

Position Paper

Libya's Transition without a Constitutional Map



Libya is threatened by many challenges and risks, but it lacks the consensus required for a constitution that can give the government the legitimacy to resolve disputes over the monopoly of arms and move the country from revolutionary legitimacy to institutional legitimacy.

Libya is facing serious dilemmas in security, reconciliation and economic development. The security situation is strongly instable and violent events occur regularly. The inability of the transitional authorities is evident as power is competed for by unofficial armed entities that are not subject to legitimate authority and therefore are able to attack the regime frequently. This situation does not make for the economic development needed to meet the demands of the population. All these risks and challenges will intensify if Libyans do not reach an agreement on a constitution that gives the regime the legitimacy to enforce the law on conflicting parties. The roadmap for democratic transition as defined by the Constitutional Declaration issued by the National Transitional Council on 3 August 2011 suffers from contradiction and the conflicts of various entities with regard to its recognition.

Events in the past few weeks have exposed the fragility of the interim period and the lack of consensus on the requirements and conditions of the transition and that factors that shape it. Interim institutions, including the National Congress, have been subjected to repeated attacks by insurgents. There have also been attempts to destroy the will of its members and force them to vote for a law of political insulation that excludes many groups from participating in the political process because of their affiliation with the former regime. This was rejected by large segments of the population and criticised by national and global human rights organisations. The country certainly faces the challenge of achieving legitimacy through the success of the National Congress as a sovereign body in the adoption of a permanent constitution for the country. Much of what is happening can be explained by a revisit of the Provisional Constitutional Declaration, particularly Article 30, which defines the nature of the transitional political system and various its stages.

The Interim Constitution: The Puzzle in Article 30

Article 30 is considered the most important part of the constitutional declaration. It sets the road map for transition to a constitutional state as well as the form and nature of the transitional political system. It stipulates that the General National Congress will take within thirty days of its first meeting a series of steps to select the constituent assembly that is to draft of the constitution and submit it to the Congress within sixty days of its first meeting. The article also states:

The constitution draft shall be approved by the National Public Conference and shall be referred to the people for a plebiscite with (Yes) or (No) within thirty days from the date of the approval thereof by the Conference. If and when the Libyan people approve the Constitution by two thirds of the majority of the voters, the Constitutional Power shall then approve the constitution draft as being the Constitution for the State. The National Public Conference shall also approve the same. In case of disapproval of the Libyan people, the Constitutional Power shall then be assigned to reformulate the constitution draft and the constitution draft shall be re-referred to the people for a plebiscite within a period not exceeding thirty days.

According to this article, the General National Congress (GNC) must issue a general election law within thirty days in accordance with the constitution, and "the general election must be held within a hundred and eighty days from the date of issuance of the laws governing it." The General National Congress must ratify the results and proclaim it, and the legislature must be called to convene in a period not exceeding thirty days. At its first meeting, the General National Congress must be dissolved and the legislative authority should engage in its functions.

However, the National Transitional Council (NTC) has, on 16 March 2012, approved a constitutional amendment by which it decided to establish a committee composed of sixty members instead of the constituent assembly. This amendment stripped the General National Congress of its constitutional legitimacy. Hence, rather than become the constituent assembly, it became the interim parliament while the constituent assembly evolved into an assembly of sixty, like the 'committee of sixty' that was formed during Libya's independence in 1951. This amendment did not satisfy many parties so on 6 July 2012, a day before the GNC elections and as a result of regional pressures especially of those who threatened with the secession of Cyrenaica, (i.e. the federalists), the NTC made another amendment to Article 30 with regard to the formation of the constitutional committee. This amendment came after the eruption of demonstrations in eastern Libya calling for the equal division of seats among the three districts (Cyrenaica, Fezzan and Tripoli) and that the commission be elected by the people and not be appointed by the parliament. Although the NTC initially tried to ignore the demands of the federalists, who resorted to defamation, deception and threats, it was forced to surrender after the protesters resorted to economic strikes in Wadi al-Ahmar, an area that separates Tripoli and Cyrenaica, and threatened to shut down oil sites. The level of tension and turmoil threatened to disrupt the elections in any way possible, which is what happened in a number of eastern cities. The members of the constitutional assembly shall therefore be elected in accordance with the amendment; sixty members evenly distributed among the three districts. This amendment was successful, probably in time to spare the country of chaos and violence or even warfare between the regions intending take on military confrontation with the Council of

Cyrenaica. However, it has also entrenched the sense of competition between interest groups over the final constitution.

Although all that was set by Article 30 has not been implemented by the specified deadline, the GNC first sought to reconsider the amendment by commissioning a special committee to have a community dialogue to discuss the formation of the constituent assembly, a step that should have been taken to expand the circle of national dialogue and involve civil society, thus providing for greater agreement on such an important issue. However, the dialogue was suspended on 6 February 2013 when the GNC decided to confirm the selection of the committee, preparing the constitution through the electoral mechanism. Although the decision was ratified by eighty-seven out of ninety-seven attendees from the congress (which has a total of 200 members), this indicated a decrease in the consensus required for an issue that will determine the country's political system. Moreover, the decision granted legitimacy to the NTC's resolution on the amendment, which it then made under a special circumstance. By this, the General National Congress was given the authority to approve or reject the draft constitution, which is to be prepared by the assembly of sixty, and the right to submit it to a referendum. This was possible because of the conflict between the two parties, each of which can leverage its respective legitimacy through the interim constitution and by virtue of being popularly elected. Here we find the debate whether it is appropriate for a popularly elected body to require approval from another institution for its activities. The acuteness of the consequences of this is aggravated by the fact that the GNC has the power to amend the provisional constitutional declaration as well.

