



**Libya’s final draft constitution:  
A contextual analysis<sup>1</sup>**

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<sup>1</sup> An earlier version of this paper was published in October 2017. Comments, corrections or questions on the contents of this paper should be directed to Zaid Al-Ali ([zalali@idea.int](mailto:zalali@idea.int)).



## **Libya's final draft constitution: A contextual analysis<sup>2</sup>**

### **1. Executive summary**

On 29 July 2017, Libya's Constitution Drafting Assembly (CDA) formally adopted a draft constitution with the support of over two thirds of its members. At the time, the CDA's achievement was considered to be a major breakthrough and many Libyans and internationals hoped that it could pave the way to a resolution of Libya's crisis. Three years later, the constitution has not yet been put to a referendum and the country remains deeply divided on a number of levels. In late 2020, the Libyan Political Dialogue Forum (LPDF) was launched in an attempt to reunite the country by establishing a new national government and forging a path towards elections.<sup>3</sup> That initiative has given the country considerable hope that the current impasse could be resolved in the near future.

If the LPDF is successful, a new conversation on Libya's long-term constitutional future will inevitably follow. When that discussion takes place, the 2017 draft constitution will feature prominently, and a number of key issues will have to be addressed. First is whether the 2017 draft constitution should still be under consideration or if it should be abandoned altogether. Currently, it appears that the draft is still considered to be the only viable basis for the country's future and as a result this paper will not consider possible alternative approaches. Second is whether the draft should be maintained entirely in its current form or if it should be amended, a fair question given that the text was adopted more than three years ago. The third question that will have to be addressed is how and when the draft constitution should be adopted.

This paper is concerned with the second of these two questions. It discusses each of the 2017 draft constitution's main features in context as a contribution to any discussions that could take place on the country's constitutional future. It does not take position or make any specific recommendations on whether the draft constitution should be amended or whether it should be maintained in its current form. It merely seeks to raise awareness of some of the draft's merits and of the challenges

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<sup>3</sup> For more on the Libyan Political Dialogue Forum, see <https://unsmil.unmissions.org/libyan-political-dialogue-forum>.

that are likely to arise in case it does enter into force. It does not purport to provide a comprehensive analysis, and nor does it have all the answers to the questions that it raises. The paper's main conclusions can be summarised as follows:

- (i) The 2017 draft constitution maintains a significant amount of legitimacy. However, the negotiation process that led to the draft's adoption and the its substantive contents raise a number of concerns that should be addressed, including but not limited to the following:
  - a. The Constitutional Drafting Assembly was relatively representative, and the final text represents a genuine compromise between its members. However, many of Libya's main political forces did not directly participate in the negotiation and drafting process. As a result, it is unclear whether and if so to what extent they will support an effort to bring the draft into force and support its implementation.
  - b. The 2017 draft does not clearly establish a vision or a social pact for the country. The draft's first section on 'fundamental principles' mainly consists of generic principles and rules of the type that can be found in many of the world's constitutions. Very few of them address Libya's specific situation. In addition, the manner in which some of the 'fundamental principles' is drafted is very likely to create confusion if they are ever implemented in practice, and could lead to them generally having no effect in practice.
- (ii) In an effort to bring stability and order to the country, the draft concentrates very significant power in the hands of the president. These arrangements are understandable in the circumstances but also carry the risk of a relapse into authoritarianism.
  - a. The draft seeks to establish a fully presidential system of government, which will allow the president to fully dominate the government and policy formation processes. Chapter 8 on public finance does not constrain the executive in any meaningful way, while Chapter 9 centralises ownership and management of natural resources at the central government level which means that any future president will have near total discretion on how oil and gas revenues should be invested.
  - b. The 2017 draft constitution is also very brief on the institutions of the armed forces and on how they should be governed, but the little detail that is there further concentrates power in the president's hands. It does even mention the intelligence services, does not define the extent of the president's powers over the armed forces, does not clarify if the parliament will exercise any oversight on the appointment of senior officers, and concentrates police powers in the hands of the president.
  - c. The provision on states of emergency is a significant improvement on past practice, but still leaves significant room for abuse. Emergencies cannot last more than 120 days. However, the president can declare an emergency unilaterally; parliamentary approval must be obtained within three days of the declaration. In the intervening three-day period, the president will be allowed to set aside civil and political rights.
- (iii) The draft constitution introduces a number of checks against presidential power, but there are serious gaps that can be exploited by the executive if these arrangements are adopted in their current form. These include but are not limited to the following:

- a. The judiciary is given significant independence. The constitutional court will have twelve members, six of whom will be appointed by the judicial council itself. The court will present its own budget to the legislature and will be headquartered in the country's south, which will encourage even greater independence from the executive. However, the draft constitution is totally silent on the judicial council's composition and powers, leaving the matter to be resolved entirely by future legislation. That means that the cabinet, which will be appointed by the president, will have very significant influence on the council's composition, which indirectly means that the president will be a major player in determining the constitutional court's composition.
  - b. The arrangements on independent agencies also provide many opportunities for abuse. In particular, the draft constitution does not provide any guidance on who or how senior officials in the independent agencies can be dismissed, leaving the matter to be resolved through subsequent legislation, which is subject to political manipulation.
  - c. The draft constitution provides for a modest form of decentralisation, which is mainly left undefined and which may never see the light of day. It provides for three levels of government, and for elected local councils, but does not state what powers these bodies will exercise, nor how governors will be selected. The draft also does not provide any specific mechanism that would ensure that decentralised government will be properly funded. The draft provides that a law should be adopted, but does not provide any indication of when that law should be passed and does not establish a mechanism that ensures that it will be adopted any time soon, which means that, even if the draft constitution does enter into force, the pre-constitutional arrangement is likely to continue for some time.
  - d. The practice of including 'clawback clauses' in the section on individual rights has been eliminated but many specific rights (including the right to protest) are so light in detail that there is a risk that subsequent legislation could heavily circumscribe the free exercise of those rights. Having said that, the draft constitution introduces a robust 'limitations clause' which will provide significant protection against abuse limitations by the executive or the legislature. In addition, the draft does not specifically state that the socioeconomic rights that are provided for are directly enforceable, which means that they are likely to remain aspirational and therefore not directly enforceable.
- (iv) The 2017 draft constitution barely includes any transitional provisions. If it is adopted in its current form, negotiators who are participating in the LPDF will have to develop a detailed plan on how its arrangements will come into force, including how and according to what timeframe specific institutions will be established. This task will be doubly complicated given that the country is currently heavily divided, which means that a transition plan will have to consider how institutions that are currently divided will be merged.

