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Libya's constitutional dilemma: Future prospects of the draft permanent constitution

Introduction

From whatever perspective it is considered, the stalled Libyan political process boils down to fundamental differences over a number of constitutional issues. As shown elsewhere,¹ the failed elections in December 2021 faltered over two typical constitutional issues: eligibility criteria for presidential candidates and the sequencing of the parliamentary and presidential elections. What has been remarked on less frequently is that these were also the very reasons behind the resistance to the draft permanent constitution adopted in July 2017. This is a reminder that the search for “a constitutional basis for elections”, i.e., an alternative interim arrangement, allegedly due to the insurmountable differences over the draft constitution, reflected a kind of political inertia, if not a conscious choice by the status quo forces to maintain the transitional phase.

Since its adoption by the drafting body, the draft permanent constitution has been sporadically referenced by Libyan politicians—always opportunistically, to serve their immediate political agendas.

Facing the real risk of a deal between the two houses that could lead to his replacement, Prime Minister Dbeiba, in his National Day address² on 24 December, extensively referred to the draft constitution, stating that a constitutional referendum was the only viable way of replacing his cabinet. Similarly, after enacting a law establishing a (parallel) Supreme Constitutional Court in December 2022, HoR Speaker Aguila Saleh justified the move by claiming³ to be implementing the draft constitution—despite having always resisted it. Throughout 2022/2023, delegations from the HoR and HCS, engaged in negotiations over a constitutional

¹ Hammady, Omar (2022). What Went Wrong With Libya's Failed Elections. Foreign Policy, 18 February. Available at <https://foreignpolicy.com/2022/02/18/libya-elections-2021-postponed/>

² National address by Prime Minister Dbeibah, Hukumatuna, 24 December 2024. Available at <https://www.facebook.com/watch/?v=566282546399322>

³ Alghad TV, عقيلة صالح: إنشاء المحكمة الدستورية في ليبيا تأكيد على حماية الحريات والحقوق □ الغد

framework for elections decided to use⁴ the draft constitution as a reference, while carefully avoiding its more divisive aspects. The intention was to reach an agreement on a new government while sidestepping elections that could have led to their own political downfall.

While these instances highlight the opportunistic use of the draft constitution, Libyans must tackle the challenges of completing their constitution-making process—an unavoidable and decisive milestone in the country’s stabilization. To this end, it is crucial to develop forward-thinking strategies on how to advance Libya’s draft constitution.

The purpose of this policy paper is, therefore, to summarize the background to the Libyan constitution-making process (II), the context of the election of the constitution-making body (III), and explain the contentious aspects of the draft constitution (IV) and objections raised against it (V). The paper will outline a number of options for the path toward completing the constitution-making process (VI).

Background: The design of the constitution-making process

The design of the Libyan constitution-making process was flawed from the start—and future developments exacerbated the problems, rather than addressing them.

The initial version of the Interim Constitutional Declaration envisioned the election of a General National Congress (GNC) immediately after the liberation of Tripoli, followed, one month later, by the appointment of a Constitution-Drafting Assembly (CDA) tasked with drafting a new constitution for the country within two months.

After several amendments, the parameters⁵ of the process were set as follows:

- The time for constitution-making was extended from 60 to 120 days
- The CDA would be elected, instead of having its members appointed by the GNC
- The CDA would be composed of 60 members, equally representative of the three main regions
- Ten per cent of the seats were to be earmarked for women and another ten per cent for the three minority groups (Amazigh, Tebu, and Tuareg)

- A decision-making process of 2/3+1 was adopted, “while seeking consensus with the cultural components (minority groups) on issues of concern to them” (this was to be a significant factor in the rejection of the process by these groups).

