

Libya Brief | no. 10

June 2021

Regional Program Political Dialogue South Mediterranean



Libya's Constitutional Quagmire

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Abstract

While significant milestones have recently been reached in the Libyan political dialogue held under the United Nations' auspices since November 2020, including the establishment of a new government of national unity, the holding of general elections set for December 2021 has now become the main focus of attention and a top priority of both the Libyan stakeholders and their international partners. However, persistent disagreement on the constitutional basis needed to hold these elections, and in particular on whether to rely on the draft constitution issued by Libya's constituent assembly in 2017 or on an alternative document, may undermine the progress achieved so far and hamper the completion of the agreed roadmap. This paper will attempt to review the main obstacles that have prevented the adoption of a permanent constitution in Libya to date, and assess whether the various constitutional options currently under discussion could provide a relevant basis for Libya's next elections.

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Introduction

On 4 May, UN Special Envoy Ján Kubiš submitted to the participants of the Libyan Political Dialogue Forum (LPDF) the proposal elaborated by the LPDF's Legal Committee to serve as a possible constitutional basis for Libya's next elections set for 24 December, hoping to bring an end to the months-long deadlock on this matter. Libya's constitution-making process initiated in the aftermath of the fall of the Qadhafi regime has indeed stalled following the adoption of a final draft by Libya's constitution drafting assembly (CDA) in July 2017, which failed to be submitted to a popular referendum. Since then, persistent disagreement and controversies have shaped the public debate on which constitutional framework could relevantly be used to organize the elections within the agreed timeframe. This paper seeks to provide some explanations to Libya's long-delayed constitution-making process, and to review the challenges that have hampered the adoption of a permanent constitution in Libya to date. It will also analyze the various constitutional alternatives that have been envisioned, and in particular the proposal recently issued by the Legal Committee, as possible ways out of Libya's constitutional quagmire.

Libya's unfinished constitution-making process

Initiated in 2014 with the election of a constitution drafting assembly (CDA), Libya's long-standing constitution-making process has so far failed to reach its completion with the approval of a final draft by a popular referendum. Causes for this failure are multiple, including both internal and external challenges faced by the constitution-making body, but also persistent disagreement by the various stakeholders on several provisions of the final draft constitution.

A challenging process

Libya's constitution-making process did not occur in normal or peaceful conditions, but rather amidst growing political tensions and military conflict. In the aftermath of the 2011 uprising and the fall of the Qadhafi regime, an Interim Constitutional Declaration issued on 3 August 2011 by the National Transition Council (NTC) – the body in charge of supervising Libya's transition – initially provided that a constitution-making committee would be selected by the future parliament, the General National Congress (GNC), to produce a draft constitution within a period of 60 days that would then be adopted by the GNC and submitted to a popular referendum (art. 30, para. 2). However, on the eve of the parliamentary elections, this decision was reversed to allow for the direct election of the constitution-making body².

The fragmentation and political instability of the GNC, its poor management of the transition and the growing insecurity facing Libya, caused in particular by the multiplication of armed militias, triggered resentment among the people and drove eastern-based forces under the lead of General Khalifa Haftar to launch a military operation ('Operation Dignity'– Karama, May-June 2014) and to push for new legislative elections to replace the GNC. Elected in June 2014, Libya's new House of Representatives (HoR) was, however, not recognized by all, and in particular not by the supporters of the outgoing GNC (mainly Islamists), which continued to operate from Tripoli. Based in Tobruk (east), the HoR gained international recognition but the country was now divided into two competing authorities and parliaments, and the country was slipping into civil war.

In this context, the constituent assembly that was elected in February 2014 was immediately faced with a polarized political environment and an uncertain legal situation. But the constitution-making body was also not immune from its own controversies and weaknesses. Composed of 60 members – 20 representatives for each of Libya's three historical regions (the

² Constitutional Amendment No. 3 of 5 July 2012.

western Tripolitania, the eastern Cyrenaica, and the southern Fezzan) – elected without any specific expertise or political affiliation, the CDA lacked both a clear political vision for the country and a strong constitutional experience.

Moreover, the limited popular interest for this election, the tense security conditions in various locations, which prevented voters from heading to the polling stations, and the calls for boycott by Libya's cultural and linguistic components – the Amazighs, the Tuaregs and the Tebus, – who deemed their representation in the CDA (two seats each) insufficient, resulted in 13 of the 60 CDA seats to remain unfilled, thus undermining the popular legitimacy of the constituent body from the outset³.

The truncated constituent assembly that started working in March 2014 also had to cope with the initial mistrust of its members, their limited experience to address technical matters and their diverging and sometimes extreme conceptions on what a future Libyan state should look like. Furthermore, the requirement for the CDA members to adopt their final draft with a 2/3+1 majority in addition to reaching consensus with the cultural components on issues related to them, as well as the prospect of a popular referendum on the draft constitution that must as well obtain a 2/3 approval, placed high stakes on the drafters⁴. Coming to an agreement on a constitutional formula that could satisfy a strengthened majority of not only the CDA members but also of the people meant that compromises would be unavoidable; they would, however, prove lengthy and arduous to reach.

The setting up of a Working Committee (WC) within the CDA in June 2015 with the aim of addressing the assembly's functioning difficulties, reconciling the drafters' diverging views and accelerating the drafting process, created new divisions. The cultural components, which deemed their limited representation in the WC unacceptable and a proof of "the Arab majority's efforts to impose its will"⁵, decided to boycott the CDA. Later on, additional members started criticizing the WC's working methods, in particular the "secrecy" of its deliberations and attempts by some of its members to impose their will rather than seek consensus⁶. The committee also faced divisions over several sensitive issues, notably the question of the form of the state, which led to the withdrawal, in January 2016, of an additional 11 members (mainly from the west) who denounced the "federalist inclinations" of the WC and accused it of dividing Libya with "regional quotas"⁷.

