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Libyan constitutionality and sovereignty post-Qadhafi: the Islamist, regionalist, and Amazigh challenges

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Since the overthrow of Muammar Qadhafi, Libya's political and security institutions have suffered from a power vacuum. The interim governments' absence of 'real power' has been mirrored by their corresponding absence of 'abstract authority'. Both dynamics are indicative of an ongoing struggle over what constitutes sovereign, legitimate authority in post-Qadhafi Libya. From the National Transitional Council's (NTC's) inception until its handover of power, it claimed to possess 'temporary' sovereign authority – sufficient to administer Libya and define the rules of the post-Qadhafi transitional phase. Throughout the protracted constitutional drafting process, the country has been 'governed' according to the Temporary Constitutional Declaration (TCD) issued by the NTC in August 2011. Amendments to – and popular contestation of – the TCD have constrained Libya's political evolution, impeded the constitutional drafting process, and impinged upon the legitimacy of the General National Congress (GNC)– the NTC's successor body. This article will illustrate how and why the TCD was contested by Islamists, federalists, and certain Berber groups. Our use of copious Arabic primary source material allows the views of these groups to be presented in their own words. The NTC's responses to its challengers reveal a distinct pattern: it attempted to incorporate Islamists into its framework, it appeased Cyrenaican federalists, and it ignored the grievances of Berber activists. The implications of this highly unbalanced strategy remain at the core of Libya's present instability and the GNC's inability to stand up against its myriad challengers.

Keywords: Libyan uprisings; National Transitional Council; Islamists; Cyrenaican federalism; Libyan constitution; General National Congress; Libyan Berbers; post-Qadhafi Libya

Since the success of the 2011 uprisings in toppling the regime of Muammar Qadhafi, Libya has simultaneously experienced many conflicting political trends. Although the uprisings temporarily unified the many disparate religious, regional, and ethnic groups, subsequent institutional shortcomings in the post-Qadhafi transition process have caused a reversion to fragmentation and the re-emergence of local identities.

From the National Transitional Councils (NTCs) inception in late February 2011 until its handover of power on 8 August 2012, it claimed to possess a provisional 'type' of sovereign

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legitimate authority sufficient to administer Libya during its transitional phase. Yet at the same time, the NTC was manifestly not able to take actions that resembled those of a sovereign, legitimate government. First and foremost, it lacked a Weberian monopoly of force. Second, many of its actions were contested and could never be enforced. Nonetheless, despite the NTC's vast array of challengers, no other body or collection of bodies coherently laid claim to possesses the sovereignty to govern Libya.[1] This perplexing state of affairs was only made more confusing by the fact that the NTC avoided referring to itself as a 'government' preferring to call itself an 'umbrella body' or 'the political face of the uprisings'.

Even without possessing clear-cut authority or a popular mandate, there were many developments during the NTC's stewardship, such as local and national elections and the restoration of oil production to nearly pre-war levels, which indicated the country's movement in a direction favourable to a democratic transformation (Vandewalle 2012). However, the security situation has been far from stable. Since the murder of US Ambassador Christopher Stevens on 11 September 2012, the impediments to political progress in Libya and the deterioration of the security situation have become extenuated. These obstacles are the result of the same underlying social fissures which were made apparent by the uprisings against Qadhafi in the first place: the lack of societal processes constructively addressing past marginalisation of certain minority and regional interests without creating new imbalances and grievances.

Violations of human rights, oppression, exclusion, the degradation of ethnic groups, marginalisation of the eastern parts of the country, and disagreements over the role of religion in politics[2] are the obvious challenges threatening the already fragile social peace and security. Each of these themes derives directly from the legacy of the Qadhafi years, which in turn represented a reversal of patterns of patronage and exclusion prevailing during the Italian colonial and Sanussi monarchy periods. In fact, the eight-month-long militarised uprisings have only exacerbated preexisting divisions, as they gave rise to armed and fragmented local militias that lacked any commonly defined goal beyond toppling the regime. These militias and the corresponding local councils usually drew on traditional regional, ethnic, or religious cleavages to mobilise their adherents (see Sawani 2013a).

Though the country successfully held its first democratic elections for the General National Congress (GNC) on 7 July 2012, the transformation towards a stable situation rests heavily on addressing the often conflicting demands of the multiple stakeholders who are now ensconced in both the GNC and the ministries, while trying to disarm – both literally and figuratively – those outside those structures who wish to influence or disrupt their proceedings. In particular, drafting of the permanent constitution is becoming the focal point for disagreement amongst different stakeholders such as Islamists, federalists, minority activists, advocates of extensive decentralisation, militia-aligned political leaders from towns like Misrata and Zintan, and liberal nationalists. As a result the GNC was unable until 6 February 2013 to decide on the method of appointing the constitutional committee – later upheld by their 10 April 2013 amendment to the Temporary Constitutional Declaration (TCD). Though the GNC opted for the selection of this committee through direct elections, which was thought to appease the GNC's federalist opponents and bring them into the political process, there remains potential for further failure to reach a consensus on other components of the constitutional process, such as the election law and districting. Even more troublingly, direct election of the constituent assembly is likely to push the constitutional process back by at least a year (the conservative estimate of *The Economist* on 23 February 2013) and produce a constitutional drafting committee which contains diametrically opposed viewpoints – all factors not conducive to the long-term compromises required for making a functional constitution and achieving social peace. If not handled

promptly, these failures could threaten the process of transition to an agreed-upon form of government and thus lead to further instability and a *de facto* and chaotic devolution of power, which might even lead to the disintegration of the Libyan state.

During its tenure from March 2011 to August 2012, the NTC addressed various challenges to its right to exercise sovereign authority. Its flawed strategies have weakened the authority of successor bodies and reduced the 'governability' of Libya. Drawing primarily on Arabic source material, we will show that the NTC's TCD raised the ire of Islamists, federalists/regionalists, and Berber groups; this primary source material allows the views of these groups to be presented in their own words.

The NTC's responses to different challengers reveal a distinct pattern woven from lack of decisive authority in confronting resolute competition: the body attempted to incorporate Islamists and their concerns into its framework, it caved in to the demands of Cyrenaican federalists, and it ignored and dismissed the grievances of Berber activists. The implications of this highly unbalanced strategy remain at the core of Libya's present dilemmas and the inability of the General National Council – the NTC's successor government – to exercise sovereign authority and actually govern the territory under its jurisdiction.

On the centrality of the transitional phase: defining the rules of the game

Unsurprisingly, most of what transpires in today's Libya can be traced back to the 2011 uprisings against the Qadhafi regime and their resonances with the earlier Sanussi monarchy, British Military Administration, and Italian colonial periods of Libyan history. The country is now 'governed' by the temporary organs created by the TCD issued by the NTC in August 2011. Thus, understanding the dynamics at play in the new post-Qadhafi Libya requires an examination of the role of the NTC, the provisions of the TCD, and Libyan society's responses to them, as well as how these developments constrain the future trajectories of Libya's evolution.

The NTC that convened its initial meeting in Benghazi on 27 February 2011 – and was officially established on 5 March – allocated to itself the task of political leadership of the anti-Qadhafi uprisings and subsequent leadership of Libya. It proclaimed this on 5 July 2012. It immediately obtained a modicum of legitimacy as it was promptly recognised by various Libyan localities which were undergoing their own separate uprisings. This legitimacy was sufficient to enable it to impose a degree of control and authority over liberated areas in eastern Libya (Cyrenaica), in addition to obtaining international support. It carried out its self-defined mandate as 'the political face' of the uprisings until after military operations ended in order to supervise the election of a founding assembly, which would both govern the country and draft a constitution to be put up for popular referendum. It self-consciously modelled its plan for a transition to elected governance on both the Tunisian revolutionary precedent from earlier in the year and, most importantly, on the way in which the Libyan nation had achieved its independence and selected its constitution and leaders from 1949 to 1951. That process had been officially conducted under the auspices of the United Nation (UN) and informally by an alliance between Britain, the USA, and the Sanussi Sufi Order. The current circumstances necessitated a similar broad alliance between rebel fighters, the technocrats of the NTC, and their western and Gulf Arab patrons.

Despite its bold and noble mission, the Council – constituting the 'centre' of the Libyan polity – possessed only moral, legal, and ethical authority, while its many opponents and Libya's competing militias constituting the 'periphery' had access to vast supplies of arms

and local networks – giving them *de facto* political authority as well as the intense loyalties of various localities (see Pack and Barfi 2012; Pack 2013).

In the wake of the 'liberation' of Tripoli on 20 August 2011, the NTC possessed sufficient support to undertake bold actions to demobilise the militias and jumpstart the economy. Autumn 2011 still represented the honeymoon period between the rebels' political leadership and the Libyan people. However, since the 28 July 2011 killing of Abdul-Fatah Younis – former minister of the interior under Qadhafi who defected in the very early stage of the uprisings and became the military commander of the NTC's formal forces – the NTC's leaders were prone to inaction, vacillation, lengthy consensus-building discussion, and infighting. Hence, the body failed to take advantage of the momentum generated by international recognition and the capture of Tripoli. As shown in Sawani (2013a), the NTC did not consolidate its authority, ceding the field to the local councils and militias, which resulted in the loss of almost all of the popular leverage it once possessed.