## 2. Background

Constitutional negotiations in a modern setting, particularly in a conflict or post-conflict environment, typically involve complex discussions on large numbers of issues. Among other things, negotiators have to agree (i) on the fundamental principles that will guide the new state, (ii) on the institutional arrangements that are most appropriate for the country, and (iii) on a plan for how the country should transition from its current situation to the constitutional ideal that is set out in the final negotiated

text. Each of these elements introduces its own set of complications to the constitutional negotiations, and each of them will require the involvement of different political groups (many of whom will have vested interests that they want to protect) and technical experts with different backgrounds. Also, in order to ensure that a wide array of actors can have a real influence on the process, constitutional negotiation processes in many countries can be highly complex and can involve several bodies, which pass control over the draft to one another as particular milestones are achieved.

Fundamental principles may appear obvious and straightforward, but comparative practice shows how increasingly complicated it can be for parties to agree on specific wording. In post-conflict situations, the expectation is that fundamental principles should include a clear statement on what the new state's objectives are. In order for that statement to be effective, the principles should be both accessible (to allow non-specialists to feel connected to, and hopefully inspired by, their constitution) and few in number (so as not to dilute the more important principles with others that are less important). The process of agreeing on these principles therefore requires the parties to engage in very difficult negotiations, and also requires special drafting skills. In some post-conflict situations, this process can be straightforward, but it is not always so.

The exercise of negotiating institutional frameworks can be equally difficult. Ideally, constitutional drafters should work to understand which existing institutions and which institutional systems are the most efficient and which are dysfunctional, in order to decide how the new constitution can improve on the existing framework. In addition, changes to the country's overall governance structure can affect the way in which specific institutions operate, even if those same institutions are not mentioned in the constitution itself. In the absence of sufficient foresight in relation to these issues, any changes are likely to lead to unforeseen results, which can never be a good thing.

Finally, post-conflict constitutions also have to deal with how to organize the transition from the relevant country's post-war situation to the constitutional ideal that is set out in the final constitution. This means that constitutional negotiators have to deal with issues such as when elections should take place, when specific institutions should be established, when the legislation that is called for in the draft constitution should be passed, and what types of governance arrangements should be in place in the interim period. With time, transitional chapters have become increasingly detailed, since negotiating parties almost always want clarity as to how their interests will be protected as the country moves from the principles that are set out in the constitution to political and institutional reality.

In 2011, Libya was perhaps the only post-conflict Arab Spring country to be engaged in constitutional reform. In addition, many Libyan state institutions were in a calamitous state; political parties were all at the fledgling stage; and there were barely any democratic traditions to draw on. All of these factors heightened the importance of addressing the three issues set out above as deliberately as possible. In order to achieve those objectives, Libya's post-2011 decision makers measured a number of options that were very much in line with regional trends on this same issue. After the 2011 uprisings, 10 Arab countries amended their constitutions in one way or another, and in virtually all cases the process that was followed was very simplistic. The only real variables were whether the drafting body should be elected or appointed, and what mechanisms could be used to 'depoliticize' the drafting process. Egypt (in 2013), Morocco, Jordan, Algeria and Syria opted for appointed drafting bodies, while Tunisia and Egypt (in 2012) opted for an elected body.

The National Transitional Council (NTC), Libya's first post-Gaddafi administration, was uncertain as to which solution the country should pursue. Eventually, it decided that the CDA's membership should be elected, but that it should consist of independent representatives who would only consider Libya's higher interests during their negotiations (rather than engage in party politics). The CDA was elected in February 2014 to draft a new constitution for Libya. It held its first sessions in April 2014, and was originally supposed to complete its work within just a few months.

### **3. Legitimacy**

Libya's transition has been highly imperfect. Aside from the very serious security and economic developments, the post-2011 constitutional framework and the transition road map suffered from a number of serious flaws, particularly in the way in which they were implemented. In that context, the CDA's final agreement on the 2017 draft constitution stands out. Unlike many other negotiation and drafting bodies that were formed following the start of the 2011 uprising, the CDA was populated by representatives from across the country. The CDA's deliberations were relatively open and transparent (particularly in comparison with the body that drafted the 2011 interim constitution). Finally, the CDA's rules of procedure stated that the final draft had to be approved by two thirds of the CDA's members, a very high threshold, particularly in comparative practice. The fact that a relatively representative body successfully negotiated a constitution in such circumstances necessarily grants the final outcome a certain amount of legitimacy that should be considered in any discussion of the country's future.

On the other hand, the 2017 draft constitution remain an unusual text for a number of reasons. Firstly, the CDA's membership did not include any formal representatives of the country's many political forces. The CDA's members interacted with political and social groups throughout the negotiation process in formal and informal settings, and also based their work on their own understanding of the country's needs and challenges. But many political groups and other major forces refused to participate altogether and increasing levels of violence throughout the CDA's life eventually made it close to impossible for it to hold regular sessions at all. As a result, the 2017 draft does not necessarily enjoy the country's main political groups' support, some of which are likely to resist its implementation if it were ever to come into force. Second, the fact that the draft constitution was finalised more than three years ago and has very little chance of being adopted before 2022 at the earliest should not be discounted either. As more and more time passes, the country's political and social needs will continue to evolve far beyond the solutions that are offered in the 2017 draft constitution, eventually relegating the text to irrelevance. If that comes to pass, negotiators will have to decide whether to launch a new negotiation process altogether, or whether to simply maintain the existing arrangement, despite its obvious flaws.