While the successive boycotts of the CDA dealt a serious blow to the body's inclusiveness, the context of intense political division and conflict in which it had to operate also put significant pressure on the drafters, despite their attempts to isolate from external tensions and to maintain their independence from the various military and political factions. These efforts, however, proved to be a double-edged sword. Admittedly, they enabled to keep the body

³ As a consequence of the boycott, polling stations remained closed in Amazigh, Tebu and some of the Tuareg dominated regions – the Tuaregs having reversed their decision to boycott the poll. Voting also had to be suspended in a number of other locations due to the tense security situation, notably around Derna. Overall, 81 polling centers were affected, mainly in the east and south of the country. For details, see The Carter Center, "The 2014 Constitutional Drafting Assembly Elections in Libya: Final Report," May 2014, p. 31-32.

⁴ The decision-making procedures for the CDA were defined in the Interim Constitutional as amended in March 2012. However, the provision related to the cultural components was added at a later stage, through the Constitutional Amendment No. 7 of 11 March 2014, as a way to solve the lack of representativeness of the cultural components in the constituent assembly following their boycott of the CDA election. This convinced the Tebus and Tuaregs to run in complementary elections in April 2014 and join the CDA. On their side, the Amazighs rejected the proposal and pursued their boycott of the constitution-making process.

⁵ Author phone interview with a CDA member from the Tebu community, January 2021.

⁶ Libyan Organization of Policies and Strategies (LOOPS), "The Libyan Constitution Drafting Assembly (CDA): Path, Outcomes and Comments," June 2016, p. 7.

⁷ Johnson, D.E.W., "Conflict Constitution-Making in Libya and Yemen," U. PA. J. INT'L L, Vol. 39, Issue 2, 2017, p. 317.

together for some time and retain significant legitimacy at a time when most institutions in Libya were lacking thereof. But the drafters' isolation also meant that their debates remained disconnected from the main political forces, whereas the issues discussed were eminently political and, for some of them, at the heart of the ongoing conflict, including debates on the country's national unity, identity, local governance and on the fair distribution of natural resources. Moreover, the context of violence and the limited accessibility of the CDA based in the eastern city of Al-Bayda prevented regular interactions between the drafters and their constituencies, who ended up feeling that their concerns were not seriously taken into consideration in the constitution-making process, and thus deprived the assembly from significant popular support.

The United Nations Support Mission in Libya (UNSMIL)'s efforts to help overcome the difficulties faced by the CDA and move the constitution drafting process forward would actually further polarize the CDA. The retreat it organized for the CDA members in Salalah, Oman, in March 2016 was only attended by 33 of them, the remaining members perceiving it as an infringement on Libya's sovereignty. The subsequent meetings held by the drafters upon their return to Libya, and the procedures through which they adopted their final draft on 19 April 2016 were also deemed illegal by the boycotters who brought the case to court⁸. The Administrative Chamber of Al-Bayda's Court of Appeals eventually annulled the adoption of the draft, a decision that was accepted by the CDA, but which froze the constitution-making process for close to a year.

Following intensive mediation efforts by civil society groups, in particular to resolve the divisions between the supporters and boycotters of the April 2016 draft, the constitution-making process eventually got back on track in the early months of 2017. The resumption of the discussions and the drafters' efforts to compromise and reach consensus, notably through the setting-up of a 'Consensus Committee' equally composed of supporters and opponents of the April 2016 draft, eventually enabled the adoption of a final document on 29 July 2017. It was approved by 43 of the 44 attending members, i.e. more than the required 2/3+1 majority, although still amidst critical voices and in the absence of most representatives of the cultural components.

The path towards the last stage of the constitution-making process, namely the popular referendum would, however, be fraught with pitfalls. Opposition to the final draft was to be found not only within the CDA but also beyond, including among members of the HoR who rejected the draft and delayed the adoption of a referendum law for several months. Once eventually passed in September 2018, the law was immediately contested as it enshrined what was deemed as a discriminatory and unconstitutional electoral system. The referendum law indeed provided for Libya to be divided into three electoral constituencies for the referendum (Tripolitania, Cyrenaica and Fezzan) with a requirement that the draft constitution be approved by a 50%+1 majority of the voters in each region in addition to the 2/3 national majority stipulated in the Interim Constitutional Declaration. This meant that votes would have unequal weights according to the region, in contradiction with the principle of equality of citizens enshrined in the Interim Constitutional Declaration.

This unresolved controversy and other practical challenges (including the electoral commission's lack of funding) eventually hampered the holding of the constitutional referendum. With the resumption of armed conflict, which culminated with the offensive on Western Libya by the Haftar-led Libyan National Army as of April 2019, Libya's constitution-making process has remained in limbo, and its fate now lie in the hands of the LPDF negotiators.

⁸ As they could not achieve the required majority of 2/3+1 to adopt the draft, the CDA members decided to amend the body's rules of procedure and lower the threshold to 2/3 of the CDA's effective members (57) rather than of the official members (60). This modification of the rules, however, was judged as constituting an infringement to the Interim Constitutional Declaration, and thus rendered the adoption of the draft constitution invalid.