Moreover, NTC bureaucrats, especially prime minister Abdul-Rahman al-Kib, were afraid to undertake bold measures – such as taking decisions which would be unpopular with the militias – until an elected government had come into power. In short, the NTC sought to act as a 'caretaker' government and pursued a policy of avoiding 'rocking the boat'.

Most state institutions and ministries were holdovers from the Qadhafi era. These and the new ones established by the NTC lacked the requisite technical and institutional capacity and were unable to implement coherent reconstruction, developmental, or economic policies, despite an unprecedented 68.5bn Libyan (~$50bn) Dinar budget for 2012. As institutions of defence and security gained little traction, matters relating to law and order largely fell in the hands of the militias. Therefore, the NTC's (and subsequently the GNC's) inability to exert a Weberian monopoly of violence – or even to accomplish concrete programmes in the areas of infrastructure spending or coherent reorganisation of state-run bureaucracy – have called into question if the NTC was in fact operating as the sovereign authority of Libya during its tenure.

By not asserting a clear monopoly on sovereignty, either in word or in deed, the NTC allowed Islamists, militia leaders, and ethnic and regional activists the opportunity to push for their aims with violence and to claim to be doing so 'legitimately'. Paradoxically, the less the NTC did the more its (relatively limited) actions were criticised as illegitimate. The wrangling between the NTC and the other actors raises the fundamental question about where sovereignty lies in the new Libya: Was sovereignty diffuse? Was it possessed by the local councils and militias that sprung up to overthrow Qadhafi? Or was it delegated to the NTC, but the NTC did not know how to wield it properly? Was this new pattern of sovereignty post-Qadhafi in fitting with a world described (Kooijmans and Kreijen 2002) whereby totalitarian states were replaced by weak state structures that competed with non-state actors for legitimacy?

The core success of the NTC was its proclamation of the TCD and a road map for a transition to an elected authority, both of which aimed to establish sovereign legitimate constitutional governance in Libya. This document successfully structured the hand-off to a new authority, the GNC, which was elected on 7 July 2012. Yet since the handover, the proposed role of the GNC has not been adhered to. According to NTC decrees, the GNC was supposed to be tasked with appointing the 60 members who were to frame the permanent Libyan constitution.

The NTC's TCD was promulgated on 3 August 2011. The TCD reflected only those ideals and aspirations that were genuinely shared by the many political and armed elements that made up the NTC during the struggle against Qadhafi; hence, it pushed thorny problems further down the road, and these would per force eventually have to be confronted. The absence of a shared objective uniting the centre and the periphery other than the desire to oust Qadhafi was reflected in this

temporary constitution: its provisions were meant to cement the uprisings by catering to all factions in a generalised way. Despite its creation of a framework for transition from revolutionary authority to elected and constitutional governance, the TCD did not sufficiently or satisfactorily address the destabilising cleavages in Libyan society. It failed to delineate the balance of power between the GNC and the government (or cabinet of ministers) or address the great federalism/decentralisation debate.

No sooner had the transition process officially begun upon the 'liberation' of all Libyan territory in October 2011, than disagreements on many issues and demands for amendments to the TCD were immediately voiced by Islamists, regional separatists, and Amazigh (Berber) activists. Given the NTC's cognisance of its own weakness, it often made important changes to decisions on Libya's constitutional and political future when concerted pressure was applied by dissidents who claimed a competing legitimacy and appeared to have a strong popular following – namely Islamists and federalists. Although much of the NTC's response to outside pressure appears to have been generated in an *ad hoc* manner, this article attempts to discern a larger pattern. We demonstrate that the NTC considered the challenges offered by federalists and Islamists as highly serious and potentially damaging to Libya's stability, while it was dismissive of the demands of Berbers and other minorities. Islamist and federalist demands undercut the very legitimacy of the NTC by calling for alternative procedures to create sovereign legitimate governing bodies.

The NTC was often caught off guard by the nuanced critiques of the Islamists, which will be treated in detail in this article. Thus, the NTC watered down aspects of the TCD and the electoral law that might provoke Islamist opposition while also incorporating more moderate Islamist elements into the political process so as to defuse them. As example, the TCD stated that the Shari'a would be *the source* (rather than 'a source') of legislation in the New Libya and after the fall of Tripoli, Mustafa Abdul-Jalil was at pains to incorporate Islamist voices inside the NTC so as to give them a stake in its success. On the other hand (according to Council of Cyrenaica member Al-Haj al-Sharif in May 2012) in facing the federalists' challenge, the NTC avoided incorporating 'overt' federalists or secessionists in its ranks and even revoked the membership of NTC personalities like Ahmad Zubair al-Sanussi when they made federalist declarations. Conversely, in an attempt to defuse the popular appeal of the federalists the NTC caved in to mitigated versions of federalist demands – most noticeably stating on 15 March 2012 as reported by the *Thawra Libya* website that the constitutional committee would consist of 60 members, 20 chosen from each of Fezzan, Cyrenaica, and Tripolitania rather than according to population. Conversely, regarding minority issues, the NTC was consistently unmoved by Berber demands, whether expressed in writing or via violent protests. In all instances, the NTC gave Berber activists' demands short shrift, presumably because it felt the Berbers were too insignificant a constituency to truly threaten the NTC's legitimacy.

The TCD and the evolving rules of the transitional period

The NTC's TCD's legitimacy was consistently questioned by competing claimants for power. These critics pointed out the differences between the initial proposals for the Temporary Constitution and the officially promulgated TCD to undermine the authority of the final document.

At an early point during the uprisings the NTC had an internal plan that it would dissolve itself immediately after the elimination of the Qadhafi regime, in favour of a new national body which would lack the NTC's crippling weaknesses of being Cyrenaica-based, unelected, and not including representatives of the militias who overthrew Qadhafi. This new body was

somehow supposed to be able to arise nearly instantaneously, represent all Libya's areas, and hold uncontested sovereignty in post-Qadhafi Libya (i.e. it was to be something of an expedited GNC). This un-actualised proposal was quite different from the longer transitional period of up to 240 days before elections which was ultimately adopted in the 'final' August TCD.

Islamists had been critiquing the framework of the TCD even prior to its issuance, revealing that a struggle over sovereignty was underway in Libya and that the TCD was the NTC's attempt to establish its own sole claim to sovereignty. In fact, the structure of the TCD guarantees that only the NTC possessed the authority to amend and implement its provisions. In this way, the TCD can be interpreted as the NTC's self-proclamation of its 'right' to set the terms of – and oversee – Libya's transition period. To untangle this complex contest over sovereignty this article analyses the key features of the TCD and the proposals that competed against it.

According to former Chairman of the NTC's Executive Office (Interim Prime Minister) Mahmud Jibril, Islamists used their influence and the sympathy of NTC President Abdul-Jalil to cause the NTC to adopt the TCD with a longer waiting period prior to elections. According to him, their aim was to prolong the life cycle of the NTC and defer any election whose outcome they feared would not be favourable to them. Therefore, it was convenient for them to extend the mandate of the NTC. (Author Interview on 19 February 2013).

After conquering Tripoli from Qadhafian forces on 23 August 2011, a debate took place within the NTC regarding abandoning the TCD in favour of a new plan to convert the NTC directly into a more representative and democratic body that would create a constituent body to draft the permanent constitution. As the NTC underwent expansion in the post-Qadhafi phase this plan would have used elections rather than appointment by the towns and cities that had no NTC representation as a means to add new members from the newly liberated areas. Again this proposal was rejected by Islamists as they feared that they would lose influence on the reformed/elected NTC. According to Mahmoud Jibril, the Islamists, funded and advised by Qatar, made real political gains by influencing the rules of the game to their advantage. Jibril's perspective may be interpreted either as an accurate diagnosis of the situation put forth by a Libyan statesman uniquely positioned to appraise the motivations of various actors, or conversely as the view of an opponent of the Islamists blaming them for the failure of his plans.

After the NTC abandoned a plan to expand itself to cover the new regions or to revert to an earlier plan to dissolve itself immediately and hold elections, it was decided that post-war the NTC would expand by incorporating new members from Libya's newly liberated regions and that it would choose a fresh executive office (or cabinet) to exercise sovereignty over Libya until full national elections could be held.[3] This version of the road map ultimately became the August 2011 TCD that led to the GNC.

The Islamists challenge the sources of authority and sovereignty

Understandably, when the TCD was proclaimed on 3 August 2011 it was met with sharply contrasting reactions. In their criticisms of the NTC's handling of events shortly *before* the 'Liberation' certain Islamist groups drew upon the original aborted plan calling for the dissolution of the NTC. They later returned to this theme to further criticise constitutional developments. They also used their representation inside the NTC to stymie the adoption of a more coherent road map to legitimate democratic governance. Libya's Islamists are not a monolithic entity; instead there are different currents ranging from moderate to various strands of Salafism to every variety of jihadism. The Libyan Muslim Brotherhood, the National Front for the Salvation of Libya, and

the Libyan Islamic Fighting Group were arguably the best organised groups within the anti-Qadhafi opposition movement. Islamists were able to take their decades of organisational experience under Qadhafi to mobilise after Qadhafi (see Benotman, Pack, and Brandon 2013, 75, 200–210; Sawani 2013b).