### **4. Fundamental principles and transitional process**

Chapter 1 of Libya's final draft is entitled 'fundamental principles', which most readers will understand should include those issues which are of the utmost importance to ordinary Libyans. But that is precisely what is missing from Chapter 1: a clear expression of the drafters' vision of how Libya should move forward. Instead, with 30 articles, the chapter is overlong, inconsistent and vague. Some of the articles are broad in scope; others are more detailed. But almost all appear to be run-of-the-mill,

rather than truly 'fundamental'. For example, article 12 provides that Libya's foreign relations should be based on the principle of national sovereignty and independence, which is probably not of primary concern to most Libyans at the moment. Article 14 deals with political asylum; article 26 provides that funds belonging to religious endowments should be kept separate from the state treasury; and article 27 discusses the role and form of traditional family values. All very important issues, of course, but their inclusion elsewhere might have been more appropriate.

One alternative to the CDA's approach would have been to significantly reduce the length of Chapter 1 (mainly by placing most of its current content elsewhere in the final draft) and limit the chapter's focus to those issues that are of absolutely critical importance to Libya's current situation. Clearly, given Libya's modern history, Chapter 1's content should be geared to responding to circumstances created by Gaddafi's dictatorship and to the post-2011 chaos. These issues should be decided by Libya's representatives; but by way of illustration, they might have included: (i) a clear commitment to constitutional supremacy, to democracy and to the rule of law; (ii) a commitment to political plurality, and to equitable treatment of Libya's various communities and geographical areas, in so far as language, cultural and economic rights are concerned; (iii) a commitment to a single army and single police force, with a clear and accountable chain of command; (iv) a clear requirement that the rest of the constitution and the entire body of positive law should be interpreted in light of these principles, and a requirement that the courts strike down any legislation that does not conform to these principles.

As it currently stands, only one article appears to be specifically geared towards Libya's particular circumstances: article 2 relates to the state's identity and to language issues, which have been controversial from the start. Libya's many ethnic minorities speak languages other than Arabic and have sought to have their status recognized and protected. Some members of these communities have also sought extensive autonomy from Libya's central government, and on more than one occasion have sought inspiration from the Kurdistan Regional Government's place within the Iraqi constitution. Others have raised the concern that any formal recognition of linguistic or cultural diversity could threaten national unity. Article 2 seeks to establish a compromise on this issue, and is similar in spirit and content to equivalent provisions that have been adopted in many other countries, including Iraq (article 4). It recognizes Libya's linguistic and cultural diversity, and states that languages such as Amazigh, Targhey and Tebu should be protected as a general obligation (as opposed to a limited obligation towards the relevant communities), but at the same time it maintains Arabic as the country's sole language of state. This formula represents a very significant advance from the position in the past and from the prevailing discourse among some groups back in 2011. Despite this progress, members of some of these minority communities have expressed significant disquiet over the final draft, mainly because of the provisions on decentralization, which do not give them anything like the autonomy that some were hoping for.

The absence of a clear vision runs deeper, however. Because of the manner in which it was drafted, it is unclear whether or not the principles that are set out in Chapter 1 are of a higher order of importance than the rest of the constitution's provisions. Many Libyan legal experts argue that they are, but it is not clear that all of the drafters agree on this point, or whether they realize what consequences will flow from this. For example, Chapter 8 of the final draft is specifically dedicated to public finance issues. Most readers would probably expect Chapter 1 to contain a few general principles on economic issues, and Chapter 8 to include a longer list of detailed procedural and substantive rules. Instead, Chapter 1 contains more provisions relating to taxation and economic

issues than Chapter 8. Also, many of Chapter 1's provisions are very detailed, whereas Chapter 8 consists entirely of general principles. This raises the question of how Chapter 8's general rules of principle can be interpreted in light of a detailed rule such as article 26's provision on religious endowments. If the consequence is that Chapter 8 should not be interpreted in light of Chapter 1, then that places Chapter 1's entire purpose in question.

Another question is whether the fundamental principles are directly enforceable by ordinary Libyans – and if so, what type of standing rights would be required to bring a claim. As there is no precedent for this in modern Libyan legal culture, there is very little to fall back on. This means that the outcome is extremely difficult to predict. The final draft brings no clarity, and so there is a possibility that Chapter 1 may be interpreted by future governments and courts as being entirely aspirational and symbolic in nature.

## **5. System of government**

Many observers would probably agree that Libya's system of government is perhaps the most fundamental issue that has been under discussion since 2011, and on which there has been the greatest movement. The final draft, which provides for a presidential system of government, represents the next and perhaps final step in a long evolution of thinking on this issue. Libya was once an illiberal monarchy, which was partly defined by a repressive executive and a very weak political party culture (as existed in many other countries of the region, including Iraq, Syria and Jordan). The monarchy was eventually replaced by Gaddafi's republican dictatorship, which concentrated power in the hands of a tiny number of unelected officials and which was even more repressive than its predecessor. After the 2011 Arab uprisings led to a large amount of constitutional redrafting across the region, most countries favoured the establishment of semi-presidential systems, which were supposed to remedy the excesses of the past. Semi-presidentialism was designed to strike a balance between the legislative and the executive branches of government: political parties in parliament would participate in the government formation process and in formulating policy, while the president would have sufficient constitutional power to keep the country's politics under control, if necessary.

Initially, Libya did not follow this regional trend. In 2011, the National Transitional Council adopted a rump interim constitution that provided for a fully parliamentary system (making it only one of three parliamentary systems in the Arab region, with Iraq and Lebanon). However, in the years since the first parliamentary assembly was elected in 2012, security has steadily declined. Many Libyans blame the country's situation on the political parties that were elected to parliament. Others respond that there was little that the parliament could do to help in the circumstances, which is why some turned back toward presidentialism and away both from a parliamentary system and even from a semi-presidential system.