A compromise but still contested draft constitution

In view of the complex and unstable conditions in which the constitution-making took place, the drafters' ability to overcome their divisions, complete their task and produce a draft that gathered a relative consensus among them, undeniably constitutes an achievement that cannot be overlooked. Nevertheless, being a compromise document, it could neither be technically perfect nor all-satisfying, and several of its provisions continue to be contested by different actors. Although circumscribed to specific groups and their supporters, notably the eastern-based federalists and part of the cultural components, the persistent opposition to the CDA's draft could put at risk the holding of a referendum in the absence of a larger consensus.

However, it is important to note that the current opposition to and rejection of the CDA's draft is largely based on misconceptions about its actual content and on an insufficient knowledge of its provisions, themselves the results not only of campaigns of misinformation by its detractors, but also to a large extent of the CDA's insufficient efforts to communicate about its work and educate citizens about its outcome. A more careful analysis of the draft in fact reveals that what appears as weaknesses and flaws is also a reflection of the drafters' efforts to reach consensus and make compromises on a number of conflicting points.

The 2011 uprising had indeed raised high expectations notably from the regions and communities that had been marginalized and discriminated against under the Qadhafi regime, and which had hoped to see these historical injustices redressed and their rights restored in Libya's new constitution. As such their demands were sometimes extreme, and finding the right balance between the need to address these concerns with what could legitimately and realistically be enshrined in the final draft proved a challenging exercise. Therefore, while the CDA's draft should be commended for having made significant progress on a number of issues compared to previous legislations (notably on citizenship rules and minorities' rights) and opened the door for improvement in the future, the drafters' inability to reach an agreement on all issues, and their choice to leave the wording of the draft often general and defer the most sensitive points to the next parliament, caused some disappointment. Several groups and notably the cultural minorities indeed expressed concerns that, if not explicitly addressed in the draft, their demands could end up being sidelined by the coming legislature.

Several points of contention thus persist in the document, which each side, based on its own preferences and interests, tends to use as arguments to reject the draft and the prospect of a referendum. However, most conflicting issues should be read against the background of Libya's recent history, the former regime's past practices as well as the context of conflict and political division that prevailed during the drafting process. Among the most outstanding points are the following⁹:

- **Symbols of the Libyan state:** Debates around issues such as the country's flag, national anthem and capital proved very divisive, having a strong symbolic value for Libyans and reflecting the deep ideological divides that shape their society. The least conflictual solution reached by the drafters to address these issues was to retain the flag and anthem currently in use in Libya (art. 197), while allowing for possible changes to be introduced by the future parliament (art. 5). As regards the capital, retaining Tripoli as the symbol of the state unity while considering eastern Benghazi and southern Sabha as unofficial capitals was not to everyone's taste, in particular some easterners who wanted to see Benghazi restored as Libya's second capital as in the 1951 independence constitution.

⁹ A more detailed analysis of the conflicting points in the draft constitution can be found in Cherif, N., "Libya's constitution: between conflict and compromise", MEDirections, Research Project Report, 2021/02, March 2021: <https://cadmus.eui.eu/bitstream/handle/1814/70538/QM-09-21-057-EN-N.pdf?sequence=3>

- **Sharia as a source of legislation:** The discussion here was not so much on whether a reference to Sharia should be included in the draft, but rather on the extent to which Islamic law should serve as a basis for the country's legislation. While the final draft keeps the wording very general, retaining Islamic Sharia as a "source of legislation" (art. 6) without any further specification, this appears unsatisfying to many. Among religious authorities, some consider that several provisions of the draft actually contradict the principles of Sharia (including the freedoms of thought, expression and association without legal restrictions and the principle of equality between men and women before the law), while other groups believe that the drafters aimed at establishing an Islamic system in Libya in the long run.
- **Identity and citizenship:** Defining who is to be considered a Libyan was particularly sensitive in a country that had long exclusively recognized its Arab identity and where citizenship had been instrumentalized and arbitrarily granted or removed, leaving thousands of people in legal limbo. While the recognition of Libya's multiculturalism and multilingualism in the final draft was positively received, even by the cultural components that had long felt excluded from the Libyan social fabric, citizenship provisions remain a serious bone of contention. The drafters' choice to freeze citizenship attribution for the next ten years (art. 186) and defer citizenship regulations to the next parliament (art. 10) was judged unacceptable, notably by the Tebus who count among the communities that suffered the most from Qadhafi's inconsistent nationality regulations. Provisions related to women's right to transfer their nationality to their children, which is not explicitly stated in the draft (but not denied either)¹⁰, and the prohibition of bi-nationals to occupy senior positions in the state institutions (to be discussed later) are other points of the draft that remain contested today.
- **Cultural minorities' rights:** Issues related to the rights and representation of Libya's cultural and linguistic components were especially challenging, not only because of the initial mistrust of these communities, rooted in decades of marginalization under the former regime, but also because the drafters had to keep channels of communication open with them after they boycotted the CDA, and ensure that their views would be reflected in the draft. Overall, while most drafters consider the final draft to be "balanced with regard to minorities' rights"¹¹, the concerned groups themselves are divided. Some acknowledged the achievements made as regards minorities' rights and specificities in the draft, while other considered them as below expectations. Their criticism mainly relates to their linguistic rights, as only Arabic has been retained as Libya's state language, while the Amazigh, Targhey and Tebu languages are still recognized as part of a common Libyan heritage that must be protected by the state (art. 2; art. 55). Their limited representation in state institutions, notably in both chambers of parliament (to be addressed below) and in the independent constitutional bodies is an additional source of discontent for many of them.¹²

¹⁰ According to existing legislation (Law No. 24 of 2010 on Libyan Nationality), Libyan women can theoretically transfer their nationality to their children even if married to a non-Libyan. In practice, however, the implementing regulations include complex procedures and restrictions that render the legal provision ineffective and perpetuate a discriminatory approach to women. Nevertheless, the drafters considered that article 7 of the draft constitution, which stipulates that "men and women are equal before the law", was a sufficient guarantee to ensure women's equal citizenship rights without having to include further specification in the draft.