Some Islamists voiced criticism right after the NTC issued the TCD, which immediately occasioned a strong anti-Islamist response by the public at large. Representatives of non-Islamist orientations and popular activists expressed in a 16 August 2011 communiqué (quoted in *al-Fibrayr* 22 September 2012) their opposition to the attempt by Islamists to dominate the process and determine the principles upon which the constitution would be drafted.

Article 1 of the TCD states that Islam is the religion of state, that Shari'a is the principal source of legislation, and non-Muslims enjoy religious freedom. While these provisions were acceptable to many within the broad 'Islamist' umbrella, Salafists and extremist Islamist elements demonstrated in Benghazi on 11 October 2011 and strongly called for the imposition of Islamic governance and the supremacy of the Shari'a as the law of the land. Islamists particularly criticised Article 30 of the TCD that would lead to the election of the GNC and the vesting of it with sovereignty. Certain Islamists considered the concept of the GNC as contradicting Islamic principles because it was not to be composed in accordance with the Islamic principle of *bay'a* (allegiance giving). This criticism was first voiced in a document that multiple Islamist groups proposed as a Libyan constitution prior to the proclamation of the TCD in April 2011, as reported in *Libya al-Yawm* 19 October 2011 and on *Al Jazeera* 8 September 2011. Later on as the NTC progressively cemented its hold on the centre of the Libyan polity, most mainstream Islamist factions abandoned this call for *bay'a*. Some Islamists, including those affiliated with the Brotherhood, became members of the NTC, influencing the relationship between religion and the state from within, while others continued to engage and criticise from the outside.

Islamists took an early hostile position towards the TCD and this reflected dissatisfaction with the NTC itself and the Islamists' wish for legitimacy to be vested in local forces (like local councils, tribes, and militias) which they claimed were a more Islamically legitimate form of governance. In this context, a number of activists from both Brotherhood and Salafist orientations published their own political roadmap on the Islamic website *al-Manara* which they termed the 'Draft Interim National Pact' (*al-Mithaq al-Watani al-Intiqali*). Its title was clearly a reference to – and refutation of – the TCD and the NTC's discourse. Their initiative published in *al-Fibrayr* on 22 September 2012 specified that

> The temporary National Transitional Council is obliged to call, within seven days of the announcement of Liberation, for the convening of the General National Congress comprised of all the representatives of the local councils of the cities. Failure to establish it during the aforementioned timeframe tasks local city councils with convening their gathering as a General National Congress in Tripoli no later than a week from the date of notice. The trusteeship of the temporary National Transitional Council will come to an end and all of its powers and areas of jurisdiction will be transferred to the General National Congress, which comprises the local bodies.

Given their own earlier 'draft constitutional proposal' of April which stressed the role of the Shari'a as the source for legislation and the Islamic identity of the state, they questioned the legitimacy of the NTC's document on 26 June 2011 in the Brotherhood's electronic journal *Libya al-Yawm*. The most detailed of the proposals critical of the NTC's right to set the rules of the game was submitted by the National Front for the Salvation of Libya (NFSL)[4] on their website on 27 June 2011 even before the TCD was formally presented. During the uprisings and before Qadhafi's ouster, they called for a temporary political authority with a democratic mandate.

The strongest expressions of reservation against the TCD were voiced by a body that did not even cursorily acknowledge its legitimacy, the Group of 'Ulama' of Libya (*hay'at 'ulama' Libya*). This body was initially formed by a number of Islamists connected to both Salafists and the Muslim Brotherhood in Benghazi several months before the battle for Tripoli. It is unlikely that the body was the product of any widespread or truly representative consensus of the 'ulama' (scholars of the Shari'a) throughout the country. Crucially, this body was able to pressure the NTC into changing the electoral law governing the July 2012 election of the GNC. Their communiqué states:

> Necessity dictates that the National Transitional Council undertake to consult with the people knowledgeable in Islamic law (*ahl al-'ilm al-shar'ı*) before it adopts the temporary Constitutional Declaration, so that its provisions do not fall outside the dictates of the Shari'a or contravene any of its source principles (*uṣūl*) ... The TCD mentions that Islamic Shari'a 'is the primary source of law' and the Group sees that none among the people of Islam in the country – who are all proud to belong to it – would deny that Shari'a must necessarily be 'the only source for laws and legislation' ... the Group deems it necessary to correct a number of phrases contained in the TCD. These include Article 1 to the effect that 'the people are the source of authority'. This expression might be understood to suggest that the people may specify whatever they so choose of rules and legislation even if these are opposed to the legal rulings (*aḥkam*) of the pure Shari'a, and on the basis of that, they might forbid what is religiously permissible (*ḥalal*) and permit what is religiously forbidden (*ḥaram*).

The Group of 'Ulama' defined the nuances of its position relative to provisions on protections for women, the freedom of opinion and expression, the freedom to form political parties and associations, and to practice religion. According to the Group, these freedoms must be restricted constitutionally so as to remain in conformity with and not in opposition to Islamic Shari'a. The Group objected to 'equality between those [i.e. men and women] of different creation and nature and capability because this nullifies the justice that God has commanded'. This was code language for its objection to the initial proposals for a quota system for 'inappropriately' or under-represented groups, such as women or Berbers.

The NTC appeased the Group of 'Ulama' and abandoned the notion of a quota system – which had been proposed in a draft version of the election law – in favour of gender rotation within the party lists. The strategy of incorporating Islamist demands before the Islamists could mobilise against the NTC was echoed again in the speech Mustafa Abdul Jalil made in Benghazi to celebrate the end of Qadhafi's rule. His speech was disappointing particularly to Libyan feminists concerned with female political participation when he made a public commitment to upholding Islamic polygamy as the law of the land and he alienated liberals with his emphasis on the Shari'a. In response, Libyan women organised the 'Voice of Libyan Women' movement and held their first conference in Tripoli from 11 to 15 November 2011, and they reiterated their desire for gender equality and for securing appropriate representation for Libyan women in the new political institutions. As reported by *Panapress* on 16 November 2011, they called for the reconsideration of the quota proposals to guarantee 40% of the seats in any elected body. In response the Group of 'Ulama' stated:

> To alter the will of the people by conferring on those whom they did not choose from within their strata or groups the task of representing them in the Council of Representatives (*Majlis al-Nuwwab*) via [the inherent manipulation imposed by] a special quota destroys democracy and smashes its structures. (Board of Trustees of the Council of 'Ulama' 2011)

The Group of 'Ulama' achieved their aim and the quota proposals were nixed. There are many indicators that in response to these developments, the NTC knowingly incorporated Islamist positions into its modification of the TCD and formulation of the election law so as to appease and

co-opt Islamist sentiment. The announcement by Mustafa Abdul-Jalil on 23 October 2011 that the Shari'a will be *the* source of legislation including marriage and family laws was an early indication.

Mustafa Abdul-Jalil's remarks during his 23 October 2011 Declaration of Liberation speech were only the beginning of his trend of appeasement that he abandoned only once out of office. His stance on 'women's equality' was once again manifest on the day of the formal handover of power from the NTC to the elected GNC. As the handover ceremony began, he ordered the head television anchor conducting the ceremonies, Sarah Elmesellati, to leave the Congress hall and not to speak because she was unveiled. Most revealingly about dynamics in Libya, he only did this after objections to her participation were voiced by a Salafist GNC member, as reported by *The Telegraph* on 9 August 2012. The message was clear: the Chairman of the NTC was pushing women to the margins of Libya society in line with the demands of Salafists and that he was using both social and legal means to do so. In fact, many of the achievements women had obtained in their societal position under Qadhafi were now in real danger. The measures the NTC adopted and the speeches of its chairman highlighted their perceived need to imitate and cater to the positions held by the Group of 'Ulama' in an attempt to co-opt their supporters. Recently, Abdul-Jalil himself alluded to this in a 21 May 2013 interview with *al-Watan al-Libiyya*. He accused the Islamists in general and the Brotherhood in particular of dominating the political scene and imposing their 'monopoly of discourse' over the government. The Brotherhood demanded he apologise but in an 8 May television interview with *al-Aan* he declined to do so.

Finally, the Group wanted to restrict the legislative jurisdiction of the future *majlis* (parliament) by specifying in the transitional constitution that in the permanent constitution no legislation could be passed contradicting the Shari'a. In this vein, the Group forcefully demanded a requirement to solicit the position of the 'ulama' with regard to all new initiatives. Following the same logic, the Group demanded its inclusion in any work that the founding body (responsible for drafting the constitution) undertakes, by specifying in their October 2011 statement published by *al-Manara* that 'the 'ulama' will have an influential representation in formulating the constitution in order to avoid what occurred with the TCD and to insure that there would be no possibility of its contravening the Shari'a'.