A range of other factors effectively limited the inclusiveness of the process by excluding wide segments of Libyan society:

- A “Law on Political Isolation⁶” (qanun al-azl al-siyassi), adopted in May 2013, barred⁷, for ten years, broad categories of Libyans from holding public office, including running for CDA election.
- The overthrow of Qadhafi in 2011 had already led to the de facto exclusion of his constituency, along with some major Libyan tribes.
- By the time of the CDA election in February 2014, the conflict had led to the exile, internal displacement, and effective exclusion from the political process of nearly 1.5 million Libyans.
- Minority groups believed that the design of the transition did not take sufficient account of their demands and boycotted the CDA (Amazigh), or the process after having elected their representatives (Tebu).

Election of the CDA

The CDA election was held on 20 February 2014. The electoral law was interpreted as effectively prohibiting political parties from presenting candidates. The vote saw a very low turnout, with just 45 per cent of registered voters taking part. This amounted to 14 per cent of eligible voters, or put differently, ten per cent of the estimated total population. The result was that the members, who were elected in individual constituencies based on a first-past-the-post system, enjoyed very limited legitimacy.

Four of the seats in the CDA remained vacant due to the Amazigh minority boycotting the entire process, and the impossibility of holding elections in the extremist-controlled city of Derna. Representatives from Derna were eventually appointed in mid-2016. The two representatives of the Tebu minority group boycotted the CDA in the middle of the process.

⁴ On the HoR-HCS Cairo talks for instance, see our comment on X, on 21 May 2022. Available at https://x.com/o_hammady/status/1528082715198750726

⁵ Constitutional Amendment no. 3. Available on the website of the Geneva Centre for Security Sector Governance <https://security-legislation.ly/latest-laws/constitution-al-amendment-no-3-of-2012/>

⁶ The Political Isolation Law, available on the website of the Geneva Centre for Security Sector Governance <https://security-legislation.ly/latest-laws/law-no-13-of-2013-on-political-and-administrative-isolation/>

⁷ Human Rights Watch (2013). Libya: Reject ‘Political Isolation Law: Provisions for Exclusion, too Vague, Sweeping. 4 May. Available at <https://www.hrw.org/news/2013/05/04/libya-reject-political-isolation-law>

When the CDA began operating, the country was already going through significant turmoil. The snap legislative election in June 2014 resulted in a conflict between the outgoing GNC and the newly elected House of Representatives (HoR). This resulted in the country having two competing parliaments and cabinets.

Further, the deteriorating security situation and the rise of ISIS shifted the international community's priorities when it came to Libya, from democracy-promotion and an orderly transition to tackling the immediate security challenges. Accordingly, the political dialogue launched under the auspices of the United Nations in Skhirat, Morocco and aimed at reunifying the country's governments, became the focus of the political process.

Consequently, even as the CDA was carrying out its work, its relevance was clearly fading, and the overall security situation significantly limited the space left for public participation.

In July 2017, following last minute compromises, the CDA announced that it had adopted a Draft Constitution with an overwhelming majority of 43 out of 44 voting members. Accordingly, it referred the draft to the HoR and asked the latter to adopt the necessary law for a popular referendum to be held.

Contentious aspects of the CDA Draft Constitution

The Draft Constitution was opposed by a number of constituencies who effectively prevented a referendum being held on it. Grievances were voiced on the grounds of (a) process and (b) content. The Draft Constitution also has certain (c) technical flaws.

A. Process

Several constituencies have rejected the CDA draft since they were not part of the drafting process for different reasons:

- **Minority groups:** While the Amazigh boycotted the entire political process from the start, Tebu representatives initially took part in the CDA's work but have boycotted it since 2016. This was on the grounds that, in their view, discussions did not respect the Constitutional Declaration's requirement of "seeking consensus with the cultural components (minority groups) on issues of concern to them".
- **Pro-Qadhafi people:** This constituency was, broadly speaking, unable to present candidates to the CDA election due to the Law on Political Isolation. Accordingly, it considers the Draft Constitution to be a "law of the victorious".

- **Pro-LNA people:** General Haftar has always dismissed the work of the CDA. However, he indicated some red lines that were only partially respected: the necessity of eligibility criteria allowing him to run for presidential election despite holding foreign citizenship and still being on active military duty. His second red line was the outright rejection of the federal system. Lastly, his constituency also refers to the draft as a Muslim Brothers' constitution and thus rejects a number of Islam-related provisions.