¹¹ Author phone interviews with various CDA members, December 2020-January 2021.

¹² The final draft indeed provides that only two out of the eleven independent constitutional bodies – namely the National Council for Human Rights (art. 159) and the National Council for the Protection of the Cultural and Linguistic Heritage (art. 160) – shall "take into account the representation of cultural and

- **Form of the state and local governance:** This has been a very controversial issue during the constitution drafting process and still remains a serious point of disagreement between the supporters and opponents of the final draft. The drafters' eventual choice to define Libya as a unitary state with an "expanded" decentralization based on governorates and municipalities (art. 1; art.143-144), after serious consideration had been given to a federal model defended in particular by eastern members of the CDA, still continue to raise criticism among the latter and their supporters, but also among those who advocated for a more centralized state. Additional reproaches to the draft also concern its lack of precision regarding the repartition of prerogatives between the central state and local units, raising fears that the country could ultimately return to the centralized model it has experienced for decades and to a continued marginalization of the eastern and southern communities.
- **Management of natural resources:** This chapter proved less a place for political disputes than one of technical difficulties for the drafters who lacked expertise on the matter. Nevertheless, they still had to cope with the expectations of communities that had long been deprived of a fair distribution of the revenues emanating from the oil and gas extractions, while also taking into consideration the context of civil and internationalized conflict that had further fueled competition over the control of the country's natural resources. The main bone of contention during the drafting process was how to ensure a form of positive discrimination in favor of the resources-producing regions without creating renewed inequalities between the citizens. While the final draft eventually provided for the implementation of development projects in the producing regions that can constitute an alternative to non-renewable resources (art. 171), some voices still call for dedicating a specific share of revenues to these regions.

Overall, despite some persistent opposition to provisions of the CDA's draft, it still embodies a significant level of consensus both among the drafters and beyond. For this reason, most CDA members and their supporters consider that this document should be used as the constitutional basis for the next elections. Not only does the text provide a comprehensive definition of Libya's future political system, including a clear description of the prerogatives of both the president and the parliament, but, in the eyes of the drafters, it also constitutes the most legitimate constitutional document in Libya today. Having been drafted by representatives directly elected by Libyan citizens, it can only be approved or rejected by the same people through a referendum.

Libya's political regime in the CDA's draft

At the heart of Libya's political and constitutional debates today is also the question of whether the president should be directly or indirectly elected, and what it means for the next elections, i.e. whether they would be only parliamentary/presidential or both. While these debates are not immune from political considerations and partisan calculations, an objective review of the provisions of the CDA's draft in this regard can offer a better understanding of what political future the Libyan constitution-makers had envisioned for their country.

Provisions related to the executive and legislative powers

On the executive front, contrary to what some experts have noted, the aim of the drafters was not to restore a fully presidential system. Aware of the risks that such a model could pave the way for a return of an authoritarian rule, the drafters also had to take into consideration the

linguistic components". These have been considered as the bodies directly related to the cultural minorities, while they themselves demanded to have representation in additional bodies, including the High National Election Commission, the Commission for Sustainable Development and the High Council on Information and Media, which they deem essential to safeguard their rights.

context in which they were operating and the failure of the parliamentary system provided by the Interim Constitutional Declaration to restore political stability to the country during the transition. Constitutional debates around the political system were thus intense and the draft experienced several changes throughout its elaboration.

While an early version (December 2014) had envisioned the indirect election of the president in a semi-presidential system, the final draft rather provided for a presidential system with a president directly elected by the people and enjoying relatively extensive prerogatives. Nevertheless, the drafters were eager to avoid an excessive concentration of powers in his/her hands, dividing prerogatives between the various branches of powers and establishing checks and balances. Therefore, while some prerogatives remain the sole responsibility of the president, including the appointment of the prime minister and other senior state officials (art. 104), as well as heading the armed forces (art. 106), others are to be implemented jointly or in consultation with the cabinet, or with both chambers of parliament. This includes for instance introducing amendments to the constitution (art. 195) or appointing the members of the Constitutional Court (art. 136). The judiciary and independent constitutional bodies were also envisioned as potential counter-powers.

However, the text is not free of flaws. The vagueness of some provisions, as well as the drafters' choice highlighted earlier to defer a number of issues to the next parliament may have given the impression of an excessively powerful president, and may effectively be problematic in practice. As a matter of example, while declaring the state of emergency is the president's responsibility after consultation with the prime minister and the speakers of both legislative chambers, the final approval (or rejection) lie in the hands of the parliament. However, the imprecise wording of the related article actually provides a three-day window for the parliament to make a decision, thus leaving the president with a margin to act according to his/her will during this period (art. 187). Similarly, the brevity of the provisions related to the management of public finances (art. 164-167) and natural resources (art. 169-176) tend to leave a large margin to the executive, and in particular to the president, as long as the regulatory legislation are not in place to provide more details on the role to be played by other levels of power on these issues.

