

ENSURING A SMOOTH TRANSITION TO THE NEW CONSTITUTIONAL ORDER: TRANSITIONAL PROVISIONS IN THE LIBYAN DRAFT CONSTITUTION AND POLITICAL AGREEMENT¹

EXECUTIVE SUMMARY

Amidst Libya's political and security crisis, and in parallel to the UN-brokered peace negotiations, the Libyan Constitution Drafting Assembly (CDA), which was directly elected in February 2014, is trying to write a new Constitution. It issued a first draft in October 2015. According to the Political Agreement the CDA should complete its work by 24 March.

Even if the CDA managed to adopt a text by 24 March, it is not clear what impact a constitution may have in the context of the current crisis. That said, it is clear that the constitution-makers should include transitional provisions that make clear how the constitution would relate to Libya's wider governance framework, in particular the Political Agreement of December 2015 and the Constitutional Declaration of 2011.

This Briefing Paper analyses the transitional provisions in both the Draft Constitution and the Political Agreement. In light of comparative experience, international obligations and the need for legal security, some of the constitutional provisions would benefit from further detail and clarification, others from substantial revision. A list of recommendations addresses the status of the 2011 Constitutional Declaration and legislation, the status of state bodies and representatives of the state, the creation of new institutions and transitional political and judicial measures.

1. INTRODUCTION

Libya's Constitution Drafting Assembly was directly elected in February 2014. It issued a first draft of the constitution on 6 October 2015. Once adopted, Libya's new constitution would replace the post-Gadhafi interim constitutional order regulated by the Constitutional Declaration of 3 August 2011 as amended, and the UN-brokered Libyan Political Agreement of 17 December 2015, which further amends the Constitutional Declaration.

The adoption and implementation of the new Constitution hinges on the wider political context of Libya. Without the rule of law and the state monopoly on the use of force being restored and without the political will to give life to a new constitution, it would become a dead letter. Once these preconditions were met, the building of functioning state institutions and the implementation of the constitution would be the focus of the years to come. To make sure that the implementation of the new constitution does not fail as a result of insufficient transitional provisions, Libyan constitution-makers should pay particular attention to a comprehensive design of the transition to the new constitutional order.

This Briefing Paper focuses on transitional provisions in the sense of providing a link between two legal orders with the aim of guaranteeing legal security. It analyses the transitional provisions of the Draft Constitution and the Libyan Political Agreement and in particular:

- a) Status of the previous constitutional order and legislation
- b) Status of state bodies and representatives of the state;
- c) Creation of new institutions;
- d) Transitional political or judicial setups.

¹ This Briefing Paper was written by Evelyn Maib-Chatré of Democracy Reporting International, with contributions from Michael Meyer-Resende, Ayman Ayoub, Anne-Marie Brinkman and Henrik Ahrens. Democracy Reporting International has already published a generic Briefing Paper on transitional provisions, available in Arabic and French at: <http://democracy-reporting.org/publications/country-reports/tunisia/briefing-paper-44-january-2014.html>.

2. WHAT ARE TRANSITIONAL PROVISIONS?

Transitional provisions are a set of temporary rules that establish the link between two different legal systems: the old constitutional order and the new constitutional order. At the entry into force of a new constitution, usually not the entire constitution can be applied at once. Some aspects of the new legal regime can only be implemented when additional laws are in place or new institutions are created. At the same time, not all institutions of the previous constitutional order cease to exist.

Transitional provisions are included in constitutions to enable a smooth transition and a progressive implementation of the constitutional articles that need additional work to be realised. They are important to ensure that there will be no legal vacuum but a stable political and legal environment in the transition to a new constitutional regime.

The clarity of transitional provisions and the transparency of the process are fundamental to guarantee this stability. Clear and unambiguous language is important to avoid quarrels or misunderstandings about the meaning of certain provisions, and transparency ensures that all political factions and society can follow the process.