The discussions that took place within the CDA matched popular discourse about this issue. An early draft constitution that was published by the CDA in December 2014 provided for a semi-presidential system of government, and was clearly motivated by a desire to limit the potential for abuse that a powerful presidential system would represent for Libya. It included a number of mechanisms that were designed to subordinate the president to the legislature. Among other things, the president was to be indirectly elected by the Shoura Council (article 50); the president had to appoint a prime minister from the electoral coalition that had the largest number of seats in parliament (article 74);



and the president had very little scope to dissolve the parliament, and could only do so following a request by the prime minister or 24 members of parliament (article 68).

Since then, the draft constitution has come almost full circle. After six years of totally chaotic politics, the drafters are seeking to establish a fully presidential system. Libyans, including members of the CDA, are well aware of the risks that a presidential system presents for countries that suffer from a weak rule of law, a weak political party culture, and which have recent histories of dictatorship. The hope, however, is that a presidential system will bring stability and order, by placing one person in charge of formulating and implementing government policy. The final draft represents the results of a political calculation, and is an expression of hope that the benefits of a presidential system will outweigh the risks. Only time will tell whether that calculation is correct; but in the meantime, it is worth drawing attention to the presidential system's most salient aspects, and to illustrate just how much authority will be concentrated in the hands of the president.

Chapter 3, on the system of government, sets out the details of how the presidential system is supposed to function, and places the president firmly at the top of the state's hierarchy of power. The final draft provides for the president to be directly elected by the people (article 100) and to be solely responsible for forming a government (article 104(1)). The type of balancing act that was introduced in some post-Arab Spring constitutions (including Tunisia and Morocco) between heads of state and parliament during the government formation process is nowhere to be seen in the final Libyan draft. Instead, Libya's final draft more closely resembles the government formation process that is provided for in Syria's 2012 constitution. Most importantly, the president's candidate for prime minister does not have to be affiliated to any particular party, or to have been elected to parliament (article 113). Parliament can withdraw confidence in the government, but the threshold requirement for this will be very hard to meet (two thirds of members) (article 115). Meanwhile, the president is solely responsible for determining government policy (article 104(2)) and the government (which the president appoints) is responsible for implementing that policy (article 117(1)).

One of the issues that the CDA tried to address in the final draft was the presidential practice of dissolving parliaments at will. As a result, article 109 stipulates that the president can only dissolve parliament if the general population agrees to this in a popular referendum. The objective that the drafters sought to satisfy here is perfectly legitimate, but the sheer cost of organizing a referendum makes article 109 completely impractical. In addition, article 109, which allows the president to dismiss the parliament for 'obstructing the state's policy', appears to contradict article 67, which states that the parliament has the power to ratify state policy. Read in conjunction, those two provisions assume that it is parliament's responsibility to fall into line with the president, rather than for the two institutions to work together to create a state policy that satisfies the maximum number of people.

Just as importantly, the sections on public finance and natural resources make it clear that the president will not have any competitors for control over the country's purse strings. Chapter 8 is dedicated to public finance, and is extremely short by modern standards. It stipulates that all revenues must be deposited in the state treasury (article 165), and that the state's finances should prioritize a number of principles, including the unity of the state's finances (article 165(1)). Chapter 8 does not provide for any clear redistributive mechanisms that would require the government to invest in, or provide additional resources to, provinces that are economically stressed (article 22, one of the constitution's fundamental principles, does require the state to seek to achieve social justice; but it

remains unclear whether the article will be directly enforceable, and what relationship it will have with Chapter 8). Chapter 8 does include some reference to local interests, but it is clear that in the final analysis, the president will have the upper hand in shaping the country's finances. Chapter 9 on natural resources, which is also extremely short on detail, centralizes ownership and management of natural resources at the central government level (article 169). The president will therefore have very significant discretion in deciding how to invest the state's funds.

## 6. Security sector

The president's powers, particularly on appointments, should be read in conjunction with the provisions on the security sector. The relevant section in the final draft is in keeping with the CDA's previous drafts, in that it is worryingly short (four articles altogether). The final draft provides for the existence of an army and a police force, but does not mention the intelligence sector at all. Recent experience in post-totalitarian environments, particularly in the Arab region, shows what happens when intelligence agencies are allowed to operate in the dark. Constitutions can and should be used either to specify what intelligence agencies should exist, or to specifically limit their activities (for example, to intelligence gathering). The final draft's silence on this issue leaves open the possibility that multiple intelligence agencies could be created, and that they could define their mandates on their own, without any (or with minimal) oversight by civilian institutions (as in many other countries of the region, including Iraq).

There are also serious problems with the chain of command. The final draft states that the president is the supreme commander of the armed forces, without giving any indication of what authority that confers on him (article 106); this is not unique in comparative practice (see Tunisia's 2014 constitution and Iraq's 2005 constitution). It is also unclear who exactly is responsible for appointing the country's senior military and security command. Article 104(10) suggests that this power will belong exclusively to the president of the republic, but it does not say so explicitly; nor does the final draft explicitly indicate if the legislature will be responsible for approving senior military appointments. Lastly, under the final draft there will be no decentralization of police powers, which means that the entire functioning of the police will be in the hands of the minister of the interior (who is appointed by the president). Given the extent of the president's powers, it would make much more sense to diffuse control over the armed forces and the police, at least by providing for the president to exercise control over the armed forces through the prime minister, as well as through the minister of defence and the minister of the interior, respectively.

Constitutional provisions on states of emergency in Arab countries have long been problematic. Loose wording and non-existent restrictions have allowed governments to extend emergencies over decades, and to suspend civil and political rights throughout that period. In response, post-2011 Arab constitutions have tightened emergency provisions, in order to make obvious abuse of this sort much more difficult. Libya's final draft is in keeping with this trend. It allows a state of emergency to last for a maximum of 120 days (article 187). It also states that although the president of the republic is responsible for declaring a state of emergency, parliament is ultimately responsible for approving or rejecting the president's declaration. Sadly, however, the current wording suggests that the emergency comes into effect immediately after the president's declaration, and that the parliament must meet 'within three days', which suggests that the president has been given a three-day grace period, during which just about any action will be permissible. Article 189 makes that explicit, by

allowing the derogation of civil and political rights ‘in case of necessity to protect public security’. Other countries in the region require the executive first to obtain parliamentary approval before a state of emergency can be declared (e.g. Iraq). In some cases, that requirement has prevented failing governments from hanging onto power on the pretext of deteriorating security (for which they themselves were responsible). It is unclear why Libya has strayed from this regional trend.