These three sets of grievances are mirrored in the content-based arguments for the rejection of the CDA Draft Constitution.

B. Content

Several aspects of the CDA Draft Constitution were contested. Some related to immediate concerns of key political and military players, others to the underlying values of the text and the institutional setup. Contested elements include:

- **Eligibility criteria for presidential candidates:** The initial version of the relevant provision required that candidates must have renounced their foreign nationality five years before the date of their candidacy; must have ended their service in the army one year prior to their candidacy; and must have resided in Libya for at least the last ten years. The issue was one of the most disputed provisions in the CDA discussion. This eventually resulted in a draft requiring candidates not to have acquired another nationality, unless this had been renounced at least one year in advance of the day of candidacy (Art. 99). Yet, even with the final version dealing only with nationality, General Haftar's supporters persisted in their objection. The fact is, the ban on military candidacy, ultimately abandoned in the CDA final draft, is already provided for in Libya's law on armed services.
- **Related to the nationality issue is the provision** barring holders of dual nationality from assuming any sovereign positions (Art. 192). This article is perceived as targeting important figures in the current political landscape, including a wide range of Qadhafi's opponents who had spent decades abroad, a significant number of them having acquired foreign citizenship.
- **General provisions on nationality:** A general provision on nationality suspends all naturalization procedures for ten years as of the entry into force of the constitution; suspends the registry system for persons of Libyan descent; and provides for reviewing "all cases of granting nationality issued as of the date of February 15, 2011". It also seems to establish a hierarchy between Arab holders of Libyan nationality based on whether they have held it from birth or have acquired it (Art. 186). This has been strongly rejected by minority groups, especially Tebu.

- **Minority groups' demands:** These were some of the main reasons the Amazigh boycotted the entire process and the Tebu walked out at a later stage. One key issue was the status of their language which the Draft Constitution does not recognize as an “official” language of the state.
- **The composition of the Senate**, the upper house of parliament, was perceived as foreshadowing a Tripolitania hegemony as it allocates 32 seats to Tripoli, compared with 26 to Cyrenaica and 20 to Fezzan (Art. 75).
- The designation of **Tripoli as the Capital of the State** (Art. 3) remains disputed by a number of easterners.
- The provision according to which “Islam shall be the religion of the State, and **Islamic Sharia shall be the source of legislation**” (Art. 6) is also disputed. The same goes for other related provisions, such as religious charity (Art. 25), endowment (Art. 26), and the Sharia Research Council (Art. 161).

C. Technical flaws and shortcomings

While not politically divisive, some technical flaws and shortcomings might hamper the implementation of the Draft Constitution and the good functioning of state institutions. Examples include:

- **System of government:** Some provisions in this chapter stand in sharp contrast with the explicit logic of the overall Draft Constitution and seem problematic in light of comparative constitutional practice and the dynamics of Libya's politics:

The grounds and procedure for dissolving the parliament seem problematic. Among the possible grounds for dissolution is “obstructing state policy” (Art. 109-1), which is hardly something an assembly tasked with overseeing those very policies can identify. Further, the Constitutional Court may be involved in deciding on the “political appropriateness and reasonableness” of the decision to dissolve one of the two Houses of the Parliament (Art. 109-2). Yet, the Court, which can only make rulings based on the Constitution, is not—and cannot be—provided with definitions of what is politically “appropriate” and “reasonable” in this regard. This procedure may be risky both for the Constitutional Court's credibility and legitimacy, and for the political branches of government.

The draft provides for a mechanism for the “devolution of competences” between the two houses of the parliament, according to which the functions of the dissolved chamber would be assigned to the remaining one (Art. 95). This seems to run counter to the logic of democratic institutions as the president could easily dissolve the chamber dominated by her/his opposition. In addition, the powers of the two houses were delineated in order for

them to keep each other in check as they emanate from two different voting constituencies (the population and the regions).

