



Negotiating Libya's Constitution

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Among the many problems facing Libya's troubled transition to democracy is the challenge of constructing a state in a country with a legacy of weak institutions. Muammar al-Qaddafi's brutal forty-two-year dictatorship employed a policy of de-institutionalization, leaving the presence of the state feeble throughout the country. Those organs that were powerful, including the secret security apparatus, lost their leader with Qaddafi's fall in 2011, leaving a power vacuum that nonstate actors have scrambled to fill. Some of the most influential political groups in Libya today are militias formed during and after the revolution. Although some are loosely affiliated with the ministries of interior or defense, most, if not all, do not demonstrate any particular loyalty to the government. Militias have kidnapped the prime minister (the militia responsible called it an "arrest"), assassinated judges and police officers, physically occupied the office of the justice minister, and engaged in an urban battle in Tripoli. They also seek to advance their political interests—which vary, but include influence over officials, rent seeking, and some Islamist agendas—with threats against ministries or officials. And yet the state relies on militias to provide essential security services such as running checkpoints and protecting the airport because no ministry force is up to the task. The ascendancy of these militias points to two troubling realities: the state lacks a monopoly over the use of force and the country faces an ongoing deterioration of the rule of law.

Rafik Hariri Center for the Middle East

The Rafik Hariri Center for the Middle East at the Atlantic Council studies political transitions and economic conditions in Arab countries and recommends US and European policies to encourage constructive change.

An opportunity to reassert the credibility of the state and strengthen the rule of law could emerge with the drafting of a new constitution in Libya. The Qaddafi regime was not bound by a constitution, instead it was formally based on the ideology of the *Green Book*, a mix of socialist and populist proclamations that Qaddafi published and promulgated in the 1970s. In practice, however, the country was governed by contradictory decrees from the leadership. Drafting a new constitution provides an opportunity to formalize a new legal order, protect human rights, outline the powers of government, and give shape to the Libyan state. At the same time, the constitution-making process in Libya faces enormous challenges, which could have the deleterious side effect of undermining the state if not dealt with effectively. In order to anticipate and mitigate potential obstacles facing Libya in this next stage of its transition, it is critical to understand the political context of the constitution-making process, concerns related to the election of the constitution-drafting body, and potentially divisive issues that ought to be addressed in the new constitution.

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Political and Security Context

Since before the fall of Qaddafi, a new constitutional order has been a formal goal of those who advocated for political change. The self-appointed wartime government, the National Transitional Council (NTC), issued a Constitutional Declaration as an interim document to govern the transitional period. That document granted provisional legislative and executive powers to an interim parliament, the General National Congress (GNC), and established a timeline for the constituent assembly-led constitution-making process. A few days before the legislative elections in July 2012, the NTC amended the Constitutional Declaration indicating that the people (not the GNC) would elect the constituent assembly.

In February 2013, the GNC formed a committee to draft an electoral law for the constituent assembly comprised of GNC members and, later, thirteen external advisers. The committee was constrained by the narrow requirements of the Constitutional Declaration, which asserted that the constituent assembly have sixty members—twenty from each of Libya's three historical provinces (Tripolitania in the west, Cyrenaica in the east, and the Fezzan in the south). Further demands were placed on the committee to reserve seats for women and ethnic groups, including the Touareg, Tebu, and Amazigh. The interests of these groups vary, but include official status for the Amazigh language and access to economic and political power. Boundary delimitation was also contentious, as Libya did not have a firm legacy of subnational districts. After much delay, the GNC approved the law in July 2013 but did not set a date for the elections.

According to the electoral law adopted by the GNC, the constituent assembly will be based in Al-Bayda, a quiet town two hours east of Benghazi, in the middle of Libya's untamed east. The location of the constituent assembly has a political rationale: it was the seat of the 1951 constituent assembly and bolsters the representation of the east. It also compounds the state's security challenges at a time when the government is struggling to provide basic order across the country. The government has had enough

problems enforcing rule of law in Tripoli, as seen in demonstrations over the isolation law, the kidnapping of the prime minister, and recent urban fighting between Tripoli- and Misrata-based militias. Securing yet another city far from Tripoli will be a daunting task.

Who Will Have a Voice in Drafting the Constitution?

The GNC's adoption of the electoral law signaled significant progress in the country's slogging transition. In fact, the electoral law represents some of the only tangible progress toward a new constitution since the adoption of the Constitutional Declaration. The law does, however, present many challenges to Libya's political leadership. Direct elections for a constitution-making body are rare. Although direct elections determined the makeup of the Tunisian constituent assembly, the Tunisian body also serves as an interim parliament and has over three times as many members at 217. The relatively small size of the Libyan assembly—sixty members—presents a challenge for policymakers: how can they ensure national representation with so few seats to distribute?