In spite of this, Libyans' attention has been mostly focused on the conditions of eligibility to the presidency rather than its actual powers. This remains a point of contention in the final draft, despite the drafters' efforts to compromise and to render the conditions to run for president less stringent than in previous versions. The requirements to have resided in Libya for at least 10 years, and for military and security personnel, to have left their functions at least a year before running for the presidency, have been removed. The age of potential applicants has also been reduced from 40 to 35 years; and the conditions for bi-nationals to be a candidate were eased by cutting down the period for renouncing their second nationality from 5 to 1 year – a concession made to the eastern federalists. However, the latter and the supporters of General Khalifa Haftar, who has made little secret of his presidential aspirations, still contest this provision, which they want to see removed as they consider it the last obstacle that could prevent Haftar to become a candidate.

At the legislative level, the drafters enshrined a bicameral parliament with the power to monitor the work of the executive. Parliamentarians can thus question the government (art. 74), and the lower chamber – the House of Representatives – can withdraw its confidence from it, although such a move requires a 2/3 majority (art. 115) that may hardly be achievable in practice. Conversely, the president has the right to dissolve the parliament but under specific conditions that may be difficult to fulfill (for reasons such as “obstructing to state's policy”, “violating the constitution”, etc., all to be checked by the Constitutional Court) and after the people's approval through a popular referendum (art. 109).

Beyond its relation to the executive, the legislature has also been designed by the constitution drafters as a way to ensure a greater geographical representation of the people. While both chambers thus entail a geographical component in their composition, the higher chamber –

the Senate – has more specifically been thought to provide “an alternative to federalism”¹³. Composed of 78 members distributed on the basis of the three electoral regions¹⁴, its decisions must be taken by an absolute majority with the condition that at least 8 members of each region in favor (art. 75), and its approval must be sought in particular on legislation related to local governance and natural resources (art. 79). However, its composition and working procedures still remain disputed, notably by the federalists, while the cultural components also deplore their insufficient representation in both chambers.¹⁵

Provisions for the presidential and parliamentary elections

The drafters have also paved the way for the next elections. The transitional provisions of the CDA's draft indeed provide that the elections of the president and of both chambers of parliament should take place at the same time and within 240 days from the promulgation of electoral law, while the electoral legislation should be issued 90 days after the promulgation of the constitution (art. 183, para. 1&2). The draft also provides for the case of impossibility to elect the first president. In this situation, the most senior judge at the Supreme Court should be designated as interim president for a period of one year with limited prerogatives (art. 183, para. 3&4).

However, in view of the 24 December deadline agreed to hold the elections, holding a constitutional referendum and implementing the timeframe provided by the draft would prove unworkable today. But this was not the case a few months ago, which explains the resentment expressed by the CDA members at the perceived attempts by the UNSMIL to sideline the existing draft constitution by searching for alternative constitutional bases for the elections. In their opinion, this draft not only remains the most legitimate constitutional document despite its flaws, as it represents the views and a consensus of representatives from all corners of the country, but its adoption and implementation also constitute the sole option that could enable a return to institutional stability in Libya, by granting the country a permanent constitutional framework.

Hence the incomprehension that prevail among the drafters and other Libyan actors, who have raised doubts about the real intentions of the UN in Libya and about their actual willingness to reach a lasting solution. CDA members have been the most vocal in their criticism, denouncing efforts to “manipulate the constitutional path and the people's will”¹⁶ from the part of the UNSMIL. In their view, while the UN mission should have supported the holding of a popular referendum on the draft constitution, it left, instead, the decision on Libya's constitutional fate in the hands of the LPDF, a body that remains perceived by many Libyans as lacking legitimacy for having been appointed on an obscure basis.¹⁷

¹³ CDA member H. Abu Hamra in the TV program “Liq'a' khas [Special encounter], Part 2, Libya Al-Ahrar TV, 29 April 2018, op. cit.

¹⁴ 32 seats for the West; 26 seats for the East; 20 seats for the South.

¹⁵ In this regard, the draft enshrines a general formula, stipulating that the composition of the HoR shall “ensure a minimum representation of the cultural and linguistic components” (art. 68) without providing a specific threshold, as the number of parliamentarians in this chamber has not been set. For the Senate, whose number of members is known (78), the relevant article is slightly more detailed, ensuring a minimum representation of “two members for each component”. The cultural components, however, demand that a clear quota be specified for their representation in the HoR (at least 3%) and to raise their dedicated seats in the Senate to 3 or possibly 4.

¹⁶ Author's interview with several CDA members. See also CDA member D. Al-Mansuri's interview in Ben Jeddou, N., “Dostorna jahaz lil astafta'... wa nastaghrab bi mobadarat Kais Saied [Our constitution is ready for the referendum... And we are puzzled by Kais Saied's initiative]”, Al-Shourouq, 4 August 2020; “Nadia Omran tatawafa' fashal al-hiwar al-siyasi [Nadia Omran expects a failure of the political dialogue], Yes Libya, 16 December 2020: <https://yeslibya.ly/2020/12/16/ان-نادية-عمران-تتوقع-فشل-حوار-السياسي-الحوار-فشل-تتوقع-عمران-نادية/>

¹⁷ “Nadia Omran: al-bahtha al-umamiya shakalat lajnat al-75 doon 'asas wadhah [Nadia Omran: The UN mission established the 75-committee without a clear basis], Libya 24 TV, 28 December 2020: <https://www.218tv.net/شعضل-الحوار-في-التمثيل-الاسماء-جدل/>

But, as the prospect of a constitutional referendum is becoming increasingly remote, continuing disagreement on the constitutional basis for the elections is now raising serious questions about the feasibility of the elections by the December deadline.