- **Decentralization:** This chapter of the CDA's Draft Constitution only partially provides for the formal elements of decentralization. There would be three levels of government, i.e., national, governorates, and municipalities (Art. 144). No details are provided as to the number and design of governorates and municipalities, their powers, and resources, nor on their relationship with the central government. In other words, the CDA's draft defers the matter completely to subsequent legislations which means that the first legislator under this constitution will make important decisions on one of Libya's most disputed constitutional questions.
- **Transitional provisions and implementation roadmap:** The CDA's Draft Constitution only contains scanty provisions related to transitioning from the current constitutional (dis)order to a new—permanent—order. It only has one relevant provision stipulating that the “legislation in force shall be amended in accordance with this constitution”, and that “authorities and public institutions shall continue functioning until the authorities established pursuant to the provisions in this Constitution assume power” (Art. 196). However, the structure of the actual phasing out of the current constitutional order and the establishment of the new one are not presented in any detail, e.g., what legislation will be passed? In what order and on what date? And what is the schedule for establishing new institutions? Which body is tasked with overseeing the implementation of the Constitution? And what compliance mechanisms are to be established to this end?

Judicial challenges

Several legal challenges were mounted against the adoption of the draft and its referral to the HoR. These have been settled with binding authority only from an administrative court perspective.

On 14 February 2018, the Administrative Chamber of the Supreme Court found that it lacked the jurisdiction to review the legality of decisions made by the CDA. The chamber, however, made its decisions “without prejudice to the jurisdiction of the Constitutional Chamber of the Supreme Court regarding decisions that the CDA might promulgate in violation of the procedures outlined in Article 30 of the Constitutional Declaration”.

Other challenges were, indeed, submitted to the Constitutional Chamber based on “the violation of the procedures outlined in Article 30 of the Constitutional Declaration”. While these are still pending before the Constitutional Chamber of the Supreme Court, it is unlikely that the matter will be settled by the courts in a manner that is acceptable to all as the very existence of this chamber is now contested by the House of Representatives.

In fact, on 6 December 2022, the HoR passed a law⁸ establishing a new Supreme Constitutional Court to be based in Benghazi. By virtue of the same law, the Tripoli-based Supreme Court would be transformed into a Cassation Court without jurisdiction over the review of constitutionality. While the latter’s Constitutional Chamber annulled⁹ this law on grounds of unconstitutionality, the HoR moved ahead with its law and members of the Benghazi-based Supreme Constitutional Court were sworn in¹⁰ on 23 September 2024 amid indignant reactions from the High Council of the State and the General Assembly of the Supreme Court.

These developments mean that Libya’s institutional divisions have now reached the apex of the judiciary and that none of the courts’ rulings on this matter will be regarded as binding by all the parties. Consequently, the fate of the CDA’s Draft Constitution will not be settled judicially, but only by mutual consent. To this end, several options can be considered.

Options for the way forward

At least three options are available to the Libyan political parties to address the constitution-making process—and none of them uses the constitution-making process to delay holding elections:

- **Holding a constitutional referendum:** As it stands now, the Libyan Interim Constitutional Declaration and the Political Agreement envisage the next electoral event to be the holding of a referendum. The Conclusions¹¹ of the Berlin Conference and the LPDF’s Roadmap¹² offered the possibility of holding elections ahead of the referendum, but efforts to achieve this have failed spectacularly. That said, a referendum on the Draft Constitution is not a viable option.

Due to the differences over the content of the Draft Constitution, it would be effectively resisted by many constituencies, including the LNA and especially the HoR. Accordingly, an agreement on the referendum law, which is a legal prerequisite, will not be possible. Political actors who promote the option of a “referendum first” do so out of contingent political calculus. This was the case, for instance, when the pro-Dbeiba members of the LPDF postponed holding elections. It is still the preferred option of Prime Minister Dbeiba to prevent his own replacement through yet another “unified government”.

