Libya's draft constitution with the December 2015 UN Brokered Political Agreement. The peace agreement, supported by both the Tobruk and Tripoli governments, created one unified national government and committed both warring factions to support the work of the CDA. This commitment offers hope that despite the CDA's internal disputes, both parties to the civil war may ultimately seek their political objectives peacefully under the constitutional regime established by the draft constitution.<sup>244</sup> For long term constitutional stability, the Libyan public will need to accept any new constitution as legitimate. Section 7 will discuss steps that the Libyan government can take to increase public support for the constitution.

### 6.2. Yemen's 2015 Draft Constitution

The CDC's completion of a draft constitution precipitated the Houthi bombing of the Presidential Palace and takeover of Yemen's capital city, Aden.<sup>245</sup> In justifying the Houthi's actions, Abdel Malik Al-Houthi, the leader of the Houthi movement, went on television and announced that he opposed the draft constitution because it did not implement the NDC outcomes, failed to reflect the views of the Houthis and Southern groups, and that in creating six regions, the constitution would "tear Yemen apart and . . . raise more conflict."<sup>246</sup> The draft constitution released by the CDC reflected the

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<sup>244</sup> As of the time of writing, the unity government—Government of National Accord—has been installed in Tripoli. The Libya Dawn backed General National Congress in Tripoli disbanded, although its supporting militias continue to operate in Tripoli. The General Haftar-based House of Representatives in Tobruk has continued to operate in the East. Ken Hanly, *Op-Ed: Libyan Government of National Accord Asks for NATO Training Help*, DIGITAL J. (Feb. 17, 2017), <http://www.digitaljournal.com/news/world/op-ed-libyan-government-of-national-accord-asks-for-nato-training-help/article/486099> [<https://perma.cc/6QJV-3K66>].

<sup>245</sup> See Menan Khater, *Houthis Bomb Presidential Palace Opposing Proposed Constitutional Draft*, DAILY NEWS EGYPT (Jan. 21, 2015), <http://www.dailynewsegypt.com/2015/01/21/houthis-bomb-presidential-palace-opposing-proposed-constitutional-draft> [<https://perma.cc/8CN9-4NVJ>] (reporting on Houthi rebel militias' decision to bomb the presidential palace after they took over much of Sanaa in September 2015).

<sup>246</sup> *Id.*

NDC's tabled proposal to create a federal state with six regions.<sup>247</sup> Although the NDC did not agree to the proposal, three weeks after the NDC produced its outcomes, President Hadi convened a small committee that adopted the six-region solution over the objection of Southern leaders.<sup>248</sup> From the perspective of the Houthis and the Southern Hiraak Movement leaders, the six region federal solution was an illegitimate approach.

In addition to the conflict over the federal structure of the state, the division of authority between the regions and the central government will continue to be a source of conflict between nationalists and Southern Secessionists and other groups desiring regional autonomy. Yemen's 2015 draft constitution appears to give concessions to both sides. It creates an empowered national government with consociational features to ensure broad representation from the regions. By creating a federal structure, the constitution also devolves certain authorities to the six regions.

Ethno-sectarian divisions in Yemen exist along geographic and religious lines. Shiite Muslims of the Zaidi denomination are located in the Western mountainous regions and comprise forty percent of Yemeni society—the Houthis are political actors of Zaidi background.<sup>249</sup> Both coasts and the southeastern interior of Yemen are populated primarily by Sunni Muslims of the Shaffii denomination, who make up more than 50% of Yemen's population.<sup>250</sup> The draft constitution creates four regions (Aljanad, Azal, Sheba, Tahamh) in the north and two regions (Aden, Hadramaut) in the south based upon Yemen's existing provinces (also known as "wilayas").<sup>251</sup> The draft constitution subsumes the Saada wilaya, the Houthi's home base, within the Northern two-province Azal region.<sup>252</sup> This raised concerns for the Houthis that their political

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<sup>247</sup> 2015 DRAFT YEMENI CONST., art. 391, <http://www.constitution-net.org/sites/default/files/2017-07/2015%20-%20Draft%20constitution%20%28English%29.pdf> [<https://perma.cc/379J-4SYV>] (last visited October 23, 2017).