The path towards Libya's December elections

As the CDA-led constitution-making process had been shaped by various controversies and its final draft frozen for more than three years, several options to set a new constitutional basis for Libya's next elections have recently emerged and gained further momentum during the LPDF negotiations.

Multiple options but no consensual solution

While the adoption of the CDA's draft through a popular referendum constitutes the 'normal' and legal path according to the provisions of the Interim Constitutional Declaration, and still remains a demand of a large part of the Libyan population, this option has become increasingly unworkable in view of the short timeframe until the December elections, the unstable security conditions and the persistent opposition to the draft among some communities. Over the last few months, a number of alternatives have thus been envisioned and discussed to set a (temporary) constitutional framework that could allow for the holding of the elections on time, while deferring the adoption of a permanent constitution to a later stage.¹⁸

Among these suggestions, which all entail advantages and drawbacks, some propose to retain the CDA's draft (or the parts of it that are needed for the elections) as a temporary basis to hold the elections, after which the draft will be revised to address the remaining contentious points and submitted to a referendum. This option initially seemed to have gathered substantial support and could have enabled to save the CDA's efforts and a draft considered as legitimate, while avoiding the risks of holding a referendum at the present time. More extreme voices even tend to consider that the CDA's draft could legitimately be considered as Libya's final constitution without having to be approved by a referendum, since it was produced by a body directly elected by the people.¹⁹ This last option, however, could hardly be acceptable to the draft's detractors.²⁰

Beyond the draft issued by the CDA, other constitutional documents have also been brought into the discussion. While all share the advantage of postponing controversial constitutional issues to a later stage, each entails its own difficulties. Moreover, there are concerns that these alternative documents could be used to definitively sideline the CDA's draft rather than only serve as a temporary basis.

<https://libya24.tv/news/369806>. See also the cultural components' criticism against the LPDF composition and methodology: "Jadal al-'asma wa al-tamthil fil hiwar mo'adhala tolahaq al-bahtha ["Controversy over the names and representation in the dialogue: a dilemma that pursues the (UN) mission"], 218TV, 6 November 2011.

¹⁸ A number of options have been presented and discussed on various occasions and in different fora, including during the HD-led National Conference and within the LPDF's Legal Committee. For details, see Centre for Humanitarian Dialogue (HD), "The Libyan National Conference Process Final Report", November 2018: https://www.hdcentre.org/wp-content/uploads/2019/01/NCP-Report_Jan-2019_EN_Online.pdf ; "LPDF's Legal Committee Presents 7 Proposals on the Constitutional Rule and Elections", Al Marsad, 14 January 2021: <https://almarsad.co/en/2021/01/14/lpdfs-legal-committee-presents-7-proposals-on-the-constitutional-rule-and-elections/>

¹⁹ Supporters of this option believe that the combination of the CDA's direct election with a popular referendum was actually a mistaken conception by the drafters of the Interim Constitutional Declaration rather than a legal necessity.

²⁰ Opponents of the CDA's draft could even less support this option that no amendment of the constitution can be introduced within the first five years of its entry into force (CDA's draft, art. 195), thus preventing their grievances to be addressed in the short run.

Temporarily restoring the **independence constitution of 1951** (or its 1963 version) in an amended form has been suggested and supported mainly by the eastern federalist movement, but this document was deemed irrelevant for the current period by many Libyan actors and international observers.²¹, while its legal validity still remains disputed.²².

A more straightforward solution appears to be an amendment of the **Interim Constitutional Declaration**, which has served as Libya's provisional constitution since 2011, and has been amended several times since then according to the needs of the moment.²³. This option, however, may appear more challenging than it seems. First, the document lacks popular legitimacy for having been elaborated by a non-elected body. Moreover, several of the previous constitutional revisions have proved controversial and were even challenged by the Supreme Court. Any new amendment would also require the approval of both the House of Representatives and the High State Council (HSC)²⁴, which, in view of the existing divisions between both chambers and within each, may prove difficult to achieve. Last but not least, this option would open a new transitional period, while most Libyans have been desperately longing for a return to stability.

Nevertheless, this seems to be the direction recently taken by the LPDF's Legal Committee, although it was not the initial choice of its Constitutional Committee – a body composed of HoR and HSC members that was initially tasked to set the constitutional basis for the elections. Members of the Constitutional Committee had first retained the option of the referendum on the CDA's draft and agreed on the procedures to hold it (Hurghada meeting, 19-22 January 2021), before backtracking in a successive meeting in view of the practical difficulties that were raised to organize the referendum before the December elections.²⁵. They then made clear that priority would be given to the elections in case the referendum could not be held on time (Hurghada meeting, 9-11 February 2021).

However, the HoR failed to endorse this proposal due to the lack of a quorum caused by its internal divisions, while some of its members, including its Speaker, had also shown little support for the CDA's draft and the referendum. Consequently, the 60-days period granted to the Constitutional Committee to determine the constitutional arrangements for the elections (LPDF Roadmap, art. 4) expired, leading to the issue being transferred to the LPDF.

Tasked to provide support on the matter, the 18-members Legal Committee recently issued a new proposal (Tunis meeting, 7-9 April 2021), according to which the December elections would be based on an amended version of the Interim Constitutional Declaration, while the revision of the CDA's draft and the referendum would be postponed to after the polls. This proposal, however, entails significant flaws.

²¹ Author phone interview with a member of the Constitutional Amazigh Movement and with several CDA members, December 2020-January 2021. See also Democracy Reporting International (DRI), "Libya: Comparison of two constitutional texts according to international standards of democracy", 24 November 2020.