The Group rejected the basic principle of democracy as it has been understood since the French Revolution: that legitimacy comes from the people. It stridently opposed any viewpoint, legislation, or legislative institution that does not enjoy the sanction of the 'ulama' and their interpretation of the Shari'a. In fact, this framework subtly guarantees that only the 'ulama' possess the authority to decree what legislation is, in fact, in conformity with the Shari'a.

The polarising positions of the group created a backlash against them by more moderate members of the 'ulama' who contested the Group's overbearing position and questioned their claims to moral and religious authority. Some more moderate 'ulama' have even criticised the Salafists and Brotherhood for exploiting religion and taking advantage of Libyans' religiosity for political purposes including the politicisation of the role of the official religious establishment and most specifically the position of the Mufti.

Sheikh Sadiq Al-Ghariani, the then Mufti of Libya, undoubtedly used his position to echo the radical Islamist position rather than to function as a bridge and an arbiter between the state and the faithful. He supported the imposition of the Shari'a in the constitution as the *only* source for legislation. He carried the argument further adopting a *takfiri* position stating that 'one would not be a Muslim unless one firmly believed in the virtue and necessity of applying and implementing the Shari'a as the only law of the land'. Representatives of a number of civil society organis-

ations meeting in Benghazi in September 2011 considered Ghariani's and the Group's proposals directly contradictory to those issued by the NTC. In a statement later quoted on 22 September 2011 in *al-Fibrayr*, they perceived Islamist critiques of the NTC's attempts to lay down the ground rules for a transition to democracy as amounting to 'acting against the will of the people as represented by the NTC'.

Buttressed by its civil society defenders, the concept – if not all the precise provisions – of the TCD eventually gained widespread acceptance in Libyan society. Many people opposed some of the policies of the NTC in governing the country but they acknowledged the need to have an agreed-upon framework for the transition period. In fact, the TCD framework laid out by the NTC acquired enough popular legitimacy that a number of Islamists formed political parties or ran as independents for the GNC, most notably the Muslim Brotherhood's own Justice and Construction Party, revealing Islamist willingness to participate in the political process set up by the NTC, when doing so could be to their advantage.

Though the NTC's attempts to modify its statements to co-opt Islamists of all stripes (Brotherhood and various Salafists including the Grand Mufti) into the political process has apparently succeeded, the outcome has unintentionally consolidated these elements' position and their ability to dominate Libyan politics. The framework of the elections held in July 2012 under the auspices of the TCD and the electoral law were quite favourable to Islamist parties. Although Islamist candidates did not win a plurality of party list seats, they fared quite well in those districts allotted to individual candidates.

Islamists and the militias have continually exploited the public's widespread rejection of former Qadhafi regime officials playing any role in the new polity. They were successful in blockading government ministries in Tripoli from 28 April to 9 May 2013 to extract from the GNC a piece of vague legislation which bars such individuals from politics for 10 years. In a glaring exception to normal judicial procedure, the GNC had previously decided to add a special amendment to the TCD in April 2013 that any 'political exclusion law' that was later passed could not subsequently be declared unconstitutional by the courts. This episode has been the most glaring example of Islamist pressure causing abject GNC appeasement which undermines the integrity of the TCD to govern the constitutional process.

The role of armed groups in pressuring the government into abrupt policy changes or outright resignations has been potentially recast by events in next-door Egypt where the Muslim Brotherhood-aligned President, Mohammad Morsi, was ousted by the army in July 2013. On the one hand, like Egypt's army, Libya's militia leaders view themselves as more legitimate political actors than their elected opponents and hence may seek to step up their campaign to use force to undermine the democratic process, claiming – similar to the Egyptian army – that their actions are enforcing the 'will of the people'. On the other hand, events in Egypt are a great embarrassment and setback to the Libyan Brotherhood and their Qatari backers. Reflecting on events there may cause them to back down from their more assertive policies for fear of occasioning a similar widespread anti-Brotherhood backlash.

The declaration of liberation, Article 30, and the regionalist/federalist challenge

Another long-lasting implication of the NTC's handling of the transition period was the strengthening of divisive ethnic and regional politics. Much disagreement centred on the role of the NTC in the transitional period – the subject of Article 30 of the TCD which stipulates a roadmap for the transition period and defines the principal responsibilities of governance units during the transitional phase. Article 30 calls for the election of a GNC to replace the NTC. In keeping

with that framework, the NTC set up an electoral commission (18 January 2012), adopted an election law (8 February 2012), amended the transitional constitution (13 March 2012), and passed a political parties' law (24 April 2012).

With some hiccups along the way, the provisions of Article 30 were actualised: elections were held and the resulting GNC was convened; the GNC selected a President or Speaker (Mohammad Magariaf); elected a prime minister (Mustafa AbuShagur) – although they ejected him shortly thereafter via a no-confidence vote after disapproving of his cabinet list; and then approved a new government/cabinet put forth by a new prime minister (Ali Zidan). According to the TCD, the remaining steps in the roadmap are dependent upon the functioning of the elected GNC, most significantly the GNC's assuming the role of a national parliament with profound powers that include overseeing the formation of a Constituent Body (*hai'a ta'sisiyya*) to draft the constitution, confirming that this draft is suitable to be put to a popular referendum, and then organising national elections within the framework of the newly approved constitution.

Under the original 3 August 2011 version of the TCD as published in *al-Fibrayr* on 20 September 2011, the GNC would choose a constitutional committee of unspecified size. After being drafted the constitution would be approved by the GNC which would recommend submitting it to a referendum for a 'yes' or 'no' vote within 60 days from the date of its approval by the Congress. Per the TCD if the Libyan people approve the constitution by a two-thirds majority of voters, the constitutional committee then ratifies it as the 'Constitution of Libya', and the GNC will formally adopt it as law. Once a constitution is in place, the GNC then must adopt a General Elections Law within 30 days and these elections will be held within 180 days after the adoption of laws regulating them. At the first session of the new parliament, the GNC will be dissolved and the newly elected Legislative Authority will assume its tasks. Additionally, the Interim Government from the GNC phase will serve as a care-taker government until such time as the Permanent Government is convened in accordance with the constitution.

Fascinatingly, the strongest rejection of Article 30 came not from the Islamists but from the self-appointed 'leaders of Cyrenaica' who on 6 March 2012 announced their plans for a federal Libyan state. They declared semi-autonomy and in April set up the Council of Cyrenaica in the eastern part of the country. These 'separatist' sentiments were unleashed as a reaction to fears that the central authority under the NTC and its successors would continue the deliberate marginalisation of eastern Libya as practised by Qadhafi. Their vision for the future harkened back before Qadhafi to Cyrenaica's 'glorious past' under the British Military Administration (1942–51) and the Monarchy (1951–69). At those times, eastern Libya was a hub of the country's economic, military, and governmental activity, occupying a privileged position in terms of representation and access to power (Vandewalle 2006; Pack 2011). Their reading of Article 30 was that the NTC's constitutional process was unlikely to protect their interests. Hence, they declared that it lacked legitimacy.

Under their envisioned federal model, Cyrenaica – where the vast majority of Libya's oil reserves are located – would have greater control over oil revenue. Ironically, the NTC that they were rejecting was formed in eastern Libya from the towns and cities that were first to rebel against Qadhafi's rule, and as such it had nearly exclusively Cyrenaican membership for most of the uprisings' duration. Nonetheless, the federalists timed their criticism of the NTC wisely. After the Declaration of Liberation and the movement to Tripoli of the NTC's office and most of its senior figures in October 2011, Cyrenaicans felt neglected. They knew that prime minister Al-Kib hailed from Tripoli and that the most powerful militias of Zintan and Misrata were influential in post-Liberation security arrangements and decision-making

processes. Thus, as reported in *Libya al-Mustaqbal* on 21 July 2011, they accused Al-Kib, the militias, and the NTC of protecting Tripolitanian interests at their expense.

To respond to what was seen as a very serious challenge to its sovereignty, the NTC quickly yielded to the mounting federalist pressure and adopted its first amendment of Article 30 on 15 March 2012 which states that the elected GNC should choose a constituent body 'of sixty members, similar to the Committee of Sixty established for the preparation of the Libyan Independence Constitution in 1951'. This has been universally understood to mean that each of three Ottoman-era provinces of Libya (Cyrenaica, Tripolitania, and Fezzan) would receive 20 members – mimicking the composition of the 60 member body that had been formed to prepare a constitution for the independence of Libya in 1951. Unfortunately, the 1951 precedent is actually an 'undemocratic' and inappropriate one. In 1949, the British and the UN ignored widespread Tripolitanian opposition, deliberately engineering the constitutional body along provincial lines so that it would be favourable to Sanussi interests and would allow Cyrenaica and Fezzan greater autonomy inside Libya (see Pelt 1970; Vandewalle 2006; Pack 2011). Then, as now, this method of determining the composition of the founding body deliberately tips the scales towards federalism as it gives far more weight to Fezzan and Cyrenaica than is their due demographically and seeks to guarantee their influence as provinces in the constitution by weakening the central government and strengthening the provinces as *de jure* legal entities and *de facto* loci of emotional attachment.