<sup>248</sup> See GASTON, *supra* note 139, at 4 (explaining that the six-region proposal, comprised of four northern and two southern regions, was adopted by a special committee that was hand selected by President Hadi despite NDC's recommendation to table the issue for future resolution).

<sup>249</sup> Babak Ghafarzade, *Yemen: Post-Conflict Federalism to Avoid Disintegration*, 48 N.Y.U. J. Int'l L. & Pol. 933, 942 (2016).

<sup>250</sup> *Id.*

<sup>251</sup> 2015 DRAFT YEMENI CONST., *supra* note 247, art. 391.

<sup>252</sup> See Ghafarzade, *supra* note 249, at 994 (explaining that while the draft constitution did not change any borders of the existing *wilayas*, its establishment of new

power and autonomy would be diluted under the new region and prompted their military takeover of Sanaa.<sup>253</sup> The division of the South, into four separate regions, rather than one – may have been intended by nationalists as a bulwark against secession. The Southern Hiraak Movement’s opposition to the creation of multiple regions in the South will embed a lingering conflict into the final constitution should it be adopted.<sup>254</sup>

Although Yemen’s draft constitution expressly prohibits racial, sectarian, and religious parties, its provisions support de facto ethnic federalism.<sup>255</sup> Consociational features in the constitution provide for diverse representation from Yemen’s ethno-religious sects based upon geographic, rather than explicitly sectarian, allocation.<sup>256</sup> For example, the House of Representatives, the lower chamber of the parliament is made up of 260 representatives elected under a closed proportional list system and after the first legislative cycle, the Southern Regions of Aden and Hadhramout are guaranteed 40% representation in the legislature.<sup>257</sup> The eighty-four member Federal Council, the upper house of parliament, is represented with an equal number of twelve representatives from each of the six regions and six representatives from the cities of Aden and Sanaa (the competing capitals).<sup>258</sup> This model guarantees that the Shaffi, Southern Hiraak, and other southern sectarian groups will have 40% representation in the legislature. It also guarantees that ethnically defined regional strongholds such as the Houthis home base in Azal will have an equal number of representatives in the legislature as other regions. Consociational features also apply to the courts and the armed services. The Supreme Federal Judicial Council includes one member of the High Court of each region.<sup>259</sup> Further, the Con-

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federal regions created social tensions because they did not wholly track existing religious divisions).

<sup>253</sup> See *id.* at 994–95 (speculating that further contest over the creation of new federal regions might lead to increased violence and calls for secession).

<sup>254</sup> See INT’L CRISIS GRP., *supra* note 143, at ii (noting that Yemeni hopes for a more stable future depend upon both sides’ abilities to establish basic trust, legitimacy, and consensus within negotiations).

<sup>255</sup> 2015 DRAFT YEMENI CONST., *supra* note 247, art. 13.

<sup>256</sup> *Id.* at art. 13(5) (“It is prohibited to establish political parties and organizations on the basis of racial, sectarian or doctrinal grounds.”)

<sup>257</sup> *Id.* at arts. 138–39.

<sup>258</sup> *Id.* at art. 141.

<sup>259</sup> *Id.* at art. 219.

stitutional Court is to include representation from all of the regions.<sup>260</sup> The regions are also entitled to equitable representation in the command structures of the armed forces (as determined by law).<sup>261</sup> Additional concessions are given to the Southern Regions – for example, decisions in the Federal Council are taken by majority vote, but if two-thirds of the representatives from Southern regions oppose a decision dealing with natural resources including oil and gas, electoral law matters, regional boundaries, the shape of the Federal State, the special status of the city of Aden, or any constitutional amendment relevant to Southern representation, they may veto the proposal.<sup>262</sup>