## **7. The judiciary**

Having granted so much authority to the president, the question is then what checks exist on executive power. The first line of defence is the courts. Here the final draft includes many of the usual guarantees that are designed to protect judicial independence. They include a robust elaboration of the principle of judicial independence (article 118) and a requirement that any decision that affects individual judges must be taken by the high judicial council (article 120). The final draft also provides for the establishment of a constitutional court, which is designed as a key check on the executive and the legislature. The constitutional court will be responsible for overseeing the constitutionality of laws, of attempts to amend the constitution, of elections (article 139), for judging whether the president’s attempts to dissolve the parliament are in conformity with the constitution (article 109) and many other areas.

Given the context, the court’s independence from both of the other branches of government is of prime importance. The final draft appears to recognize this by providing the court with additional guarantees of independence, including that the constitutional court will be financially and administratively independent, that it will present a draft of its own budget to the legislature, and that it should have its headquarters in Sebha in southern Libya (article 135). However, real judicial independence depends just as much on the appointment mechanism. The key is to ensure that the court is not dominated by one political inclination or another, and that depends on who (or which institutions) gets to appoint the court’s members. Tunisia’s constituent assembly struggled with this issue until the last moment, and it finally decided in favour of allowing each of the executive, the legislature and the judiciary to appoint a third of the members of the constitutional court.

The final draft of the Libyan constitution adopts a similar mechanism, but tilts the balance in favour of the judiciary: article 136 states that the court should have 12 members, of whom 6 should be appointed by the high judicial council, 3 by the president and 3 by parliament. Thus, aside from being responsible for judicial appointments, for establishing courts and for many other standard functions (article 125), the high judicial council will also play a key role in determining the constitutional court’s makeup. The question therefore becomes who will sit on the high judicial council, and how its decisions will be taken.

This is one of the areas of weakness within the final draft. It is silent on how the high judicial council is to be composed (article 126) and says nothing about its decision-making processes, leaving both of these issues to subsequent law. This is a major source of vulnerability, which could easily be exploited by future political majorities.

Modern constitutions in other countries include significant detail on how judicial councils are to be composed. Kenya’s 2010 constitution sets out exactly who should sit on the judicial service commission (article 171), as does Morocco’s 2011 constitution (article 115); meanwhile Tunisia’s 2014

constitution provides general guidelines on how its supreme judicial council should be made up (article 114). Earlier versions of Libya's draft constitution included detailed formulas for how the council should be composed, so the final draft's lack of detail on this issue comes as a major surprise. The result is that the law that will eventually be drafted to govern this area could be put together by individuals who are intent on capturing the constitutional court. Article 126's lack of detail means that the door has been left open to the possibility that the future high judicial council could be packed with individuals who are loyal to the president, and that it will then appoint constitutional court members who themselves lean toward executive power, instead of serving as impartial arbiters.

Timing is also relevant here: what we know from comparative practice is that it can take a very long time to draft and pass the type of legislation that is necessary to establish a high judicial council and a constitutional court. Tunisia's 2014 constitution stipulates that the supreme judicial council should be established within six months of the date of the first legislative elections, and that the constitutional court should be set up within a year of the elections (article 148(5)). Despite this very strict timeline, both deadlines were missed quite considerably.<sup>4</sup> In contrast, Iraq's 2005 constitution does not provide any indication as to when the new law on the federal supreme court should be adopted. The result is that more than 15 years on, the new law has yet to be passed, and the supreme court is exactly as it was when it was constituted under United States occupation in 2005.

The clear lesson for Libya is that while constitutional timeframes are not a panacea, they can be useful in pressuring the ruling authorities to make progress on certain issues. Sadly, however, Chapter 10 on transitional principles is totally silent on when specific legislation should be passed, or even on what arrangements should be in place until then. The clear suggestion is that the existing supreme court will continue to serve as the country's highest jurisdiction on constitutional issues until the new constitutional court is established, which is unlikely to happen anytime soon.

## **8. Independent agencies**

Many modern constitutional systems provide for a large number of independent agencies, in one form or another, including audit institutions, central banks, etc. Many have a strong oversight function, especially audit institutions and anti-corruption bodies, which makes their work particularly sensitive. Until 2011, Arab constitutions barely mentioned any independent institutions, leaving all their work and functioning to be determined by law. The result was that, prior to 2011, independent agencies were under the absolute control of the president, who was solely responsible for appointing the agencies' heads, never published any controversial reports and limited the funding, in order to reduce the effectiveness of the bodies. From that experience, we have learned that for independent agencies to have any chance of being effective, they must be totally independent (through an air-tight appointment and dismissal mechanism, and by protecting their budgets), their mandates must be sufficiently broad and clearly defined, and their reports must be made available to a sufficient number of institutions and to the public.

Here, the final draft is a mixed bag. It states that the parliament is responsible for electing competent and independent individuals to administer the state's independent agencies, without clearly stating who will be responsible for appointing each agency's actual head (article 155). The final draft is even worse on how senior officials at each of the independent agencies should be dismissed: it does not

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<sup>4</sup> At the time of writing, Tunisia's Constitutional Court has not yet been established.

state who can dismiss them; it also says that subsequent law will determine the grounds on which they can be dismissed, but it does not define which grounds should be regarded as legitimate (article 155). Thus, a political majority could pass legislation specifically designed to dismiss troublesome central bankers and auditors, as has been done in other countries of the region.

The reporting requirements are equally troubling. The final draft states that all independent agencies must submit their reports to the parliament, and these may be published ‘after they are debated’ (article 156). The very obvious possibility here is that if an audit report is particularly troublesome for whichever power it is that controls the administration of parliament, it could simply choose not to publish that report.