As the election for the GNC drew near, federalists used the threat of force to challenge the allocation of seats in the GNC from a quasi-proportional representation system to a model more in keeping with their goals – one that would mimic the composition of the constitutional committee as per the 15 March Amendment by giving Cyrenaica, Tripolitania, and Fezzan an equal number of seats regardless of population (i.e. akin to the US Senate where Oklahoma and California have equal representation[5]). This system of provincial representation would have given the advocates of federalism more strength in the GNC prior to the constitutional debate.

While advocating for changes to Article 30, the Council of Cyrenaica also attempted to change the political process and impose a greater degree of autonomy on their fellow Cyrenaicans by force – through their own militia, the so-called Army of Cyrenaica (as reported by the *Libya Herald* on 26 June and 1 July 2011). One week before the election, federalists tried to disrupt the elections entirely by destroying election materials in the election commission offices of Benghazi and Tobruk. Abubakir Baira, the Chairman of the Political Bureau of the Council of Cyrenaica, adamantly insisted on *Libya al-Ahrar* in July 2011 that Cyrenaica, as an entity, be accorded its proper place in the political process.

The NTC responded to this threat by yet another amendment, the third amendment of Article 30, less than 48 hours before the election. It stipulated direct popular election of the constitutional committee, taking that responsibility away from the GNC. In hindsight, the *ad hoc*, compromising nature of the NTC and its desire to wriggle out of difficult confrontations via last-second compromises which later constrained the GNC characterises the NTC's dealings with thorny constitutional issues. Unsurprisingly, the amendments to Article 30 were met with many criticisms that highlighted their inappropriate timing and subjected the NTC to ridicule for caving in. A most insightful line of criticism was that by Azza Maghour in *Libya al-Mustaqbal* on 28 November 2012, lambasting a weak NTC, lacking in popular support, which decided on an amendment that would in turn limit the authority of an elected GNC.

Though the NTC explained its decision as an attempt to respond to regional and federalist demands that threatened the political process, the fact that Islamists welcomed the move was

a strong indication of the link the amendment may have had to a wholesale attempt to appease all groups disputing the NTC's – and hence the GNC's – sovereignty to set the terms of the constitution-writing process (Pack and Cook 2013). In fact, the NTC's manoeuvres can been seen, just as indicated by Azza Maghour, as having the effect of voluntarily eviscerating its successor body's – the GNC – claims to sovereignty.

On 6 February 2013 the GNC accepted the amendment, 'supposedly' definitively closing the doors to further debate on where sovereignty for the constitution-writing process derives. On 26 February 2013 the Constitutional Court declared the 5 July 2012 Amendment unconstitutional, temporarily undoing the 6 February decision. The Court appears to have taken this decision because the NTC made its 5 July decision without a full quorum and because the Court determined that the unelected NTC had no constitutional legitimacy to curtail the powers of the GNC which would derive directly from the people (Second Author phone conversation with Mustafa AbuShagur 13 March 2013). However, as reported in *al-Madina* on 10 April 2013 the GNC voted again in favour of direct election of the constituent assembly with a new amendment to the TCD. This demonstrates that constitution-writing authority – and thus sovereignty – has been allocated to the provinces – which, in this instance, have been treated as if they were self-governing entities choosing to come together on equal terms (as from 1949 to 1951). In July 2013, the GNC (as indicated above) reinforced this interpretation by passing an election law determining how seats are distributed geographically by treating each province as an electoral district of 20 seats. Nonetheless, it remains an open question if 'sovereignty' is exclusively vested in the provinces as 'entities' and/or only in the Libyan people acting on behalf of those provinces. Strangely, this process reflects an emotional reality that makes no practical sense in today's Libya because since 1963 the provinces ceased to exist as administrative entities. This outcome of re-provincialisation appears likely to pour fuel on the flames of conflicting political, tribal, ethnic, and regional interests that have emerged or re-emerged in an organised fashion for the first time in decades as alternate viewpoints to Qadhafi's national vision for Libya. Looked at differently, the decision to select members of the constitutional assembly on the bases of the provinces enshrines 'provincial' interests and interest groups where they had not existed in 50 years. It also threatens attempts to build a new coherent Libyan identity.

Since the 10 April decision, 'election' became so popular with the Libyan people that the senior Libyan politicians felt that the GNC would virtually engender the entire loss of its authority in the East were it not to enshrine direct election of the constitutional committee by another amendment to the TCD.[6] In short, this whole complicated process illustrates in detail the intense dysfunctionality of the Libyan constitutional process and the unintended consequences that are constantly being generated by previous hasty and politically motivated decision-making.

Firming up the rules for the formation of the constitutional assembly

Although the 10 April 2013 TCD amendment that reinstates portions of the 5 July 2012 amendment calling for an elected constitutional committee is framed as being in accordance with the TCD and 'democratic' in nature, it extends the GNC's mandate and, hence, the transitional period. By further postponing the resolution of critical issues related to the election law and drawing the boundaries of districts, the GNC will have to go well beyond the envisioned timeframe of its mandate as hazily laid down in the TCD's Article 30, which obliged the GNC to accomplish its mission within one year after it held its first session. Furthermore, the initial time frame set down to decide on the formation of the constitutional committee was 50 days from the GNC's first session on 10 August 2012. Clearly, none of these deadlines were met.

Attempts to force partial compliance with the timelines at this stage would only further desta-bilise the already fragile situation in the country. Therefore, the GNC has been implicitly assert-ing that the unforeseen challenges of the transition period require it to carry on acting as Libya's sovereign authority despite the lapse of its formal legitimacy and sovereignty as mandated by the TCD. Because this 'implicit' argument is a weak reed leaving grave questions plaguing the GNC's right to continue to exercise sovereign authority, the Congress is forced to continually defend to the Libyan people its legitimacy.

Of particular importance are the implications of the amendment to Article 30 which will bring into being a new elected constitutional committee, as that potentially creates something akin to a duplication of powers between the GNC and the constitutional committee. Although the constituent assembly will not have any plenary legislative power, its mere existence and popular mandate creates a structural conflict between the two elected bodies (Second Author phone conversation with Mustafa AbuShagur 13 March 2013). Possible problems include: the elected constitutional committee might draft a constitution that the GNC would not ratify or be willing to put to the people via referendum. The GNC's refusal to ratify the constitutional draft or put it to referendum would have been unlikely under the old system where the GNC would have picked a committee that would inherently only produce a constitution that the GNC could accept.

It is difficult to see how one directly elected body (the constituent assembly) can willingly assume a subordinate position and refer its decision for approval to another notionally superior one (the GNC) that its members believe was elected by less 'fair' procedures (i.e. not according to equal seats to each province). Given the current trajectory of Libyan politics, conflict is likely, especially since the makeup of these two bodies is fundamentally different.[7] While members of the GNC reflect popular and nationwide votes with a slant towards the ideologically moderate, the committee will be representative of regional interests with a slant towards the populist and extremist.

Little considered by Members of Congress or the Libyan public is that if the GNC insists on its enforcing its constitutional right as outlined in Article 30 to reject the constitution drafted by the committee of 60, then the GNC may force the constitution to be 're-drafted'. In short, despite the direct election of the constituent assembly, it will remain subordinate to the GNC. Looking over this morass, it is apparent that the ambiguities present in the TCD – and especially the NTC's hasty decision on 5 July 2012 – have laid the seeds for a possible conflict in which the constitu-ent assembly could appeal over the heads of the GNC directly to the provinces and the 'will of the Libyan people'. This setup may well threaten the transition process as initially envisioned in the TCD and end up derailing or delaying the progress towards constitutional governance.

The Amazigh: a cultural or ethnic challenge?

Studies on ethnicity and the formation of Libyan identity are scarce. Contemporary Arabic language studies trace Libyan identity to times well before the European colonisation. Mid-twentieth century western studies question the formation of any genuine Libyan identity and nationalism prior to the country's independence in 1951. In the bulk of western scholarship (Rivlin 1949; Golino 1970) a bona fide Libyan identity is seen as resulting only from the for-mation of the unified and federated Libyan state by the UN General Assembly's resolution in 1949. Conversely, the Arabic language scholarship tends to view both the Qaramanli and late Ottoman periods as laying the groundwork for later Libyan nationhood and identity. Fascinat-ingly, late nineteenth and early twentieth century European colonial and Orientalist studies of

Vilayet Trablous stress the Qaramanli and Ottoman administrative forms that connected Cyrenaicans, Fezzanis, and Tripolitanians while nonetheless pointing out the cultural, economic, religious, ethnic, and tribal differences between the regions.[8]

While in eastern Libya certain Cyrenaican federalists have harked back to the 1951 constitutional precedent in demanding that their local autonomy be enshrined in the constitution, in western Libya, certain Amazigh (Berbers) of Jabal Nafusa have staked a claim for explicit protection of their language and culture in the new constitution, although there exists no legal precedent in Libya's monarchical or Qadhafian history for such protection. Moreover, as their demands have been ignored, many elements of the Amazigh community have increasingly stressed the uniqueness of their community, while a small number have gone as far as calling for separatism.[9]

Qadhafi's rule was characterised by a denial of minority (Amazigh, Tubu and Tuareg) rights to exercise their cultural and linguistic identity. Perhaps as a result, the revolution against Qadhafi was marked by heavy military participation of the Amazigh tribes of Jabal Nafusa in the northwest and some political participation of the Tubu in the southeast. Conversely, Tuareg fighters were an essential component of Qadhafi's anti-revolutionary forces. As a result, the Tuareg became the target of much communal violence and discrimination during the revolution and afterward.