Some features in the constitution could also be considered centripetal, in that they encourage ethnic moderates who can appeal to multiethnic constituencies. Candidates for President must be endorsed by 5% of the members of one of the national legislative bodies, or by signatures of 6,000 voters from a majority of regions, with at least 500 signatures from each region.<sup>263</sup> The President and Vice President are elected together on the same ticket provided they hail from different regions.<sup>264</sup>

In addition to ensuring diverse regional representation at the federal level, Yemen's draft constitution also envisions empowered regional governments. The constitution creates a parallel structure to the national government at the regional level, including executive, legislative and judicial branches. Like at the national level, regional parliaments are elected under a proportional list system.<sup>265</sup> The parliaments are given the authority to pass laws on regional matters based on competencies defined in the constitution.<sup>266</sup> The regional government has competencies some of which are exclusive<sup>267</sup> and others of which are concurrent with the national government.<sup>268</sup> The constitution also establishes regional governors with

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<sup>260</sup> *Id.* at art. 329.

<sup>261</sup> *Id.* at art. 311.

<sup>262</sup> *Id.* at art. 143.

<sup>263</sup> *Id.* at art. 183.

<sup>264</sup> *Id.* at art. 180.

<sup>265</sup> *Id.* at art. 230.

<sup>266</sup> *Id.* at art. 237.

<sup>267</sup> *Id.* at art. 337.

<sup>268</sup> *Id.* at art. 336.

executive authority.<sup>269</sup> First level courts are established in the districts, appellate courts in the wilayas and supreme courts in the regions.<sup>270</sup> The rulings of the regional supreme courts are final, except for matters falling in the competency of the Federal Supreme Court.<sup>271</sup> The Constitution also requires that each regional legislature draft and adopt a regional constitution, provided that it may not conflict with the federal constitution.<sup>272</sup> Each region is tasked with passing its own regional budget and local laws.<sup>273</sup> The constitution also bans political parties, individuals, or groups from forming armed wings or militias.<sup>274</sup>

While these consociational features are intended to address regional and sectarian divisions, the Houthis rebel movement and Southern Hiraak Movement separatists have made clear their opposition to a six-region state and their preference for a two-region country.<sup>275</sup> Given the ongoing civil war and the diverging positions of the competing governments on the structure of the federal government, the draft constitution is likely to be an ongoing source of conflict—unless a political agreement between the competing governments can be reached through a peace process similar to the UN negotiated peace settlement in Libya. Section 7 will discuss steps that the Yemeni people and international community can take to consolidate support for the draft constitution and contribute to stability in Yemen.

## 7. WAY FORWARD

In Libya and Yemen, active civil war constrained the ability of constitution-makers to engage in widespread participatory constitution-making—which led to protracted conflict within the drafting bodies and limited the ability of drafters to adopt solutions reflecting national consensus. This lack of consensus among key factions embedded unresolved conflicts into the draft constitutional texts.

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<sup>269</sup> *Id.* at art. 239.

<sup>270</sup> *Id.* at art. 226.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at art. 237.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at art. 14.

<sup>275</sup> GASTON, *supra* note 139, at 4–5; Gluck, *supra* note 23, at 50; *Yemen's Houthis Reject Draft Constitution*, *supra* note 144.

Such conflict constitution-making processes require rehabilitation to ensure that the resulting constitutions contribute to, rather than detract from, societal stability and reconciliation.

Rehabilitated conflict constitution-making can provide for revised institutional arrangements brokered as part of a peace deal, in anticipation that later participatory processes will allow for public engagement in broader institutional reforms. The constitutions should include mechanisms which allow for transparency and public participation in critical matters – one such mechanism is the deferral of key issues to later enactment by a legislature, public referendum or constitutional amendment.<sup>276</sup> Such deferred issues might include the drafting of electoral laws, provincial authority laws, territorial boundaries or regional constitutions. For example, the 2005 Iraqi constitution deferred several difficult issues that could not be resolved by the constitutional drafting bodies to future legislatures and public referenda including a provincial powers law, electoral law, hydrocarbons law, and disputed territorial boundaries.<sup>277</sup> Similar procedural and substantive measures can be undertaken in Libya and Yemen.