The final draft is stronger on mandates. It provides, for example, that the audit institution is responsible for auditing all of the state’s funds, ‘including all the bodies that the state funds, even if only partially, including local administrations’ (article 158). This wording should get around the argument that some of the state’s funds (for example the security sector’s budget) cannot be audited by the state’s audit institution. But a mandate to carry out an audit is not sufficient on its own to ensure that questionable practices are made public, given that the head of the audit institution could be replaced, and given that the parliament’s administration will ultimately decide when the reports are published.

## **9. Decentralization**

One of the causes of the Arab uprisings is what many in Yemen now refer to as ‘blind centralism’ – the insistence of states throughout the region on concentrating all decision making – even minor issues, such as fishing permits for tiny villages – in the hands of central bureaucrats, who are sometimes thousands of miles away. That particular structure of government has contributed to huge disparities in the standards of living; these have aggravated social relations in all countries of the region and are sometimes accentuated by historical grievances. Libya is no exception. Many Libyans (sometimes referred to as ‘federalists’) have been demanding that the new constitution should establish a federal arrangement to address these inequalities, to ensure some form of shared rule in the country, and to diffuse power away from what has traditionally been an overly powerful centre. Similarly, some ethnic minorities have expressed the view that a federal arrangement would give them sufficient autonomy to manage their own affairs. Many others have favoured a more traditional form of centralized government as a means of guaranteeing national unity. These competing visions have been the source of significant tension in the country since 2011. An early draft of the constitution contained two proposals: the first was for a governorate-based system that would have introduced limited decentralization; the second would have established a three-region federation.

Here again, the CDA has opted for a more traditional approach (by regional standards). It provides for a modest form of decentralization, which is mainly undefined, and which may in fact never see the light of day. The final draft’s proposed system has one clear advantage: it is simple. It is clear who is in charge, and in a country like Libya that is one of the key objectives that need to be satisfied. Assuming that Libya is stabilized and the final draft enters into force, the disadvantage is that the country will at best look the way Iraq’s more peaceful provinces look today: Libyans will vote for their representatives in local councils, initially without realizing that they have little or no power to affect

standards of living at the local level; this will ultimately lead to frustration with democracy and with the constitutional arrangement as a whole.

Chapter 6 of the final draft provides for three levels of government: the central government in Tripoli, the governorates and the municipalities (article 144). The three-region federal option is now clearly off the table. However, the final draft does not give any precise idea of what the governorates and municipalities will look like, how they will function or what they will do. Almost everything is left for future legislation. What this suggests is that the CDA has been unable to come to any final agreement on what powers the country's future local authorities should have, and has decided to defer the matter to the country's future elected officials. The difficulty with this approach is that comparative practice, particularly from within the region, suggests strongly that when a state does not establish the fundamental basis of a truly decentralized system of government in its constitution, that country is very unlikely to be able to decentralize effectively. Egypt's 2013 constitution serves as a good illustration of this: it stipulates that the state should be decentralized, without providing any details on how local institutions will function. The result is that the country remains heavily centralized. Iraq's 2005 constitution (outside the Kurdistan Region) is another example. In Tunisia, where the constitution creates a stronger basis for decentralized government than its regional counterparts, many observers have argued that the implementing legislation provides for a lesser form of decentralization than is envisaged in the constitution. Libya's final draft also tends in that direction, although not explicitly: for example, article 145 states that local governments shall enjoy 'financial and administrative independence', which suggests that they will not be able to shape their own local policies.

In addition, there is reason to believe that whatever form of decentralization is adopted will be delayed. The final draft does not state how many governorates will be established, instead leaving the matter to be determined by law. It does set out factors that should be taken into consideration when establishing the country's future internal boundaries (article 144). These include population, size, economics, history, etc. – and also 'national security' (a confusing reference, given the context). The final draft is entirely silent on how and when these criteria should be applied. Most modern constitutions include detailed transitional provisions that give an indication of when key implementing legislation should be applied (e.g. during the first parliamentary term), and sometimes even provide for specific penalties in the event that these timeframes are not respected (e.g. early parliamentary dissolution). Libya's final draft does not provide any indication of when any of the legislation relating to decentralization should be passed, let alone implemented, by the central government authorities. This means that it could be a long time before the country's new decentralized system of government (whatever it is) is implemented, and that some version of the status quo will continue to remain in force for the foreseeable future.

There are also problems with much of Chapter 6's detail. One provision states that each local administration will have an elected council, but says nothing about how the governor should be selected (article 146). The CDA has been struggling with this matter for some time. An earlier draft provided that governors would be directly elected, but a majority of CDA members revisited this issue in favour of appointed governors. This final draft proposes a compromise by leaving the matter to subsequent law, but other countries in the region (including Egypt) have adopted the same approach for some time, and the result has been that governors are directly appointed by the central government. Finally, article 148 provides that each local administration should receive enough funding to allow for the local administrations to carry out their functions. But article 147, which is

supposed to establish local administrations' competences, merely states that this shall be left entirely to subsequent law. What that means is that if the central government is dominated by centralizing forces, it could easily pass legislation that will limit the local administration's competences, and give it a commensurately small amount of the budget.

The final draft's provisions on public finance and resources do not offer any reassurance on these areas either. Chapter 8 on public finances limits itself to establishing a number of vague principles, which will make little difference to the state's allocation of resources. For example, article 164(5) provides that the state's public finances should guarantee local authorities' financial independence. That provision can be interpreted in so many ways that it will at best serve as a basis for litigation, which means that any local authority which considers that it has not received a sufficient proportion of the budget will have to appeal to the courts, which in turn means that the outcome of this important issue will depend on judicial discretion.

Clearly, given that so much has been left to legislation, the future parliament will play a major role in determining decentralization's shape and form. The parliament's upper chamber is supposed to create a mechanism for local concerns to be given a proper voice in central government, and is designed to allow for significant geographical representation of Libya's three historical regions at the central level, which is a positive development. Article 75 provides that it will have 78 seats, of which 32 should be from the western region, 26 from the east and 20 from the south. Article 79(2) also states that the upper chamber must authorize any draft law that relates to local governance.