Transitional provisions have to be tailor-made to the specific country context, outlining in detail any interim measures to ease the transition between two constitutional regimes. There are no international obligations on transitional provisions, at least not those of a procedural nature, but they can be inspired by other constitutions.

They are often rather technical, defining procedural issues, stakeholders, dates, timelines, etc. But it is often such procedural issues that are overlooked and that later on pose problems if they give rise to multiple interpretations. That is why particular attention should be paid to the question of how the transition to the new constitution and its implementation will be regulated.

3. TRANSITIONAL PROVISIONS IN THE LIBYAN DRAFT CONSTITUTION AND THE LIBYAN POLITICAL AGREEMENT

3.1. STATUS OF THE PREVIOUS CONSTITUTIONAL ORDER AND LEGISLATION

At the entry into force of a new Constitution, the old Constitution must be abrogated to ensure legal security of only one constitutional text in force. Article 211 of the Libyan Draft Constitution provides a timeline on the entry into force of the new Constitution: “after approval of the people in the referendum and publication in the Official Gazette.” However,

it is not clear whether the previous constitutional regime automatically ends, in particular because the 2011 Constitutional Declaration provides a timeline on legislative elections after the entry into force of the new Constitution,² whereas the Draft Constitution foresees presidential elections before legislative elections.³

Libyan constitution-makers in the Constitution Drafting Assembly need to be clear on the status of the Constitutional Declaration. If the new Constitution replaces the Constitutional Declaration, it should clearly say so, like the Constitutional Declaration itself provided an end to the constitutional regime of the Gadhafi era (Article 34): “The constitutional documents and laws which were applicable before applying this Declaration shall be repealed.” If some of the provisions of the Constitutional Declaration are to apply after the adoption of the Constitution, they should either be included or referred to in the new Constitution. The transitional provisions in Tunisia’s 2014 Constitution, for example, start with a list of articles of the interim constitutional order that will stay in force until a fixed date.⁴

As for the status of legislation, usually, laws and regulations enacted under the previous constitutional regime stay in force, except in cases of non-compliance with the new Constitution, or if they are modified or annulled. With its entry into force, the Constitution as the supreme law takes precedence over any other legislation, and courts have to interpret and apply legislation in line with the spirit and text of the new Constitution.

As the Libyan Draft Constitution does not refer to the status of previously enacted legislation, constitution-makers could consider to include an article specifying that existing laws are enforced only in so far as they do not contradict the new constitution.

3.2. STATUS OF STATE BODIES AND REPRESENTATIVES OF THE STATE

With a new regime in place, the question arises what happens with the institutions and representatives of the previous regime. The stability of state institutions and the state itself is at risk if all mandates acquired under the old regime cease with the entry into force of the new constitution. A new constitution should be very clear on the mandates both of elected bodies and on the mandates of other state representatives, e.g. of the judiciary. The options chosen should of course reflect the specific country context.

² Article 30 stipulates that the legislative body shall issue the electoral law for legislative elections within 30 days after the adoption of the new constitution, and that elections shall be conducted within 180 days from the promulgation of the electoral law. The Constitutional Declaration does not mention presidential elections.

³ Article 195.

⁴ Article 148(1) provides: “Provisions of articles 5, 6, 8, 15 and 16 of the Provisional Regulations of Public Powers remain in effect until the election of the Assembly of the Representatives of the People.”

The Libyan Draft Constitution is silent on the mandates of current elected bodies, but this important – and divisive – issue is regulated in the Libyan Political Agreement.

3.2.1. THE LEGISLATURE

Since the summer of 2014, Libya has had two rival parliaments; the internationally recognised House of Representatives (HoR), elected in June 2014 and based in Tobruk, and the General National Congress (GNC), a self-proclaimed continuation of the GNC elected in July 2012, based in Tripoli. At the time of writing it is still unclear whether the UN brokered Libyan Political Agreement will be accepted by the entire HoR and the GNC. If the Libyan Political Agreement can be implemented, the HoR will be Libya's sole legislative authority, while the GNC will be transformed into a consultative body called the State Council.