### 7.1. *Libya*

Libya's conflict constitution-making process was rescued from its stalemate when the United Nations brokered a peace agreement that committed the warring governments in Tripoli and Tobruk to support the completion of the constitution-making process. While the UN-brokered peace agreement opened up space for the completion of the draft constitution, the process under which it was drafted embedded certain conflicts – such as the scope of minority group rights and local authority – into the text. Although the Tripoli and

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<sup>276</sup> See HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 39–41 (2011) (arguing that incrementalist strategies of constitution-making in deeply divided societies allow the deferral of controversial choices to future political institutions, which in turn allows the constitution to reflect divided perspectives). Deferral also enables more broad-based participation with regard to fundamental issues, once the societal and political environment improves.

<sup>277</sup> IRAQ CONSTITUTION Oct. 15, 2005, art. 49, 112, 122, 140. See generally, Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1 (2007) (discussing and analyzing the drafting history and most significant and controversial provisions of the 2005 constitution).



Tobruk based governments reached a *détente* regarding the completion of the draft constitution—minority group members continued to have reservations about the process and boycotted its final stages. Public participation in the constitution-making process was severely limited due to the security concerns.

The Libyan constitution must be adopted by public referendum.<sup>278</sup> In order to enhance public support for the constitution, pre-referendum and/or post-referendum processes should be developed that provide opportunities for the public and disaffected minority groups to provide input about the constitutional text. These processes should include negotiations with core constituencies, public referenda, and legislative debate. In order to ensure broad-based public support for the constitution, the Libyan unity government should institute a pre-referendum negotiation process to reach consensus with minority group representatives on constitutional provisions that touch upon their concerns, such as cultural and linguistic protection, local autonomy, and political representation. As minority group representatives boycotted the final stages of the drafting process, their constituencies are likely to oppose the constitution if they are not provided with an opportunity to weigh in on textual provisions that impact them.

If the Libyan unity government is unable to reach consensus with affected communities on these issues prior to the public referendum, then the public referendum should be coupled with a public commitment to institute a constitutional amendment process on provisions that are of concern to minority and local constituencies. The current draft of the constitution does not allow for constitutional amendment until five years after the constitution has entered into force.<sup>279</sup> If the most contentious issues cannot be resolved in a pre-referendum process, the draft constitution should be amended to allow for an immediate amendment process upon completion of the referendum. The current draft of the constitution allows either the President, or a third of either legislative chamber to submit a provision for amendment to both chambers for approval by absolute majority.<sup>280</sup> Following approval, the amendment is submitted to the public by referendum for approval by an absolute majority of those voting.<sup>281</sup> The goal of either a pre-referendum or post-referendum

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<sup>278</sup> DRAFT LIBYAN CONST. art. 221, *supra* note 87.

<sup>279</sup> *Id.* at art. 217(1).

<sup>280</sup> *Id.* at art. 217(3)-(4).

<sup>281</sup> *Id.* at art. 217(6).

process would be to bring minority and local government advocates into the constitutional order, so that they do not resort to violent means to achieve their political aims.

The draft constitution properly defers a number of issues that involve the distribution of power to a future legislature to resolve. The resolution of these issues without adequate public debate and deliberation could undermine reconciliation. This approach was followed by the Government of Iraq after it adopted a new constitution following years of sectarian division under the brutal dictatorship of Sadaam Hussein.<sup>282</sup> In both Iraq and Libya, the constitutional deferral of power sharing arrangements to future legislatures is an acknowledgement of the long-term nature of reconciliation and the importance of public engagement in the resolution. For example, the Libyan draft constitution calls for a law to determine the geographic distribution of votes for the Presidency.<sup>283</sup> This provision seeks to ensure that the President is not solely elected by populous urban centers and that less populous regions have a meaningful say in the election. This centripetal feature of the constitution is intended to promote moderate non-sectarian candidates for the Office of the President who will have national rather than merely regional appeal. How to achieve the appropriate geographic balance is likely to be the subject of intensive debate as it impacts the proportionate influence of regions.<sup>284</sup> The draft constitution also provides that the type and competencies of local government units will be determined by future laws.<sup>285</sup> Similarly, any other issues that implicate minority group rights and local powers that remain unresolved should be deferred to future legislation.