By late September 2011, Tripoli witnessed intensive, and destabilising, Amazigh political activity. Rather than pushing for a cessation of Qadhafi's benighted policies towards their community, they asked for communal privileges. In this way, their calls resembled those of the federalists, who did not merely ask for a cessation of Qadhafi's deprivation of Cyrenaica, but in fact demanded communal 'over-representation'. The highlight of this movement was the convening of the 'National Congress of the Libyan Amazigh' on 26 September 2011. The conference focused on the issue of enshrining the Amazigh language in the constitution. Amazigh political leaders were careful to disavow potential charges of separatism or political manoeuvring. They proclaimed that Amazigh identity would never be used as the basis of a political party. But yet those same leaders also told the crowd that they must vote down any constitution produced by the constituent assembly if it does not grant Tamazight the status of national language.

The demand for a constitutional clause granting Tamazight the status of national language has been deemed illogical by its opponents since available statistics suggest that the Berber and Tuareg communities likely comprise less than 5% of the Libyan population and that far less than 1% of the total Libyan population is literate in any form of Tamazight. The actual size of Berber, Tuareg and Tubu communities is itself another source of disagreement. Estimates vary but generally those who identify as having any Berber extraction are only between 5% and 10% of the population at 236,000–590,000 (this means that the actual 'Amazigh' population is much less). The exact numbers of Tuareg are also difficult to determine but they are estimated between 17,000 and 56,000, while Tubu numbers are likely even smaller (Moseley 2012). This represents a growth relative to earlier estimates of Amazigh demography in Libya. Yet despite this favourable demographic development, even serious Tamazight activists in Libya concede that the language will never achieve regional or economic viability. In short, the Berber microcosm in Libya demonstrates how the reversion to local identities can inherently cause inefficiencies and runs the risk of weakening state institutions.[10]

Moreover, the majority Arab population has responded in print and in protests to be highly unsympathetic to the demands of Berber activists. Hence, it remains unclear whether the Amazigh will develop along the lines of other tribal or regional cleavages present throughout Libya or, conversely, whether they will become uniquely mobilised as a distinct ethnic/political party with positions and politics that differ markedly from their Arab neighbours.

In response to the perceived lack of NTC sensitivity to ethnic minorities and the announce-ment of the post-Liberation cabinet of Abdul-Rahim al-Kib – which was accused of lacking sig-nificant Berber representation – Amazigh activists took action. A group calling itself the Libyan Amazigh Congress said in a statement it was suspending all relations with the NTC in protest at the choice of cabinet ministers. (The body's name and behaviour was evocative of the Council of Cyrenaica: neither body could demonstrate that they actually had any sort of mandate from the people they claimed to be representing.) Simultaneously, clashes between Arabs and Berbers resulted when Berber tribesmen reportedly began evicting 'pro-Qadhafi' Arabs from tracts of land in Jabal Nafusa on which they had been settled by Qadhafi. This dynamic resembled the civil war in the Nafusa Mountains from 1919 to 1922 which was exacerbated by Italian support of the Berber side and attempts to alter the pre-existing demographic balance via a policy of expropriation of Arab lands (Del Boca 2010).

The above demonstrates that the Berber microcosm exemplifies the systemic trend in the new Libya towards a politics of patronage, whereby demands that a member of each self-identifying group be represented on the decision-making body that doles out patronage. In the words of the more articulate end of the spectrum of Berber opinion quoted by *Reuters* on 25 November 2011, 'We [the Amazigh] do not disagree with the new government, but we want to be represented and included [Authors' interpretation: placated] with ministerial positions'.

Tensions escalated during the last three months of 2011 and a large demonstration erupted in Tripoli on 6 December 2011. The protest was sparked by remarks of the NTC's President Mustafa Abdul-Jalil in the town of Nalut on the very day he attempted to give verbal assurances to the Berber community. Abdul-Jalil stated on 6 December 2011 on *Libya al-Ahrar* TV that 'Tamazight culture and language are respected by all Libyans but . . . the Berbers need to "*inte-grate*" into the Libyan society and avoid "*exclusion*"'.

In response, activists made savvy use of international law citing the UN's 'Rights of First Peoples' and demanding that the NTC abide by its own TCD by applying the provisions related to democratic government, freedoms, equality of opportunities, and respect for cultural and linguistic diversity.[11] Amazigh activists continue to call for their special inclusion and rep-resentation in the committee responsible for drafting the election law, the management of the electoral commission, and the constitutional committee. They also demanded a quota system specifically guaranteeing minority representation in the interim government. Their reaction to Article 30 was the strongest. Amazigh activists (observed by the authors) in December 2011 in Tripoli asserted that the precise provisions of the article were structured to deny them any sig-nificant political role.

The cases of the Amazigh and Cyrenaican activists are similar in that both groups reject the basis of the NTC's fundamental claim to sovereignty and frequently speak against any election based purely upon demographic criteria as they feel their representation must be greater than their natural proportion in the population so as to protect their special (minority/regional) inter-ests. Amazingly, even after the passage of the Constituent Assembly Election Law on 16 July 2013, which reserved six seats for minorities, far more than their proportion of the Libyan popu-lation, Amazigh activists were up in arms, literally threatening to both boycott the elections and disrupt the constitutional process with violence. In response, the GNC hastily passed legislation guaranteeing 'Amazigh communal rights' and according their language a national place, but the Amazigh still demand more. Although Islamists also want special provisions for their represen-tatives – such as an 'ulama' tribunal to approve laws or the constitution itself – their critique differs from the federalist or Amazigh critique in that they are frequently happy to put their agenda to a representative proportionally elected body in hopes they can increase power

through their mass appeal. However, all groups appear to seek adequate safeguards against the 'tyranny of the majority' that a representative democratic procedure may not automatically accord them. The Berbers start at a disadvantage, as the NTC's TCD does not explicitly protect minority interests or establish quotas, while it does favour regionalist claims and proclaim that Islam is *the* source of law. Berber activists argue that given the inadequacy/inappropriateness of their representation they are bound to be on the losing side of the constitutional referendum if it is held in a purely proportionally representative demographic fashion.

The NTC and the interim government only paid brief lip service to grievances of the Amazigh, without implementing real change. Additionally, they did not enter into a constructive dialogue aimed at integrating Amazigh interests into the political process. Leaders of mainstream Arab political movements and parties also took positions similar to those of the NTC. Some Muslim Brotherhood and Salafist leaders considered the demands of the Amazigh as endangering national unity while also threatening the divine status of Arabic as the language of the Qur'an. They also stated, for example in a 12 April 2012 post on the *Libya First* blog, that Arabs and Berbers belong to a broader Islamic culture that does not discriminate between its various ethnic components and that an Islamic state accommodates and best serves the demands of the Amazigh.

Given the popular response, it became obvious to some Amazigh activists that their calls fell on deaf ears and they were bound to be excluded and neglected. They saw the attitude of political leaders, including the Islamists, as a clear indication of the strong grip of Qadhafi's Arabist views on the psyche of today's politicians. This acknowledgement of an innate opposition between an Arab establishment and an Amazigh fringe gave more rationale and impetus to the articulation of even more polarising demands by Amazigh activists. Such polarisation led to mainstream parties ignoring the Berber issue and the election commission deciding that voting in Jebel Nafusa could only be for single candidates and not party lists, as shown in election district maps on the High National Election Commission website. It was assumed that Berbers would choose either an ethnic/separatist party (which were forbidden by the election law) or would feel entirely marginalised by the system. This effectively left the Berbers out of the political party system, unless independent candidates from those areas were informally affiliated with elected parties.

Frustration with the supposed sovereignty of the NTC was best displayed in the writings of Amazigh activists. The most powerful and visible dissatisfaction was expressed by Fathi bin Khalifa, a Libyan national who is the President of the World Amazigh Congress. Bin Khalifa demanded in a 20 April 2012 article for *Ossan Libya* that the NTC listen and act on the demands and rights of the Amazigh or they would boycott the elections and refuse to accept their outcome as legitimate and binding upon them. He also called on Amazigh individuals to withdraw from the NTC and other state institutions. In what appeared as an ultimatum, he indicated that, given the failure of the NTC to engage with and include the Amazigh, their next step as a community is to go directly to the UNs and international organisations calling upon them to address Amazigh grievances as violations of minority and human rights.

Clearly, the inability of the NTC to respond coherently to Amazigh demands (even via the half-hearted compromises with which it addressed Cyrenaican federalists) generated counterproductive Amazigh reactions, which further isolated them from mainstream Libyan politics. If such issues remain unattended to by the GNC and no clear policy is adopted to address the demands and aspirations of the Amazigh, a Pandora's box of questions concerning ethnicity and Libyaness may be opened.