The Constitutional Declaration complicates matters by requiring that Libya's three historical provinces in the east, west, and south are represented equally, with twenty seats apiece. However, the use of these boundaries, relics from Ottoman rule without formal meaning since the revised constitution in 1963 abolished the federal system, does not provide a valuable framework for equal representation. To begin with, throughout the Qaddafi regime, Libya was divided into various subnational divisions that often changed names and borders. More importantly, the representation of these three historical regions will not necessarily mitigate regional competition; indeed, some of the most intense conflicts occur between cities from within the same province, such as Misrata and Zintan. With Libya facing critical challenges, such as regional representation and decentralization, an arbitrary arrangement makes little sense.

Furthermore, the populations of the three provinces are vastly different—the west accounts for about 60 percent of the total population, the east 30 percent,

and the south 10 percent—yet they each have equal representation in the constituent assembly.¹ A compelling argument could be made to support this formulation on the basis that a constitution should reflect a national consensus and distribute seats according to population size, but this is not necessarily the best formula for achieving a national consensus. Libya's southern province will need to consent to the final constitutional bargain, and this support would not be guaranteed if it holds only 10 percent of the seats in the constituent assembly. The inequality of the seat distribution is particularly problematic since the west has only twenty seats to represent roughly four million citizens, many from feuding cities.

The provisions for guaranteeing seats for women and ethnic groups also present an additional layer of complexity in ensuring broad representation. The law provides that 10 percent of the seats are reserved for women. Some electoral districts will present two candidate lists: one that includes men and women, and one that includes women only. This means that women have little incentive to run on the general list since their chances will increase significantly on the women-only list. Unfortunately, the quota of seats effectively places a cap on women's participation and means only six women will likely participate in the constituent assembly.

Guaranteed representation for ethnic groups also suffers an imbalance, only two seats each for the Tebu, Touareg, and Amazigh, with dramatic underrepresentation relative to the share of the overall population. Furthermore, the electoral law forces the national elections commission, in devising the electoral districts, to use a method whereby members of an ethnic group could replace elected representatives from the general list. Under this system, voters will choose from general lists of candidates from the subdistricts, but members of an ethnic minority will elect a representative from *across* the electoral district. In most cases, one more representative of the ethnic minority than the total allowed for a district will be elected, *replacing* a

representative from the general list in whichever subdistrict he or she resides. Clever members representing a specific ethnic group could back a particular candidate in a subdistrict to block a rival running on the general list. In Iraq and elsewhere this system has led to electoral violence and could set a troubling precedent in Libya as well.

As of the time of this writing, no official date has been set for the elections. According to the Constitutional Declaration, after elections the constituent assembly will then have four months to draft a constitution and one month to submit it to public referendum. Neither benchmark, however, appears certain. One certainty is that the electoral law sets forth an electoral system that is confusing and contains many traps that could undermine the goals of broad representation and consensus building in the constitution-making process. Without additional regulations and rules of procedure for the constituent assembly that work toward inclusiveness and participation, this confusion could cause strife among an already divided society.

The Constitution-making Process

Once the constituent assembly is elected, Libya will have two representative bodies—the GNC and the constituent assembly—with independent sources of legitimacy that present both challenges and opportunities to Libya's transition to democracy, particularly as it relates to the constitution-making process. A robust legal framework should be developed to avoid the problems and take advantage of the opportunities. Some thought should be given to supporting the internal structure of the constituent assembly to ensure adherence to international standards of transparency, accountability, and public participation.

Comparative experience of constitution-making processes suggests that transitional democracies are best served when the functions of constitution drafting and interim lawmaking are divided between two legitimate assemblies. The decision in Libya to have the General National Congress pass interim

¹ Ronald Bruce St John, "Not Inclusive Yet," *Sada*, September 26, 2013, <http://carnegieendowment.org/sada/2013/09/26/not-inclusive-yet/gobf>.

legislation while a second body drafts the constitution is therefore applauded. But the simultaneous presence of two independently legitimate bodies in Libya means that the prerogatives of the two institutions should be clearly delineated to avoid conflicts over jurisdiction.

On jurisdictional issues, the Constitutional Declaration is unclear on a number of potential areas of conflict. Article 30 states only that the constituent assembly will “formulate a draft constitution.”² It is not clear whether the constituent assembly is independent of the GNC, whether the GNC can oversee the work of the constituent assembly, or which body calls for a referendum when the draft constitution is ready. Importantly, the Constitutional Declaration does not state which body can extend the timeline for constitution making should more time be needed.