Articles 18 and 22(2) of the Political Agreement stipulate that the terms of the House of Representatives and of the State Council continue until the first session of the new legislative authority elected under the new Libyan Constitution. These are important provisions to avoid an institutional vacuum.

However, neither the Libyan Political Agreement nor the Draft Constitution specify a timeline regarding the elections of the new parliament. Article 195 of the constitutional draft elaborates on the elections of the first President of the Republic and details an electoral system for these first elections, but beyond the mention that presidential elections will be organised before legislative elections, it does not specify when the new legislature will be elected. As mentioned above, the 2011 Constitutional Declaration provides a timeline for legislative elections, but it is unclear how this fits with the call for presidential elections in the constitutional draft. The Libyan Political Agreement seems to prioritise legislative elections as it requires a joint committee of the House of Representatives and the State Council to propose a law on legislative elections two months before the CDA's work comes to an end.⁵

In order to provide a clear legal basis for elections and to make sure that elections will happen in a reasonable timeframe after constitution adoption, Libyans should agree on, and include in the new constitution, a timeline for all elections to be organised, ideally including the sequencing of elections and the adoption of electoral laws.⁶ Instead of referring to a fixed date that may be difficult to meet as experience has shown repeatedly, it is advisable to refer to a given period of time that should not be exceeded, while determining with clarity when the count for such period starts.

3.2.2. THE EXECUTIVE

Article 195 of the Draft Constitution sets out an electoral system for the elections of the first President of the Republic, which are to be held after the entry into force of the constitution and before legislative elections. As mentioned above, since this article seems to overlap with the Constitutional Declaration and the Libyan Political Agreement, which refer to legislative elections, a timeline clarifying the sequencing of elections should be agreed on.

The Libyan Political Agreement foresees the establishment of a Government of National Accord (GNA) with a mandate of one year plus another year if the constitution is not finalised, thus two years maximum. If within this time a new government is established after elections as per the new Constitution, the GNA mandate automatically ends.⁷⁸

3.2.3. THE JUDICIARY

A vetting process is foreseen by Article 206 of the draft constitution which tasks the Higher Judicial Council with identifying the “most eligible” members of former judicial bodies, including members of the public attorney office and similar bodies, to be reengaged in judicial institutions in the new regime. Positively, the draft foresees an interim arrangement for the period during which the vetting process will take place and ensures for the members of those judicial bodies equal financial treatment with the members of the judiciary.

3.2.4. OTHER STATE BODIES

Article 191(1) of the Draft Constitution provides: “Vetting [the staff of] public institutions to reform these establishments structurally, adopting lustration measures involving those who had a hand in human rights violations and corruption crimes and unqualified personnel, and reexamining the entitlements of ranks, grades, and positions in them in accordance with the law. Any public institution found to be in violation of the constitution must be dissolved.”

There are two sides to this kind of arrangement: On the one hand large-scale vetting, closely linked to transitional justice processes, can have a negative impact on state-building as it can affect a large number of people previously in charge of and employed by state institutions. On the other hand vetting can contribute to a break with the past through ensuring that these institutions and their staff are fully committed to the new constitutional order they are expected to serve.

⁷ Article 1(4).

⁸ While this presents a clear deadline for the mandate of the GNA, the LPA does not provide for a clear deadline to finalise the constitution. Indeed, as article 52 of the agreement establishes 24 March 2016 for the CDA to finalise its work. If this is not the case, then a joint committee of representatives of the HoR, the State Council (GNC) and the GNA needs to meet and deliberate. Such a committee may actually decide to grant the CDA an extension and establish a new deadline for it, or may take any other decision. Therefore, and while the LPA clearly reflects a will to ensure that the GNA mandate does not extend beyond a maximum of 2 years, during which it is only hoped that a new constitution is adopted, the agreement only provides a deadline for the work of the CDA but not for the finalisation of the constitution.