Finally, transitional justice measures must be prioritized. A reconciliation process which addresses the abuses and oppression of the Qadaffi era, as well as the human rights abuses that occurred during the civil war, will be critical to ensuring broad based societal support for the emerging constitutional system. The current draft

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<sup>282</sup> Darin E.W. Johnson, *2007 In Iraq: The Surge and Benchmarks – A New Way Forward?*, 24 AM. U. INT'L L. REV. 249, 253–254 (2008).

<sup>283</sup> DRAFT LIBYAN CONST., *supra* note 87, at art. 111.

<sup>284</sup> As discussed in Section 3, the topic of regional influence delayed the initial appointment of the constituent assembly. There are many models for achieving a geographic distribution in the election of a president. The United States has opted for the electoral college, while other states, such as Nigeria, have required that successful candidates receive a minimum threshold of support from all regions, as discussed in Section 5.

<sup>285</sup> DRAFT LIBYAN CONST., *supra* note 87, at art. 155–158.

constitution calls for transitional justice measures that include the documentation of human rights violations, compensation, restitution, prosecution, and the passage of laws that ensure that the reconciliation measures are effective, impartial, and reflective of the various segments of Libyan society.<sup>286</sup> The immediate implementation of transitional justice measures will foster reconciliation and address lingering grievances that might serve as a basis for a devolution back into civil war if left unaddressed.

## 7.2. Yemen

In Yemen, transition planners organized a broadly inclusive participatory process in the form of the National Dialogue Conference, with the goal that the agreed constitutional arrangements would be implemented by a constituent assembly. Unfortunately, the National Dialogue did not achieve consensus on an issue that ultimately caused major factions to wage war – the federal structure of the state. In order for the draft constitution – or an amended draft constitution – to be viable, the competing governments in Sanaa and Aden must arrive at a peace settlement that includes a consensus solution regarding the federal structure of the state and other unresolved issues that threaten national cohesion. A renewal of United Nations backed peace talks, held from May to August 2016, appears to be the most viable way ahead for the resolution of issues between the warring parties.<sup>287</sup> The peace negotiations could also serve as a forum for the resolution of several other structural and political issues important to Yemeni factions that were not resolved in the NDC or the CDC, such as the devolution of power, balance of powers within the political party system, and transitional justice

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<sup>286</sup> *Id.* at art. 197.

<sup>287</sup> At the time of the writing of this article, the UN-brokered peace talks had been suspended. Rod Nordland, *Talks to End War in Yemen Are Suspended*, N.Y. TIMES, (Aug. 6, 2016), <https://www.nytimes.com/2016/08/07/world/middleeast/yemen-peace-talks-cease-fire.html> [<https://perma.cc/Y8CB-YDZP>]; See *Yemeni Peace Talks Enter 'New Phase,' as UN Envoy Announces Month-Long Pause for Consultations*, U.N. NEWS CTR. (Aug. 6, 2016), <http://www.un.org/apps/news/story.asp?NewsID=54637#.WIKlxFMrLZ4> [<https://perma.cc/4W86-M6HR>] (discussing the new phase of Yemeni peace talks that will focus on crystallizing precise technical details among different parties to the conflict).

measures.<sup>288</sup> Left unresolved, these issues will undermine societal reconciliation and public support for a new constitution. As part of a peace deal, the parties must also agree to embed the consensus solutions into the draft constitution and to put it forward for adoption by public referendum, so that the broader public has an opportunity to endorse the consensus solutions.<sup>289</sup>