Authority over public outreach related to constitution making is also not stated. If the constituent assembly will be responsible for public outreach, it will need a robust staff to manage a national campaign; if the GNC will have that responsibility, a legal framework should ensure the independence of the constituent assembly. In addition, the Constitutional Declaration does not empower the courts to rule on jurisdictional conflicts or provide any instructions for courts in such circumstances. If the constituent assembly’s only authority is to draft the constitution, the Constitutional Declaration should explicitly grant all other matters related to the democratic transition and governing to the GNC.

Another challenge is to guarantee the independence of the two bodies while ensuring their accountability to the public. International standards related to independent government institutions can be helpful. A legal framework should specify whether the GNC has authority over the budget of the constituent assembly and the constitution-making process, whether the bodies can compel members to testify, and whether the GNC has the authority to regulate

the internal structures of the constituent assembly. If the assembly is to be directly elected, then the GNC’s oversight should be minimal given the sovereignty of an elected body. The GNC could, however, mandate that the constituent assembly adhere to principles of transparency, participation, and public accountability, which are consistent demands of civil society organizations in Libya.

In spite of these challenges, the existence of two bodies with independent sources of legitimacy also presents opportunities. For example, the two bodies can lend legitimacy to each other, supporting the other if its mandate is questioned. This could be particularly helpful in determining the timeline for development of the constitution and the terms of office for the GNC and the constituent assembly.

Public participation

Many Libyans are demanding a participatory constitution-making process, and a group of more than one thousand civil society organizations have signed a manifesto to that effect. The depth of public participation in Libya’s constitution-making process, including civic education and feedback mechanisms from the general population to the constituent assembly, is yet unclear. Most constraining is the four-month timeline envisioned by the Constitutional Declaration,³ which would effectively preclude robust public participation. The constituent assembly might opt to extend its mandate to allow for a more participatory process, yet the mechanism for doing so is not clear in the Constitutional Declaration and might require action by the GNC. Even if the timeline is extended, it is not clear who would run a public-participation process, how it would be funded, or how constituent assembly members could be held accountable. Many Libyan civil society groups and international nongovernmental organizations are working to address this issue.

2 See http://portal.clinecenter.illinois.edu/REPOSITORYCACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9jLA7421FN3d70VnOYueW7t67gWXEs3XiVJjxM8n18U9Wi8vAo07_24166.pdf.

3 See http://portal.clinecenter.illinois.edu/REPOSITORYCACHE/114/w1R3bTIKEIG95H3MH5nvrSxchm9QLb8T6EK87RZQ9pfnC4py47DaBn9jLA7421FN3d70VnOYueW7t67gWXEs3XiVJjxM8n18U9Wi8vAo07_24166.pdf.

Representation: women and ethnic minorities

Defining the relationship between state and citizen, and integrating ethnic minorities and women, are also important components of this process. In particular, civil society organizations representing women have protested the allocation of only six seats to 50 percent of the population. Reactions among ethnic minorities to the allocation have been varied. Although the Tebu and the Touareg have generally been accepting (with few exceptions) of the allocation and have put forth candidates for the election, the minority Amazigh have been vocal in protesting what they feel is a marginalization of their community, which amounts to about 10 percent of the Libyan population. Amazigh groups have occupied oil fields, and some have issued declarations calling for the boycott of the elections. No Amazigh candidates have put forth their names for consideration. If Libya hopes to develop a sense of national unity and mitigate security problems that stem from ongoing competition for power and representation, it will be essential to establish an electoral system and governance mechanisms that ensure marginalized communities feel represented.

Key Policy Areas

Aside from the points outlined above, there will be other issues of contention. Some political elites in Libya believe that reaching consensus on these issues will be made easier and faster by using the 1951 constitution of Libya as a basis. Yet the 1951 constitution was suited for a different time, and although there are important lessons that can be derived from it, there are no quick fixes to writing a robust constitutional framework for a democratic Libya.

Islam and the state

Like Egypt and Tunisia, the debate about the role of Islam in Libya's constitution begins with the formulation of the role of sharia (Islamic law) in lawmaking: should sharia be the only source, the principal source, or a source among sources for legislation? Ennahda, the Islamic majority party in Tunisia, eschewed the question by not referencing sharia at all in the draft constitution. The failed

Egyptian constitution of 2012 established sharia as the principal source of legislation and created a role for the clerics of the Al-Azhar religious institution to consult *ex ante* in lawmaking. Neither borrowed the formulation of the Iraqi constitution, which bans laws that contradict the established provisions of Islam, or Pakistan, where an Islamic court adjudicates questions of sharia with the same authority as the Supreme Court.