⁵ Article 23.

⁶ Tunisia's 2014 Constitution stipulates, for example, that “Presidential and legislative elections are organised in the period starting four months after the creation of the Higher Independent Elections Commission and, in any event, no later than the end of 2014.” (Article 148(3)).

Article 191 as it stands now is not clear on what kind of public institutions will be vetted. In the interest of clarity, it should be considered to specify which institutions will undergo a vetting process. The Office of the United Nations High Commissioner for Human Rights recommends that vetting should “prioritise the military, law enforcement, intelligence services, the judiciary and other institutions that underpin the rule of law,” and in large institutions should be targeted at senior managers and “employees who are publicly known to have committed gross violations of human rights”.⁹ Similarly, the provision that “Any public institution found to be in violation of the constitution must be dissolved” is vague. Libyan constitution makers should agree on which, if any, public institution violate the essence of the new constitution and cannot continue its work in the new regime. For all other institutions, the vetting process foreseen for staff of public institutions seems sufficient.

3.3. CREATION OF NEW INSTITUTIONS

New constitutions often establish new independent institutions, which are regularly tasked to supervising various aspects of the new constitutional regime. Constitutions should specify how such new institutions will come to life. After entry into force of the new constitution, it is common practice to wait with adopting laws on the new institutions and establishing them until after elections when a new government is in place. It is possible to set up interim institutions in the meantime, e.g. in Tunisia an interim constitutional court was established.

In Libya, the Draft Constitution provides for various new institutions to be established, some of which previously existed in one form or another. The institutions include inter alia the Constitutional Court, the High National Electoral Commission, the Auditing Authority, the National Council for Human Rights, the National Council for Cultural and Linguistic Heritage, the Senior Scholars Council, the Transparency and Anti-Corruption Commission as well as the Sustainable Development Authority.¹⁰

Article 210 of the draft importantly makes reference to the laws that will need to be adopted in order to establish the new institutions foreseen in the constitution. It sets a deadline for the legislative authority to issue these laws - the first election cycle of the legislative authority. It is important for the Constitution – and all stakeholders – to be clear on where the law-making process shall stand at the end of the first election cycle: do the laws need to be proposed, discussed or adopted

by the time the parliament’s mandate ends? In Morocco, for example, the Constitution of 2011¹¹ gave rise to different interpretations on the timeline of adopting organic laws, some arguing that by the end of parliament’s first cycle, only first draft laws needed to be presented by the executive, others argued that the laws already needed to be adopted by parliament. While the provision in the Libyan Draft Constitution seems to be clearer – the legislature has to adopt the laws in its first election cycle – it may be considered to refer to a fixed framework of a number of years because the first parliamentary term could be over fast in case of crisis and dissolution of parliament.

In order to be clear and unambiguous on the law-making process, and to stimulate comprehensive implementation of the constitution, it is recommended to include a timetable for the adoption of key laws establishing new institutions, as well as, possibly, other necessary legislative reform. In Tunisia’s 2014 Constitution, for example, deadlines were set for the establishment of the Supreme Judicial Council (within six months from legislative elections) and the Constitutional Court (within one year from legislative elections).¹²

3.4. TRANSITIONAL POLITICAL OR JUDICIAL MEASURES

Depending on the country-specific context, interim political or judicial measures can support the transition to a new constitutional order.

For transitional political or judicial measures to be effective, the importance of a ceasefire, disarmament and the fight against terrorism, even though not discussed in detail in this paper, must be highlighted. In the case of Libya the Political Agreement includes governance and security arrangements,¹³ and the Draft Constitution addresses disarmament.¹⁴

In Libya, both the Political Agreement and the Draft Constitution provide for various temporary measures of political or judicial nature.