One foreseeable and avoidable outcome is that key Amazigh representatives may follow through on their plans to boycott the constitutional process, severely damaging its legitimacy.

This step would likely lead to Amazigh activists exiting the formal political process and using their militias to destabilise the country. Additionally, they might also begin *de facto* construction of parallel political institutions in Jabal Nafusa, threatening the national unity of the country.

Looking forward

Although this article has primarily focused on criticism of the NTC from dissident responses to its attempt to define the rules of the political game via the TCD, more recent developments after the success of the July 2012 elections are a further testimony to implications of the TCD and criticisms of it. Islamist, regional, and ethnic challenges to Libya's authorities continue to be articulated as contestations of the constitutional process and the sovereignty of the GNC and the NTC to establish rules for the transition period. These developments reveal the continued supremacy of 'perpetual dynamics' detailed by Sawani (2013) of religion, ethnicity, and regional identity as the focal points of Libyan politics. The NTC's inability to meaningfully defuse these dynamics and integrate disparate groups into the new Libyan nation has impaired the GNC by bequeathing them a noticeably weak central authority. Moreover, as outlined above, the NTC's failure to incorporate these differing groups into a new national political process has undermined the transitional authorities' claims to sovereignty. It has demonstrably given the GNC a weakened mandate to oversee the constitutional phase dominated by the very issues that the NTC was unable to previously resolve.

The GNC's preliminary debate on the constitutional committee beginning 11 November 2012 brought to the surface the sensitive issues springing from Article 30 of the NTC's TCD. These relate to the delicate issues of the election law, districting, the role of political parties, the role of women, and the rights and privileges of minorities. The election law as finally put forth on 16 July 2013 specifies quotas for minorities and women but has not resolved and the way districts are mapped.

Whereas the most pressing issues in today's Libya are those of security, capacity building, reconciliation, and fostering economic growth, the most fundamental test that the GNC must face is not in those domains. It must first secure genuine recognition of its authority and complete its primary task of overseeing creation of a constitution. To date, its failures to assert its authority and engender a constitutional draft to be initiated constrain its action on the more pressing problems of security, by depriving it of its inherent legitimacy and sovereignty.

The challenges of federalism in the East and the potential for secession in the marginalised southern region of Fezzan remain the most serious of all problems. Federalism, despite the initial opprobrium against its proponents and then, later, the considerable renewal of their activity after the 6 February 2013 decision, is the primary threat to the constitutional process and stability of the nation. At the margins, demands of the Tuareg and Tubu for their rights will further complicate the process of national reconciliation. Given that Tawergahans are still displaced and that the Tubu are facing an ongoing bloody confrontation from the Arab tribes in Kufra and that they accuse the central authorities of partiality in favour of the Arab Zwai tribe, these are also explosive time bombs.[12]

Unless the GNC can resolve the issues of human rights violations, oppression, exclusion, the degradation of ethnic groups, marginalisation of the East and South, and disagreements over the role of religion in politics with sensitivity and due consideration they will continue to provide the ingredients for further instability. Any constitutional arrangement that does not offer due process for conflict resolution and does not provide for compromise with the demands of federalists and ethnic groups without allowing those groups to dictate terms by

force is likely to be disastrous for both Libya's stability and the ability of its authorities to exercise sovereignty.

Notes

1. The NTC exercised 'a stranglehold over formal authority but an abject lack of institutional capacity [to exercise that authority]'. The quote is from Pack and Barfi (2012) and this theme is developed more fully in Pack (2013).
2. Although almost all Libyans are Muslims, they differ strongly in the extent to which they wish the Shari'a to underpin the country's legislation. This has been documented via informal polling on the Facebook pages of various Libyan politicians and pollsters. Illustrating this trend, certain Islamist political parties maintain that Libyan society needs its laws to derive from the Shari'a and for its political leaders to possess Islamic credentials in order for the state to be considered Islamically legitimate. Conversely, other social forces (usually those on the Liberal side of the spectrum such as the National Forces Alliance) state that the political arena is inherently Islamic because the Libyan people are Muslim and that Libya's laws do not need to derive exclusively from the Shari'a, nor do its leaders need to possess personal religious credentials or inclinations for the state to be considered Islamically legitimate. Therefore, despite the relative religious homogeneity of Libya's population, religion has unfortunately become a source of polarisation rather than unification. For more on the history of the contested role of religion in legitimating political authority in Libya, see Sawani (2013).
3. The aforementioned earlier plans appear to have been scrapped because the NTC was afraid of too quickly losing power to be able to shepherd the transition. Our private conversations with former NTC leaders indicate that they understood by early August that Tripoli might fall abruptly after which point their authority and legitimacy would wane. Second, the NTC promised to select a whole new cabinet after the mysterious killing of Abdul-Fattah Younis on 28 July 2011 had cast grave suspicions on certain NTC members. Third, Mahmud Jibril was seen by many revolutionaries as having amassed too much authority and he was willing to voluntarily step down to defuse such criticism.
4. The NFSL was established at the beginning of the 1980s by exiled opposition figures. It has always maintained an Islamist orientation, though over time it incorporated other religious tendencies into its ranks in an attempt to transform itself into the most prominent umbrella grouping of the anti-Qadhafi opposition. Historically, many of its leaders belonged to the Brotherhood. For more see Pargeter (2010).
5. In fact, the US Senate is a good analogy for both the advantages and intrinsic unfairness of the federalists proposed electoral method. It would have granted Fezzanis overrepresentation in the GNC relative to Tripolitanians by about ten to one. This is roughly the same ratio by which Oklahomans are overrepresentated relative to Californians in the US Senate. However, the proposed Libyan system would lack a purely proportional representation body like the US Congress to counterbalance the effect of such overrepresentation. In 2013, there is no functioning federal democracy in the world whereby proportional representation does not play at least some component in the composition of the country's legislature. This highlights how peculiar and potentially destabilizing it is that the NTC caved in to federalists' demands for a purely non-proportional approach to apportioning delegates for the constituent assembly. It also illustrates that having extracted this compromise from Tripolitanians and the NTC, Fezzani and Cyrenaican delegates have many incentives to attempt to build it into the way the future constitution structures the permanent legislature.
6. Second Author conversation on 4 March 2013 with former Libyan prime minister Elect Dr Mustafa AbuShagur. He related that in a poll conducted on his Facebook page over 200,000 Libyans voted for their preferred method of generating the constitutional committee and over 93% favoured election (i.e. even the vast majority of those from Tripolitania who would be thought to benefit from selection rather than election).

7. For a comparative study of other cases of concurrent elected legislatures and separately elected constituent assemblies, consult Lorianne Toler Updike, 'Anticipating Sovereignty Power Plays: who will exercise it for Libya?', *Libya Herald*, 5 August 2013. http://www.libyaherald.com/2013/08/05/anticipating-sovereignty-power-plays-who-will-exercise-it-for-libya/She highlights the Icelandic example, where similarly to Libya, the Parliament possesses both oversight capacity and the requirement to ratify the drafted constitution. This arrangement led to the failure of the Constitutional drafting, ratification, and implementation process.

8. See for example the 1890 'Report on Tripoli, Barka and Fezzan' preserved in The National Archives, WO 106/5962 and authored by Captain Charles Edward Callwell, then Staff Captain at the Intelligence Division of the War Office, who would later distinguish himself as a theorist of insurgency with his famous book *Small Wars*. He alleges that The Qaramanlis completely conquered Fezzan and Barqa and that the Ottoman reconquest and administrative practice from 1835 until 1879 substantially unified Fezzan, Barqa, and Tripoli into one unit and that later Ottoman practice in separately administering Barqa after 1879 as a separate Muttasarif reporting directly to Istanbul was not particularly relevant in undoing the commercial and cultural connections between the regions.

9. This section draws on Sawani (2003b).

10. The Tubu are another ethnic group who are considered by Amazigh activists as being Amazigh even though, unlike the Tuareg, their language is not in the same family as Tamazight. They represent .02% of the country's population numbering only in the tens of thousands. Citing both racial and linguistic characteristics, most Tubu activists do not however consider themselves to be Amazigh.

11. Full text of the statement issued is available on Ahewar.org. See "Bayan al-I'tisam al-silmiy al-madani li-Amazigh Libya bi-Maydan al-Shuhada' ihtijajan 'ala 'adm dustra huquqihim w-iqsa'ihim wa-tahmishihim min al-musharika fi al-hukuma al-intiqaliyya al-mu'aqqita." *Wikala Anba' al-'Ummal.* 6 December 2011. http://www.ahewar.org/news/s.news.asp?nid=745414

12. For more on the long-term ethnic and tribal issues in Libya and how 2012 has been far more violent for Libya's minorities than 2011 consult Smith (2013).