The Supreme Court Ruling: Repealing the Amendment

The amendment to Article 30 may make for more differences and conflict on more than one level and make a fertile environment for many contradictions or catalysts. The most pertinent issue is that of the latest developments regarding the commission of sixty itself. The Supreme Court surprised the GNC and the public with a decision that requires acceptance of the constitutional critiquing of a number of lawyers and jurists, and later the judgement that Amendment No. 3 was unconstitutional due to the absence of the quorum needed to adopt it. The issue of contention is that the General National Congress has yet to make an effort to meet this challenge. The Supreme Court ruling struck down the text as unconstitutional, nullifying Amendment No. 3 and all that was based on it, including the GNC decision regarding the election of the committee of sixty.

This then takes us back to the threat of competition, conflict and contradictions that preceded and accompanied the proposal of the amendment. The congress did not rise to the challenge – according to constitutional law specialists – and convene to discuss what measures should be taken with regards to the ruling of the unconstitutionality of the text on the constitutional steps identified by the roadmap for democratic transition. This

threatened to delay the process of drafting the constitution at a time where the country is witnessing an unstable security situation and a growing sense of failure. The ruling gives the GNC two choices: either to draft a new constitutional amendment, or abide by the pre-amendment version of Article 30 and select committee members with a majority of 120 votes, which many, including the federalists and representatives of the south of Libya, have objected to.

The experience the country faced under the GNC has made clear that relying on the congress to choose such an important committee may lead to strife between political parties, within parties and at regional and interregional levels. We have seen, for example, how the congress dealt with the interim government of Mustafa Abushagur. It initially supported the government but later withdrew because of conflict among its forces. This indicates that the partisan and regional coalitions that fought to choose a prime minister and other heads will face greater antagonism on the selection of the sixty members of this committee with the intervention of different parties that had stormed the headquarters of the congress and threatened its members, seeking to impose their views by force. However, the biggest challenge pertains to the extent of acceptance among the federalists, politicians of the south, minorities and women. Also, by returning to the beginning of the process, the congress's role in making the selection means a greater possibility that Cyrenaica and Fezzan will not get an appropriate share in the committee, and thus be marginalised while Tripoli dominates. Perhaps the fear of these objections has led the GNC to retreat from involving ordinary Libyans in the discussion by abolishing the commission for community dialogue that was established for discussion about the formation of the constituent assembly. The federalists have expressed their positions through the president of the National Union Party in Libya, and called for an agreement between the various factions and regions for the formation of the constituent assembly. The federalists attach great importance to the committee, which their party leader described as the 'issue of the moment' in the political life of Libya. He also stressed the need to take all regions into account in the composition of the commission, which will oversee the electoral process in a manner that responds to the geography of the country and which should select the committee of sixty with equal representation for Cyrenaica, Tripolitania and Fezzan.

Finding the Missing Consensus

Libya, at this critical stage, lacks consensus on a constitutional formula that it desperately needs. There are two obstacles; one is political, concerning the power expected by those who won a majority in the recent parliamentary elections; the second concerns the armed forces. Head of the National Forces Alliance Mahmoud Jibril stated his coalition was leaning towards the adoption of the 1951 constitution – which was drawn up for the Libyan Kingdom – with the amendments of 1963, so that there is a legal framework through which everyone can move. He also said the coalition prefers

changing the constitutional assembly for the drafting of the constitution to a commission for the amendment and development of the constitution, with notes on the procedures related to the articles that deal with the formation of government under the old constitution.

The proposal avoids the most controversial issue: the system of governance. Returning to the 1951 constitution means adopting the federal system while accepting the 1963 amendment for a unitary system, a difficult point that incites conflict and is a source of contradiction. Can the amendment be ignored? This will mean the imposition of federalism without approval from the voters, and thus will have long-term repercussions on political stability, economic prosperity and social harmony.

As for the armed forces, including the Revolutionary Command Council, what has been expressed are only threats that highlight the legitimacy of the revolution with the claim that it gives them the right to interfere in the political process.

All this casts doubt on the ability of the commission of sixty to gain legitimacy and mobilise consensus, not only in this regard but also with regard to the electoral law and the law of the High National Elections Commission (HNEC), its composition and the method or standards by which the country or regions would be divided into constituencies. This is based on the assumption that the three regions are already autonomous as they had been in 1949-1951. Since 1963, these regions were merely administrative units that sometimes overlapped. However, constitutionally entrenching this administrative division could give rise to political forces and interest groups that did not previously exist.

In view of the priorities of the political transition in Libya, role players need to adopt measures for dialogue so as to reach consensus on the mechanism for selecting the constituent assembly. The assembly will have a deadline of thirty days to prepare the draft constitution and submit it to the General National Congress. The congress must then organise a referendum within sixty days, though this is not sufficient time to address the priorities for the future of Libya or for an agreement on a form of rule that would satisfy all parties. The system of governance, without doubt, is a source of differences and contradictions between the various parties, including the Islamists and the federalists, minorities and tribal and local forces (especially in cities like Misrata and Zintan), the rebels and their armed units, the political campaigns that continue to sustain the revolutionary phase, as well as the armed militias with their differing objectives. It is clear that the era of the GNC will extend beyond the maximum time specified in the road map and prolong the transitional period, leading to the neglect of the interim constitution. This will place the country in a vacuum that may drive some forces to seize power and control the whole process. Unless the General National

Congress hastens to meet these challenges, the country will face a greater risk of deteriorating security and new threats in the absence of any mechanism resolving the inconsistencies and forging consensus.

Copyright © 2013 Al Jazeera Centre for Studies, All rights reserved.