²² A number of analysts, notably in the federalists and monarchists' ranks, argue that the constitution has not been abrogated by Qadhafi's constitutional proclamation following his coup in 1969, nor by the 2011 Constitutional Declaration, but is valid and can be reactivated. Other scholars and the general opinion more broadly consider that this constitution has lost any legal validity and court decisions have also been issued in this regard. See "Press conference on the Libyan Dialogue Forum in Tunis", Al-Ghad TV, 14 November 2020: <https://www.youtube.com/watch?v=gi-7T-Ax5Js>

²³ The Interim Constitutional Declaration was amended eleven times between 2011 and 2019.

²⁴ To solve Libya's division between two parliaments, the Libyan Political Agreement (LPA) reached in 2015 under UN sponsorship had provided for the establishment of a High State Council (HSC) composed in large part of former GNC members, alongside the elected House of Representatives (HoR). The LPA stipulates that the HoR and HSC "shall commit to achieve consensus among themselves" to agree on any amendment to the Interim Constitutional Declaration. LPA, Additional Provisions, art. 12.

²⁵ Zaptia, S., "Holding referendum on draft constitution could delay election date beyond 24 December 2021", Libya Herald, 10 February 2021: <https://www.libyaherald.com/2021/02/10/holding-referendum-on-draft-constitution-could-delay-election-date-beyond-24-december-2021/>

While preserving the work of the CDA is a laudable compromise reached by the Legal Committee, the procedures envisioned for the revision of the draft constitution raise serious doubts about whether the document will ever be implemented. The proposal indeed provides that the new legislative authority shall “take all the necessary measures to complete the referendum on the draft constitution before the end of its mandate” (art. 1; art. 47) and more precisely that it is “required to ensure that the permanent constitution is passed by a maximum delay of six months before the end of its mandate” (art. 6). But, at the same time, it leaves the door open for a new transitional period in case of failure to pass the constitution within this timeframe, with new legislative elections to be called “at least 120 days before the end of the parliament’s term on the basis of the present constitutional basis and the electoral law issued on this basis”.²⁶ This is even more of a concern that the parliament has a margin of “two years” to start working on the revision of the CDA’s draft, meaning that if the legislature comes to be dominated by opponents of the draft, they would have a greater interest in delaying the start of the revision process and stretch it out beyond the end of the parliament’s term, as a way to extend the transitional period.

Moreover, the later the revision process starts, the more complex it may become, as the draft could lose relevance over time, and eventually require more changes than initially anticipated. Last but not least, the proposal offers little information about the committee that will be tasked with the draft’s revision, except that it would be set up by the parliament and should “take into consideration the cultural components’ representation” (art. 47). Its actual composition, the mechanisms and conditions of appointments of its members, and its decision-making procedures remain unknown.

Overall the proposal does not provide sufficient guarantees that a permanent constitution will see the light of day in the short-term in Libya. Furthermore, while the newly elected authorities would probably enjoy more legitimacy than the current ones to revise the draft – assuming that the elections occur in appropriate conditions and the results are accepted by all – conditioning the adoption of Libya’s permanent constitution to electoral politics and renewed partisan calculations may turn out to be a risky bet.

The way forward

At this stage, the Legal Committee’s proposal remains only an option that needs both to be confirmed by the LPDF plenary and approved by the HSC and the HoR, in order to be included as constitutional amendments into the Interim Constitutional Declaration and gain a legal value. While the LPDF members started discussing the proposal in a first round of negotiations held on 26-27 May 2021, the heated debates that were observed do not point towards the possibility of a swift agreement on this issue, as several participants expressed reservations about the proposal, which also fall short of the cultural components’ expectations. Moreover, renewed opposition to the LPDF process have been expressed, and several personalities from the CDA and beyond recently announced their rejection of the Legal Committee’s outcomes and called for the referendum on the CDA’s draft to take place before the elections.²⁷

Disagreements not only concern the constitutional framework for the elections, but also the decision to elect Libya’s future president directly or indirectly – a matter that the Legal

²⁶ While, as explained by a member of the Legal Committee, this provision was legally necessary to prevent the elected parliament from unduly extending its mandate in case of failure to pass the constitution, it was still read by opponents of the proposal as giving it an incentive to delay the revision and adoption of the draft.

²⁷ “Over 100 Libyan personalities reject LPDF’s legal Committee outcomes”, The Libya Observer, 24 May 2021: <https://www.libyaobserver.ly/news/over-100-libyan-personalities-reject-lpdfs-legal-committee-outcomes>

Committee left unsettled for lack of consensus among its members.²⁸ The HoR Speaker Aguila Saleh, however, recently stated that, in case of failure of the LPDF to produce an outcome on this issue, the elections would be held on the basis on the 7th Constitutional Amendment²⁹ and the HoR's Decision N°5 of 2014 that ensued, which provide for the direct election of a president in a semi-presidential regime.³⁰

Whatever the outcome of the LPDF negotiations, getting the approval of the HoR on any constitutional basis may prove even more challenging. In view of the internal divisions of the parliament that have recently become apparent, the LPDF proposal may be subject to another round of intense debates and revisions, if not rejected at all.

These various steps, however, risk being extremely time-consuming, while the December deadline is fast approaching. Moreover, the elections need not only a constitutional basis but also a legal framework, which needs to be adopted by the parliament and submitted to the Electoral Commission by next July for the elections to be realistically held at the end of the year.³¹ The path towards the elections therefore still appears full of challenges while time is running short, and doubts have increasingly been expressed that the elections could not take place at all.