- **A referendum on an amended version of the Draft Constitution:** Libyans may wish to build on the CDA’s work on developing a Draft Constitution acceptable to all parties which would then be voted on in a referendum. The Libyan Political Agreement provides a legal basis to this effect. It instructed the CDA to “request the opinion of the House of Representatives and the State Council on the Draft Constitution upon the completion of the final draft and before it is sent for referendum” (Art. 51), and provides that, in the event that the CDA is unable to conclude its work, a 15-member joint committee designated by the HoR, the HCS, and the prime minister “be formed (...) to deliberate on this matter” (Art. 52). It also offers another route via the LPDF, or another iteration of the Political Dialogue, to address the contentious issues of the Draft Constitution based on Art. 12 of the LPA’s Additional Provisions.

A review of the Draft Constitution has the advantage of providing time and political space to involve previously excluded constituencies, thus broadening consensus on a permanent constitution.

Since the divisive issues in the Draft Constitution are largely the same as in the “constitutional basis for elections”, this option has the advantage of avoiding another transitional phase. A special arrangement on certain issues, e.g., eligibility criteria, could be included despite the fact that they may only be applicable to the first election. Other eligibility criteria in line with the rule of law and with comparative practice should enter into force for the subsequent elections as the country stabilizes, and as a viable social contract is created, as is common in comparative constitutional practice.

⁸ The Law Society of Libya, القانون رقم 5 لسنة 2023 م بإنشاء المحكمة الدستورية العليا في ليبيا - المجمع القانوني

⁹ Al-Wasat, المحكمة العليا تقبل الطعن في قانون استحداث محكمة دستورية, (The Supreme Court accepts the challenge against the establishment of a new Constitutional Court), 5 March 2023. Available at <https://alwasat.ly/news/libya/391161>

¹⁰ The Libyan House of Representatives, المستشارون بالمحكمة الدستورية العليا يؤدون اليمين القانونية أمام مجلس النواب (The members of the constitutional court take oath before the House of Representatives). Available at <https://tinyurl.com/2rsjsem2>

¹¹ Press and Information Office of the Federal Government of Germany (2020). The Berlin Conference on Libya. Conference Conclusions. 19 January. Available at https://unsmil.unmissions.org/sites/default/files/berlin_conference_communique.pdf

¹² UNSMIL (2020). Roadmap “For the Preparatory Phase of a Comprehensive Solution”. Available at https://unsmil.unmissions.org/sites/default/files/lpdf_-_roadmap_final_eng_0.pdf

Adopting a “constitutional basis for elections” alongside a process to address the Draft Constitution: The Libyan parties might well decide to adopt only an interim constitutional arrangement for the upcoming election. The grounds for this would be that differences over the Draft Constitution extend beyond election-related provisions and involve more fundamental issues. The choice of this option would be based on a political calculus as long as the “status quo party” neither has incentives, nor sees the benefits of a more comprehensive compromise in terms of putting an end to Libya’s long transition.

In this case, it would be appropriate for the “constitutional basis”, without addressing the substance of the CDA’s Draft Constitution, to outline how the constitution-making process would be completed. It would then be the priority of the elected parliament finalise this process, along with a clear timeline, safeguards, incentives, and sanctions for delay:

- The process might be led jointly by the elected parliament and the CDA, which still exists, preserved by the LPA (Art. 60–61).
- The process should be time-bound with clear consequences for delay, e.g., if the deadline set for the referendum/final adoption is not respected, the CDA and the parliament shall be deemed dissolved, and snap legislative elections organized.
- The process shall provide for genuine dialogue and engagement with all political constituencies, as well as with Libyan civil society, experts, and scholars.

Conclusion

There are solid grounds for the views held by different Libyan stakeholders regarding the country’s constitutional dilemma. To support them moving forward, international partners and mediators should navigate the contingencies of the process with a view to ending Libya’s long transitional period through the adoption of a permanent constitution. The art of the mediator will consist in addressing the fears and concerns behind the current resistance, obtaining the consent of the relevant actors for a completion of the constitutional process that would avoid triggering the resistance of “veto-holder” constituencies. To this end, the mediator may wish to consider a proactive approach whereby they would directly engage the relevant constituencies and formulate bridging proposals to take the process forward.

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