These textual and institutional arrangements will play an important role in the upcoming constitutional debate in Libya. Libyans from across the political spectrum believe that questions of Islam and sharia are important for the constituent assembly to consider, and according to a nationally representative University of Benghazi survey, 40 percent of Libyans prefer that sharia be the only source of legislation.⁴ In line with this, the GNC recently adopted a law that makes sharia the basis of all legislation, and is expected to establish a committee to vet all preexisting laws to ensure their compliance. What effect the adoption of this law will have on the constitutional committee's freedom to deliberate this issue remains to be seen.

Decentralization, federalism, and natural resources

The conflict between federalists and anti-federalists about the future shape of the state is one of Libya's most intense conflicts. Federalists, strongest in the east, demand significant powers for their region, arguing that anything less would amount to marginalization akin to that of the Qaddafi regime. Others consider federalism to be a stand-in for the disintegration of the state and the rejection of central government. The binary debate over federalism or central government is a red herring, however, as both terms capture a wide range of constitutional design options. The constituent assembly should move beyond the semantics and leave terminology aside. Indeed, many decentralized states, including Spain and South Africa, have deliberately eschewed the word federalism.

According to the University of Benghazi survey, only 8 percent of Libyans and 15 percent of people

⁴ See <http://en.rcc.uob.edu.ly/wp-content/uploads/sites/2/2013/10/Constitution.pdf>.

in Cyrenaica favor a federal state.⁵ This minority is more vocal than the majority, however, and in recent months calls for eastern autonomy have increased. A group of prominent federalists, calling themselves the Cyrenaica Political Bureau, has declared the region's autonomy, followed by a similar declaration from a local council in Libya's south. Eastern militias also amplify the voice of federalists.

Related to the question of decentralization is the distribution of rents from natural resources. Oil is the lifeblood of the Libyan economy, accounting for 80 percent of GDP.⁶ The control of oil production and revenue will be one of the key issues facing the constituent assembly. The geographic distribution of natural resources, which are concentrated predominantly in the east, has contributed to calls for federalism and even independence by political groups in that region. The oil is not, however, contained in one specific region or controlled by one ethnic group, as in Iraq. According to the University of Benghazi poll, 60 percent of Libyans prefer that all revenues go directly to the central government, which then distributes to the regions.⁷

This has not stopped the Cyrenaica Political Bureau from announcing the creation of its own oil company, based in Tobruk, intended to give the self-proclaimed eastern government an independent source of revenue. The company would not be recognized under international commercial law, so foreign governments and companies would be unlikely to work with the new entity for fear of a lawsuit. The bold move does, however, represent a direct challenge to the central government, which has few resources—military or otherwise—to constrain separatists.

Conclusion

Libya can draw from international standards of democracy and comparative best practice in constitution making. In particular, Libya has signed the

International Covenant on Civil and Political Rights, which requires that state parties protect the “right and opportunity” of “every citizen” to “take part in the conduct of public affairs, directly or through freely chosen representatives.”⁸ This has been interpreted to mean that constitutions should be prepared through participatory processes with a high degree of transparency. International standards related to independent government bodies, such as the United Nations Basic Principles on the Independence of the Judiciary, provide operational guidance on securing the independence of the constituent assembly, covering issues such as appointment, remuneration, and fiscal and administrative autonomy.⁹ Lessons learned from the constitution-making experiences of Kenya (diverse technical commission), Tunisia (lack of research capacity to the constituent assembly), and Tanzania (specific mandate for ensuring public participation) could also be helpful.

The international community has a role to play in assisting Libya in its constitution-making process. The United States, the European Union, and other international friends of Libya can publicly voice their support and provide technical assistance, expertise, and financial assistance for a transparent and inclusive constitution-writing process. Such regular public pronouncements of support to safeguard political and human rights should also be accompanied by direct and sustained outreach to all groups involved in the process.¹⁰

As the constitution will be the new Libya's guiding document and serve as the cornerstone for the nation-state's foundation, it is critical that the drafting process is carried out with transparency, inclusivity, and patience. Not doing so carries great risk for Libya's fragile democracy.

5 See <http://en.rcc.uob.edu.ly/wp-content/uploads/sites/2/2013/10/Constitution.pdf>.

6 World Bank, “Libya Overview,” <http://www.worldbank.org/en/country/libya/overview>.

7 See <http://en.rcc.uob.edu.ly/wp-content/uploads/sites/2/2013/10/Constitution.pdf>.

8 See <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

9 See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

10 Libya Working Group policy letter to US Secretary of State John Kerry, September 10, 2013, http://www.atlanticcouncil.org/images/upload/20130910libya_tf_kerry_letter.pdf.

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