The Political Agreement foresees the creation of a Government of National Accord as the interim executive body for a maximum of 2 years, during which a new constitution should be adopted and elections held. To accommodate the two rival parliaments, the Political Agreement sets out a power-sharing framework, which accords the legislative function to the House of Representatives and a consultative function to the State Council. Key questions must be agreed

9 Vetting: an operational framework, Rule-of-law tools for post-conflict states, Office of the United Nations High Commissioner for Human Rights, 2006, pp. 10-11, available at:

<http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>. On vetting of security institutions, see

Report on security sector reform, including vetting of security institutions, UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 21 October 2015, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/438

10 See Chapter 4 on the Constitutional Court and Chapter 7 on Independent Constitutional Bodies.

11 Article 86 stipulates that “Les lois organiques prévues par la présente Constitution doivent avoir été soumises pour approbation au Parlement dans un délai n’excédant pas la durée de la première législature suivant la promulgation de ladite Constitution.”

12 Article 148(5).

13 Chapter on security measures, Articles 33-46.

14 Article 191(2) provides for “Disarmament and the dismantling of all armed groups and psychological and professional rehabilitation of their members.”

on by both the House of Representatives and the State Council.¹⁵

Such transitional measures are well suited to complex transitions – decision-making bodies uniting the different forces from a peace agreement can take such decisions without being accused of political bias.

At the same time, the Draft Constitution sets out other transitional measures that risk violating the Libyan constitution and international human rights and that do not allow for flexibility in amending the new Constitution.

Article 197 requires that all political parties be abolished for four years after the entry into force of the Constitution. This provision violates political rights, in particular the freedom of association. On the national level, it is in tension with Article 136 of the Draft Constitution, which provides for the freedom to form political parties and Article 9, which refers to the principle of political pluralism. In addition, it contravenes the 2011 Constitutional Declaration, which committed the post-Gadhafi Libya to a multi-party system and the freedom of forming political parties.¹⁶ On the international level, it violates Libya's obligations under the International Covenant on Civil and Political Rights.

Although weak and fragmented political parties may add to the difficulties of transitions to democracy, it is highly questionable whether banning parties can alleviate these difficulties. Risks associated with political parties in post-conflict states include: Armed groups which adopt a façade of a political party; parties that organise and deepen ethnic or religious divisions and parties that merely promote the interests of influential or wealthy individuals and elites. However, a prohibition on political parties is likely to exacerbate these risks as the underlying problems can be better tackled through the presence and evolution of political parties than without.¹⁷

Article 198 of the Draft Constitution suspends all naturalisation processes for a period of ten years. Taking just one example of children born to a Libyan woman and a non-Libyan father, in combination with Article 11 of the draft, it would mean that they would not be able to be naturalised and risk being stateless. This is likely to violate Libya's international obligations, in particular the right to nationality

and the principle of non-discrimination included inter alia in the ICCPR. The CDA should consider deleting this article, or at least establishing mechanisms to double the checks and controls system for a transitional period of time, instead of suspending naturalisations altogether.

The Draft Constitution also includes a transitional provision on prohibiting any constitutional amendment for five years after entry into force of the constitution (Article 208(1)). Constitutions are living documents and any necessary changes will only become apparent in their implementation. Such a rigid measure prevents any flexibility in the first five years to correct possible imperfections of the Constitution. It is noteworthy that Tunisian constitution-makers included a similar five-year ban on constitutional amendment in the first two drafts of its new Constitution, but abandoned this provision in later drafts.

Libyan constitution-makers should reconsider this ban. Article 208(2) of the Libyan draft already includes a list of articles that cannot be amended, which provides a protection on tampering with parts of the constitution. The five-year ban could either be deleted, or, instead of submitting the entire constitution to this ban, additional non-amendable articles for a set period of time could be added to Article 208(2). Additionally, special measures could be envisaged for a transitional period to limit the possibilities of amending the constitution, thus making it more difficult rather than banning it.