References

Al-Mahir, Khalid. 2011. "Mashru' mithaq watan al-libi." *Al Jazeera*, September 8. Accessed May 13, 2012. http://www.aljazeera.net/news/pages/7ef0c473-ea21-4536-92ac-d28822253115

Al-Mahir, Khalid. 2011. "Rafd taqseem Libya ila fidiraliyat." *Libya al-Mustaqbal*, July 21. Accessed May 13, 2012. http://libya-al-mostakbal.org/news/clicked/11350

Al-Majlis al-Waṭani al-Intiqali. 2011. "al-I'lan al-Dusturi al-Mu'aqqat." *al-Fibrayr*, September 12, pp. 2–3.

Al-Mismari, A. S. 2012. "Hal Nuldhagh Marratayn: Qira'a fi Bayan al-Tanẓimat wal-Tajammu'at wa Munaẓẓamat al-Mujtama'a al-Madani Ḥawl al-I'lan al-Dusturi." *al-Fibrayr*, September 22. Authors' translation.

"al-Mustashar Mustafa 'Abd al-Jalil: al-fi'a allity usissat li-l-ghadr bi-al-shadid 'Abd al-Fatah tu'assas bi-tariqa nafsiha muhawila ittihamna." 2013. *al-Watan al-Libiyya*, May 21. Accessed May 26, 2013. http://www.alwatan-libya.com/more-27893-40-%D8%A7%D9%84%D9%85%D8%B3%D8%AA%D8%B4%D8%A7%D8%B1%20%D9%85%D8%B5%D8%B7%D9%81%D9%89%20%D8%B9%D8%A8%D8%AF%D8%A7%D9%84%D8%AC%D9%84%D9%8A%D9%84%20:%20%D8%A7%D9%84%D9%81%D8%A6%D8%A9%20%D8%A7%D9%84%D8%AA%D9%8A%20%D8%A3%D8%B3%D8%B3%D8%AA%20%D9%84%D9%84%D8%BA%D8%AF%D8%B1%20%D8%A8%D8%A7%D9%84%D8%B4%D9%87%D9%8A%D8%AF%20%D8%B9%D8%A8%D8%AF%D8%A7%D9%84%D9%81%D8%AA%D8%A7%D8%AD%20%D8%AA%D8%A4%D8%B3%D8%B3%20%D8%A8%D8%A7%D9%84%D8%B7%D8%B1%D9%8A%D9%82%D8%A9%20%D9%86%D9%81%D8%B3%D9%87%D8%A7%20%D9%85%D8%AD%D8%A7%D9%88%D9%84%D8%A9%20%D8%A7%D8%AA%D9%87%D8%A7%D9%85%D9%86%D8%A7

"Bayan al-I'tisam al-silmiy al-madani li-Amazigh Libya bi-Maydan al-Shuhada' ihtijajan 'ala 'adm dustra huquqihim w-iqsa'ihim wa-tahmishihim min al-musharika fi al-hukuma al-intiqaliyya al-mu'aqqita." 2011. *Wikala Anba' al-'Ummal*, December 6. Accessed May 12, 2013. http://www.ahewar.org/news/s.news.asp?nid=745414

Benotman, Noman, Jason Pack, and James Brandon. 2013. "Islamists." In *The 2011 Libyan Uprisings and the Struggle for the Post-Qadhafi Future*, edited by Jason Pack, 191–228. New York: Palgrave Macmillan.

Bin Khalifa, Fathi. 2012. "Amazigh Libya 'ila 'ain wa 'ila matta." *Ossan Libya*, April 20, Accessed May 12, 2012. http://ossanlibya.org/?p=25771

Board of Trustees of the Council of 'Ulam'a (Hay'at al-'Ulama). 2011. "Bayan Hawl al-I'lan al-Dusturi al-Mu'aqqat." *al-Manara*, November 7. Accessed May 12, 2012. http://almanaramedia.blogspot.com/2011/10/blog-post_8451.html/

Del Boca, Angelo. 2010. *Mohamed Fekini and the Fight to Free Libya*. Translated by Antony Shugaar. New York: Palgrave Macmillan.

Golino, Frank Ralph. 1970. "Patterns of Libyan National Identity." *The Middle East Journal* 24 (3): 338–352.

Kooijmans, Pieter Hendrik, and Gerard Kreijen, eds. 2002. *State, Sovereignty, and International Governance*. Oxford: Oxford University Press.

"Libya: al-Brliman Yaqirr Ta'dilat Qanun al-'Azl al-Siyassi wa-l-Intkhab al-Mubashir li-A'ada' 'al-Ta'sisiyya'." 2013. *al-Madina*, April 11. Accessed May 23, 2013. http://www.al-madina.com/node/445904

"Libya: The Party and the Hangover." 2013. *The Economist*, February 23. Accessed February 20, 2013. http://www.economist.com/news/middle-east-and-africa/21572243-country-still-struggling-move-ahead-party-and-hangover

"Libyan Woman Provokes Headscarf Row in Parliament." 2012. *The Telegraph*, August 9. Accessed May 12, 2012. http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9465130/Libyan-woman-provokes-headscarf-row-in-parliament.html

Maghour, Azza. 2012. "al-Hai'a al-ta'sisiyya li-wad' distur Libya al-muqbil." *Libya al-Mustaqbal*, November 28. http://libya-al-mostakbal.org/news/clicked/28770

Moseley, Maya. 2012. "Libya's Ethnic Minorities and Upcoming Elections." Civil-Military Fusion Centre. Accessed May 12, 2012. https://www.cimicweb.org/cmo/medbasin/Holder/Documents/i016&per;20CFC&per;20Med&per;20Basin&per;20Review&per;20INFOCUS&per;20&per;2805-Jun-12&per;29.pdf

"Mu'tamr li-l-mir'a al-libiyya yada'u li-tahqiq al-masawa bayna al-rijal wa-l-nisa'." 2011. *Panapress*, November 16. Accessed May 13, 2012. http://www.panapress.com/%D9%85%D8%A4%D8%AA%D9%85%D8%B1-%D9%84%D9%84%D9%85%D8%B1%D8%A3%D8%A9-%D8%A7%D9%84%D9%8A%D8%A8%D9%8A%D8%A9-%D9%8A%D8%AF%D8%B9%D9%88-%D9%84%D8%AA%D8%AD%D9%82%D9%8A%D9%82-%D8%A7%D9%84%D9%85%D8%B3%D8%A7%D9%88%D8%A7%D8%A9-%D8%A8%D9%8A%D9%86-%D8%A7%D9%84%D8%B1%D8%AC%D8%A7%D9%84-%D9%88%D8%A7%D9%84%D9%86%D8%B3%D8%A7%D8%A1–12-805303-24-lang3-index.html

Pack, Jason. 2011. "British State-Building in Cyrenaica during the War Years (1941–1945)." MSt thesis, University of Oxford.

Pack, Jason. 2013. "Introduction: The Center and the Periphery." In *The 2011 Libyan Uprisings and the Struggle for the Post-Qadhafi Future*, edited by Jason Pack, 1–22. New York: Palgrave Macmillan.

Pack, Jason, and Barak Barfi. 2012. "In War's Wake: The Struggle for Post-Qadhafi Libya." Washington Institute for Near East Policy, February, 3–4. Accessed May 12, 2012. http://www.washingtoninstitute.org/policy-analysis/view/in-wars-wake-the-struggle-for-post-qadhafi-libya

Pack, Jason, and Haley Cook. 2013. "The July 2012 Libyan Elections: Appeasement, Localism, and the Struggle for the Post-Qadhafi Future." Unpublished Manuscript.

Pargeter, Alison. 2010. *The Muslim Brotherhood: The Burden of Tradition*, 110–113. London: Saqi.

Pelt, Adrian. 1970. *Libyan Independence and the United Nations: A Case of Planned Decolonization*. New Haven, CT: Carnegie Endowment for International Peace.

Rivlin, Benjamin. 1949. "Unity and Nationalism in Libya." *The Middle East Journal* 3 (1): 31–44.

Sawani, Youssef. 2013a. "Dynamics of Continuity and Change." In *The 2011 Libyan Uprisings and the Struggle for the Post-Qadhafi Future*, edited by Jason Pack, 53–84. New York: Palgrave Macmillan.

Sawani, Youssef. 2013b. "Post-Gadhafi Libya: Interactive Dynamics and the Political Future." In *The Arab Spring: Critical Analyses*, edited by Khair El-Din Haseeb, 142–144. London/Beirut: Routledge/The Center for Arab Unity Studies.

Smith, Henry. 2013. "The South." In *The 2011 Libyan Uprisings and the Struggle for the Post-Qadhafi Future*, edited by Jason Pack, 175–190. New York: Palgrave Macmillan.

The National Front for the Salvation of Libya. 2011. "Ru'ya li-l 'Amaliya al-Siyasiya Khilal al-Marḥala al-Intiqaliyya." June 27. Accessed May 13, 2012. http://libyanfsl.com/PDF/VISION1.PDF/

Vandewalle, Dirk. 2006. *A History of Modern Libya*. Cambridge: Cambridge University Press.

Vandewalle, Dirk. 2012. "After Qadhafi: The Surprising Success of The New Libya." *Foreign Affairs* 91 (2012): 8.