However, the final draft's proposed arrangement is likely to leave many actors disappointed, particularly Libya's federalists. It is extremely difficult to predict with any degree of certainty how many of the eastern and southern representatives will favour a decentralization law that grants significant power to the country's future local authorities; but what we have learned from the past few years is that there is nothing close to a consensus on these issues in the eastern region. The final draft also does not appear to provide for any special voting threshold or quorum requirements to be met for a decentralization law to be approved by the upper chamber. In any event, article 81 makes it clear that the most that the upper chamber can do is prevent a bill from being passed. What that means is that even if a majority of the upper chamber's members favour strong local powers, it will not be able to impose its vision if the lower chamber does not also agree. One possible outcome could be prolonged deadlock between the two chambers of parliament, which would mean that the pre-constitutional arrangement remains in place for the foreseeable future.

## **10. The individual and the state**

The last issue that remains to be discussed is how the final draft affects the relationship between the individual and the state. This is particularly important, given that the final draft places so much authority in the hands of the president. The historical backdrop is equally relevant here: prior to 2011, Libyan state institutions engaged in serious abuses against ordinary Libyans, mainly in an effort to keep ordinary people under control. The 2011 uprising was partly motivated by a desire to end those practices, but since then large parts of the country have descended into a state of lawlessness, which has led to a new form of oppression.

What, if anything, should a constitution aim to achieve in these circumstances? In an ideal world, it would create the type of environment that would reverse past crimes by allowing individuals to reach their full potential. This would entail creating sufficient space for them to express and organize themselves, while also requiring the state to provide them with support, wherever necessary. This should not necessarily translate into an expansion of the state's authority, but rather a modernized vision of how the state can and should allow previously oppressed people to thrive.

By Libyan standards, the final draft clearly provides unprecedented rights and guarantees. It provides for generous civil, political, social and economic rights that sometimes go beyond regional standards. A number of provisions on women's rights are particularly impressive, including a state obligation to provide equal opportunities to men and women (article 16) and to eliminate 'social customs' that detract from women's dignity (article 49). At the same time, in many respects the final draft limits itself to matching regional progress on these same issues. It restricts itself to rewording how specific rights are formulated, rather than reconsidering the framework within which rights are protected.

Following 2011, constitutional drafters throughout the region, including in Libya, obsessed about how individual rights should be formulated, and the general conclusion was that clawback clauses (which provide for the unlimited regulation of basic rights by subsequent law) should be eliminated. Libya's final draft matches that trend, primarily by removing all references to subsequent law and by providing an indication of the ways in which basic rights may be limited. For example, article 37 – which relates to freedom of expression – specifically prohibits hate speech and takfir (a clear instance of borrowing from Tunisia's article 6), and makes no mention of the right possibly being restricted by subsequent law. That change, while symbolically important, is unlikely to make any practical difference, given that there are no such thing as unrestricted rights, whether in Libya or anywhere else. By way of example, the final draft's provision on freedom of movement may not specifically state that subsequent law may regulate the way in which that right is exercised, but in Libya there are and will continue to be traffic regulations that limit freedom of movement – just as there should be and just as there are in every other country of the world. The regulation of rights is both inevitable and necessary, which means that the reformulation of rights to eliminate reference to subsequent law will not make any practical difference.

On the other hand, many of Chapter 2's provisions have justifiably created some cause for concern. Article 43, on the right to peaceful assembly, can be used to illustrate this point. As with the rest of Chapter 2, this article makes no reference to the possibility of regulation through legislation or otherwise. As the new constitution comes into force, one of the issues that will arise is whether peaceful protesters have to give advance notice to the authorities of their intention to protest; who they should give notice to; and whether the requirement to provide notice also entails the authorities having to approve the protest, including the specific path in case the protesters intend to organize a march. None of these issues is addressed in article 43, which means that the legislator will decide these issues entirely on its own, which in turn opens up the very real possibility that the right to assembly could easily be restricted. This comes as a surprise, considering that this issue is very topical in Egypt. There, the supreme constitutional court has recently rendered a number of high-profile decisions on this specific issue, and the Libyan CDA should have anticipated that many of those issues were likely to recur in its country. These issues could have been addressed in just a few sentences in the final draft, rather than have them decided by future and temporal political considerations.



Aside from the specific formulation of rights, the final draft does not resolve a conceptual problem relating to socio-economic rights. As with many other regional constitutions, the final draft provides for the right to health (article 48), education (article 52), work (article 56), and food and water (article 47), among many others. Debates relating to each of these rights generally revolve around how to formulate them in a way that encourages broad coverage, while addressing inequalities. So, for example, article 48 provides that ‘all people’ (as opposed to all citizens) have the right to ‘high-quality’ health care ‘at all stages’, while also stipulating that the state must guarantee an ‘equitable geographical distribution’ of health services. Despite these generous formulations, what is missing in the final draft (as in the rest of the post-2011 Arab constitutions) is any degree of certainty that these socio-economic rights will be directly enforceable by the courts, rather than remaining purely aspirational. While the current wording does not suggest that they are not directly enforceable, the reality is that Libyan courts (and courts in the Arab region generally) have often refused to enforce socio-economic rights, on the grounds that to do so would violate the separation of powers. Egypt has the most developed jurisprudence in the region on this issue, and it is only recently that its administrative courts have argued for a more robust enforcement of socio-economic issues, regardless of the government’s own preferences. Egypt’s 2014 constitution also sought to take this matter further, by providing the exact percentage of the state’s annual budget that must be invested in areas such as health, education and scientific research. The absence of any clear guidance on this issue in Libya’s final draft is another example of how specific sections appear to have been drafted without consideration for the context in which they were formulated.