4. CONCLUSION

The transition to a new constitutional regime can be greatly facilitated by clear transitional provisions. A smooth transition sets the tone for and enables the proper implementation of the Constitution. In Libya, the Draft Constitution of 6 October 2015, as well as the Political Agreement of 17 December 2015, include various transitional measures. These will support the transition from the interim constitutional regime regulated by the 2011 Constitutional Declaration to the new Constitution. In light of comparative experience, international obligations and the need for legal security, some of these provisions would benefit from further detail and clarification, others from substantial revision.

5. RECOMMENDATIONS

1. Status of the previous constitutional order and legislation

- Libyan constitution-makers should clarify the status of the 2011 Constitutional Declaration. If the new Constitution replaces the Constitutional Declaration, it should clearly say so. If some of the provisions of the Constitutional Declaration are to apply after the adoption of the Constitution, they should either be included or referred to in the new Constitution.
- As the Libyan Draft Constitution does not refer to the status of previously enacted legislation, constitution-makers could consider to include an article specifying that existing laws are enforced only in so far as they do not contradict the new constitution.

15 As one of the first measures, Article 15 of the Political Agreement requires the House of Representatives and the State Council to reach agreement on high-level representatives of the state within 30 days. Its Article 10 sets out that a joint committee comprising the House of Representatives, the State Council, the Government of National Accord and the National Defence and Security Council shall draft a law on the competencies of the Supreme Commander of the Libyan Army and the leadership levels in the army, within a timeframe of three months after the establishment of the Government of National Accord. Article 23 foresees that a joint committee of the HoR and the State Council will propose laws on the constitutional referendum, legislative elections and other laws necessary for completing the transition.

16 Articles 4 and 15.

17 See *Democracy Without Political Parties: Constitutional Options*, Michael Riegner and Richard Stacey, Center for Constitutional Transitions at NYU Law, June 2014. Available at: <http://constitutionaltransitions.org/wp-content/uploads/2014/06/DEMOCRACY-WITHOUT-POLITICAL-PARTIES.pdf>.

2. Status of state bodies and representatives of the state

- On Article 30 of the Constitutional Declaration, Article 195 of the Draft Constitution and Article 23 of the Political Agreement: In order to provide a clear legal basis for elections and to make sure that elections will happen in a reasonable timeframe after constitution adoption, Libyans should agree on, and include in the new constitution, a timeline for all elections to be organised, ideally including the sequencing of elections and the adoption of electoral laws.
- On Article 191 of the Draft Constitution: In the interest of clarity, it should be considered to specify which institutions will undergo a vetting process. In addition, Libyan constitution makers should agree on which, if any, public institutions violate the essence of the new constitution and cannot continue its work in the new regime.

3. Creation of new institutions

- In order to be clear and unambiguous on the law-making process, and to stimulate comprehensive implementation of the constitution, it is recommended to include a timetable for the adoption of key laws establishing new institutions, as well as, possibly, other necessary legislative reform.

4. Transitional political or judicial measures

- On Article 197 of the Draft Constitution: The four-year ban on political parties violates political rights, in particular the freedom of association. Libyan constitution-makers should carefully consider whether the Libyan context calls for this curtailment of rights.
- On Article 198 of the Draft Constitution: The suspension of all naturalisation processes for a period of ten years is likely to violate Libya's international obligations, in particular the right to nationality and the principle of non-discrimination. The CDA should consider deleting this article.
- On Article 208(1) of the Draft Constitution: The five-year ban on any constitutional amendment is a rigid measure preventing any flexibility in the first five years to correct possible imperfections of the constitution. Libyan constitution-makers should reconsider this ban. It could either be deleted, or, instead of submitting the entire constitution to this ban, specific non-amendable articles could be identified.

Finally, Libyan constitution-makers could think of additional transitional measures in support of implementation, such as, following the example of Kenya in 2010, the setting up of a temporary commission monitoring the implementation of the Constitution.

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