Indeed, beyond the debates on the constitutional basis and on whether the president should be elected directly or indirectly that may delay the logistical preparations of the polls, concerns over the security situation are calling into question the feasibility of the elections in the current context. Despite the ceasefire reached in October 2020 and the obligation for foreign forces and mercenaries to leave the country by January 2021, little progress has been reached on the security front and there are no indications that foreign fighters will be out any time soon.

While a peaceful environment is crucial to ensure both the safety and integrity of the poll, concerns have been expressed that armed militias, which remain active and influential in several parts of the country, but also foreign forces may attempt to weigh on the polls by influencing or threatening voters.³² Worries that massive fraud could take place during the elections, especially in the east and south, have also been voiced, which could ultimately lead to a contestation of the results and a rejection of the new authorities, thus opening the door to renewed instability.³³

A number of political forces, both Libyans and foreign, may also have an interest in delaying the elections and extending the transition period, including members of the recently elected Government of National Unity (GNU), of the HoR and of the HSC. Observers have actually been

²⁸ The proposal envisions either a direct election of the president by the people, or its indirect election by the House of Representative. Other points of disagreement concern the simultaneity of the parliamentary and presidential elections; the eligibility criteria for the presidency; the oath to be taken by the future president and elected representatives; and the cultural minorities' representation in the legislature.

²⁹ Eljarh, M., "Libya's uncertain path to elections", Al-Monitor, 10 May 2021: <https://www.al-monitor.com/originals/2021/05/libyas-uncertain-path-elections>

³⁰ Also known as the 'February Committee Proposals', these provisions were elaborated by a committee of experts set up by the GNC in February 2014 and introduced in the Interim Constitutional Declaration as article 11 of the 7th Constitutional Amendment in March 2014. The amendment, however, left it to the future HoR to decide on the direct or indirect election of the president, which the HoR did with the adoption of Decision N°5 of 14 August 2014 that enshrined the process of a direct presidential election. While the 7th Amendment was later nullified by a decision of the Supreme Court in November 2014, the HoR's Decision N°5 still has a legal existence and value.

³¹ "Libya's Elections Commission Sets July 31st as Deadline", Libya Review, 14 March 2021: <https://libyareview.com/11111/libyas-elections-commission-sets-july-31st-as-deadline/>. This deadline was also endorsed by UN Security Council resolution 2570 of 16 April 2021.

³² "Jadal fi Libya 'ala maw'ad istifta' al-dostor [Controversy in Libya over the timing of the constitutional referendum]", Skynews Arabia, 5 May 2021:

https://www.skynewsarabia.com/program/north_africa/1435525-الدستور-استفتاء-موعد-ليبيا-جدل

³³ Author phone interview with a CDA member from Benghazi, May 2021.

wary that the GNU was not behaving like a short-time cabinet tasked to lead the country to elections but rather as one that is expected to stay in power for much longer, as it recently sought an impressively large budget and is getting engaged in ambitious investment projects.³⁴ It is also important to highlight the oversized influence that the HSC and the HoR will have in enabling (or blocking) any progress towards the setting up of a constitutional basis and a legal framework for the elections.³⁵ Therefore, unless significant pressure is exercised on the stakeholders who are satisfied with the status quo and willing to retain political relevance in the coming period, both the December elections and the adoption of a permanent constitution for Libya may well be indefinitely postponed.

Finally, while the elections have increasingly been regarded as a panacea that could help solve Libya's institutional crisis and ongoing conflict, experts have raised serious concerns that whether held or not, elections could actually fuel renewed conflict, and initiate a new period of instability in the country.³⁶ If held in the absence of conducive conditions, including a secure environment but also a genuine process of national reconciliation at both the national and local levels, the elections could cause further division rather than foster unity. The failure to hold the elections could prove even more dangerous, as it would drive the country into a political and institutional crisis – the GNU's mandate expiring with the elections – and possibly trigger military escalation, unless appropriate measures are taken sufficiently in advance to avoid a legal vacuum.

Conclusion

Despite the relative appeasement and the sense of renewed hope that followed the establishment of the GNU, and the support expressed by both the international community and Libya's main stakeholders for the December elections, the situation in Libya remains fragile, and the path towards the polls fraught with pitfalls. Agreeing on a constitutional basis for these elections is only one of the several challenges facing Libya, but not the least. Ensuring a broad consensus on this constitutional basis is indeed essential to set a stable ground for the new authorities and avoid possible contestation in the future. But setting the appropriate environment to hold the elections, including conditions that can ensure the safety and integrity of the polls and that the results will effectively represent the will of the Libyan people, is equally important. However, it requires real political commitment from all stakeholders to overcome the status quo and bring an end to the current chapter of political division and armed conflict.

Disclaimer: *The information and views set out in this publication are those of the author and do not necessarily reflect the views of the Konrad-Adenauer-Stiftung or its Regional Program Political Dialogue South Mediterranean.*

³⁴ Fitzgerald, M., "Peace in Libya Will Require More Than Elections", World Politics Review, 3 May 2021: <https://www.worldpoliticsreview.com/articles/29618/ending-the-libyan-civil-war-will-require-more-than-fresh-elections>; Megerisi, T., "Libya crisis: The unity government's success hides dangers ahead", Middle East Eye, 13 April 2021: <https://www.middleeasteye.net/opinion/libya-new-unity-government-dangers-ahead>

³⁵ Eljarh, M., "Libya's uncertain path to elections...", op. cit.

³⁶ Author phone interview with a UN advisor, May 2021; see also Fitzgerald, M., "Peace in Libya Will Require More Than Elections...", op. cit.

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