Finally, the CDA should be commended for a robust limitations clause in the final draft. Limitation clauses are designed to prevent state institutions from overregulating rights, by clearly establishing a number of rules that must be followed when rights are restricted (including, for example, the obligation to ensure that whatever means are used to restrict a right must be proportional to the planned objective). Much of the rest of the world incorporates limitation clauses and/or proportionality in its constitutions or daily practices, but Tunisia was the first Arab country to have followed that lead (article 49). Yemen’s 2015 draft constitution was the second instance in which a limitations clause was included, and article 65 of Libya’s final draft is now the third. It provides that any restriction of a basic right must be ‘necessary, clear, limited, and proportional with the restrictions’ objectives’, which is a very clear and strong formulation of principle that should serve Libya well. Other commentators have noted that article 65 also provides (as does its Yemeni counterpart) that the limitation clause should be applied in a manner that is consistent with ‘the provisions of this constitution’, which is a clear reference to the earlier requirement that Islamic Sharia be considered a source of legislation (article 6). The concern is that this additional reference will prevent a truly liberal conception of rights and freedoms, but the main deciding factor here (as in other countries) will be the judges who have to decide the cases.

## **11. Transitional provisions and amendment**

Constitutions establish complex institutional arrangements that need to be established when they come into force. In almost all cases, these arrangements will be grafted onto a web of pre-existing institutions that are equally complex. As a result, modern constitutions almost always contain detailed transitional provisions that seek to satisfy a number of objectives, including: (a) setting a time frame according to which institutions must be established and laws must be passed; and (b) establishing temporary arrangements while policy makers develop a new legal framework to allow

for the new constitution to come fully to life. Because the number of state institutions that are mentioned in modern constitutions continues to increase, and because of the inherently complex nature of their work, transitional provisions are becoming increasingly detailed and complex.

In Libya, the conflict interfered with the elaboration of transitional provisions in ways that were not originally anticipated. In some conflict countries, warring factions negotiate peace agreements that are themselves highly complex. They can include governance arrangements as well as transitional road maps to allow for the country to progress from a state of war, to peace and eventually to a state of normality. In almost all cases, negotiators have to take pre-existing constitutional arrangements into consideration given that whatever they agree to will have to be grafted into the existing constitution. In 2015, as Libya's conflict progressed, representatives of some of the warring parties negotiated a resolution under the auspices of the United Nations. Those negotiations eventually led to the drafting of the Libyan Political Agreement (LPA).<sup>5</sup> What was unique about that process is that it worked in parallel to the CDA's own negotiations on the final constitutional arrangements without being formally connected to them. As a result, the peace negotiators could only focus on establishing transitional arrangements without knowing what the final constitutional settlement would be, while the CDA negotiated the final constitutional settlement without having any input on the path that would be followed to reach that end point.

Ultimately, the LPA was never fully implemented which is why, in December 2020, the LPDF is proposing an alternative approach to resolving the country's divisions. The LPDF seeks to build consensus around the formation of a new government of national unity in the short term without pronouncing itself on the country's long-term system of government. In practical terms, the CDA's reduced mandate means that Chapter 11 (on transitional measures) is extremely short, with virtually no detail on how any of the CDA's propositions should come into existence. Just to illustrate this point, in their constitutions Kenya, South Africa and Colombia have 4,268, 9,688 and 8,417 words, respectively, in the chapters on transition. Libya's Chapter 11 contains 688 words. It may be that this does not matter, since the details of the transition can be decided elsewhere; however, it does create the huge challenge of ensuring that whatever is agreed to by the LPDF is properly synchronized with the 2017 draft constitution, despite the fact that the LPDF negotiators did not participate in the negotiation of the 2017 draft.

More specifically, the LPDF appears to be focusing on establishing a path towards elections, possibly including presidential elections. Some negotiators are also insisting that the 2017 draft constitution enter into force before the elections. It is therefore critical that negotiators bear in mind that the 2017 draft constitution provides that elections should take place at most 240 days after the constitution enters into force (article 183). That timeframe will either have to be respected or be amended. In addition, at least some of the individuals who are participating in the LPDF will be considering whether to establish power sharing mechanisms during the initial period. In that context, they should take Article 184 into consideration, given that it provides that the first two individuals who are elected to the office of president can only hold the office for a single non-renewable term. Finally, it has been suggested by some of the individuals who are participating in the LPDF that the 2017 draft constitution should be adopted as soon as possible and that it should be amended shortly

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<sup>5</sup> The full text of the Libyan Political Agreement is available here: <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf> (English) <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20AR%20-%20w%20Signatures.pdf> (Arabic).

after it enters into force in order to bring in into conformity with whatever will have been agreed in the LPDF. If that option is still seriously being considered, article 195 should be taken into account, first because it provides that the constitution cannot be amended during the first five years of its operation and second because the amendment procedures are actually quite complex and will be difficult to meet. Among other things, article 195(5) provides that any proposed amendments must be approved by the constitutional court. The court will not be established for years (at best), which means that it will be close to impossible to amend the text in its current form.

## 12. Conclusion

The 2017 draft constitution is an endpoint, which is very useful; but there are problems that can and should be fixed. As already stated, the CDA's decision to favour a strong presidential executive is understandable, but far more should be done to introduce safeguards, with a view to creating a 'constrained majoritarianism'.

The presidential system concentrates far too much power in the hands of the president, who is generally able to exercise that authority with only limited oversight. Improvements could be made to the powers of the president; to the provisions relating to the security sector; to the way in which individual rights are formulated; and to the provisions that purport to guarantee judicial independence and the independence of audit institutions and other oversight bodies. The final draft also fails to address inequality adequately: while its provisions on socio-economic rights do clearly indicate whether they are directly enforceable, the decentralized structure of government leaves far too much authority in the hands of central government.

On the political aspects, significant effort will have to be devoted to bridging the gap between the final draft's current content and the expectations of the country's main factions. It is unrealistic that any future government will be comfortable implementing the final draft's provisions if its members have not had a chance to review and debate its content. By not engaging in that discussion, Libya runs the risk of initiating yet another period of instability. Significant efforts should be devoted now to avoiding that outcome.

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