Regarding the federal structure of the state—Hadi loyalists will need to reach agreement with the Houthis and Southern Hiraak Movement regarding the number of regions within the federal system and their boundaries. Although the Southern Hiraak Movement has advocated secession in the past, its leaders are open to federalism in the near term, as their representatives in the NDC previously supported a two-region federal structure.<sup>290</sup> A two region federal structure is not without its problems. The four to one population imbalance between the North and South would favor the North in population based representative bodies and could inflame tensions between Northern elites and Northern minority groups such as the Houthis, who had been politically marginalized by Hadi.<sup>291</sup> As the Houthis have taken over a swath of the country by force, they will likely seek a political settlement that protects their gains in political power. One consociational option for ensuring Houthi political influence would be to draw a new federal region comprised primarily of the Houthi homeland, which would guarantee Houthi representation in national governance bodies.<sup>292</sup>

Complex issues such as determining the specific territorial boundaries of the federal regions may require more time and detailed negotiations than peace talks may allow; therefore, after framework agreements are reached during peace talks, a follow-on independent commission can be charged with resolving these questions.<sup>293</sup> The draft constitution also provides that a future legislature will draft an elections law, regional authority law, judicial authority

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<sup>288</sup> Gaston, *supra* note 139, at 5.

<sup>289</sup> Currently the draft constitution is being held in limbo, as the completion of the document without a consensus on the federal structure of the state led the Houthis to take over the capital. In order to capitalize on the work completed by the constituent assembly, the Houthis' political commitment to support the draft constitution must be obtained through negotiations.

<sup>290</sup> See INT'L CRISIS GRP., *supra* note 143, at 13.

<sup>291</sup> Ghafarzade, *supra* note 249, at 1002.

<sup>292</sup> *Id.* at 1003–04.

<sup>293</sup> *Id.* at 1001–05.

law, constitutional court law, and transitional justice law.<sup>294</sup> Deferring these issues to a future legislature appropriately provides the public with an opportunity, through elected representatives, to have input on laws that impact the distribution of power and reconciliation in the reconstituted state. To ensure multiethnic and regional representation, future legislatures can consider centripetal and consociational options in the elections, regional authority and constitutional court laws. Particular emphasis should be given to centripetal options in electoral laws to encourage the moderation of views among political representatives. Similarly, the transitional justice law should be drafted in a manner that ensures impartiality and inclusivity.

## 8. CONCLUSION

This case study of “conflict constitution-making” in Libya and Yemen reveals that where a constitution-making process is pursued during active civil war, armed actors will exploit the constitution making process and transform it from a zone of conciliation into a zone of conflict, unless a political agreement is achieved that commits armed actors to a consensual process. Further, remedial measures must be implemented to increase public support for the new constitution, citizen engagement in state formation over time, and the election of moderates committed to maintaining the state. In the case of Libya, constitution-making processes were stymied by internal conflict, but a UN brokered political agreement created renewed space for the competing governments to support the constituent assembly and a unified state under the new constitution. Once the security environment improves, measures can be implemented to engage the public in the constitution-making process and in the development of implementing legislation that encourages moderate political actors. In Yemen, the National Dialogue’s failure to achieve political consensus with powerful factions on fundamental issues catalyzed a civil war that undermined the work of constitutional drafters and threatened the long-term viability of the draft constitution. A peace agreement that commits warring governments to peace and ends the violent conflict is a predicate to any future progress on constitutional reform. Such progress will be dependent

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<sup>294</sup> DRAFT YEMEN CONST., *supra* note 247, at art. 420.

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upon measures that address the political aspirations of the politically powerful Houthi and Southern secessionist groups, and which commit them and the broader public to supporting a single state over time. Measures that encourage the multiethnic representation of moderates at the national level can help to diffuse ethnic and regional divisions over time.

Ultimately, for effective constitution-making to occur, there must be a state to constitute. Where civil war has destroyed the fabric of the state and created warring *de facto* states, defined by region and ethnicity, a peace must be achieved committing the parties to the creation of one state. That collective commitment to re-constituting the state is made effective through a consensual constitution-making process that involves the public and incentivizes continuing peace and broad public commitment to the newly constituted state through constitutional design features specifically tailored to mitigate societal divisions.