



European
University
Institute



ROBERT
SCHUMAN
CENTRE FOR
ADVANCED
STUDIES



Middle
East
Directions

Libya's constitution: between conflict and compromise

Nedra Cherif

Research Project Report
March 2021
2021/02

© European University Institute 2021
Content and individual chapters © Nedra Cherif, 2021

This work has been published by the European University Institute,
Robert Schuman Centre for Advanced Studies.

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the authors. If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the year and the publisher.

Requests should be addressed to med@eui.eu.

Views expressed in this publication reflect the opinion of individual authors and not those of the European University Institute.

Middle East Directions
Robert Schuman Centre for Advanced Studies

Research Project Report
RSCAS/Middle East Directions 2021/02
March 2021

European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
www.eui.eu/RSCAS/Publications/
cadmus.eui.eu



Funded by
the European Union

The European Commission supports the EUI through the European Union budget.
This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Libya's constitution: between conflict and compromise¹

*Nedra Cherif*²

¹ This research paper is part of a series of publications prepared in the framework of the 'Dialogue Platform for Peace and Stability in Libya'. The project aims to establish a platform of dialogue and exchange between Libya's major political forces, Libyan and international researchers and key actors of the international community on policy issues key to Libya's future.

² Nedra Cherif is an independent analyst and researcher focusing on the political transitions and constitutional reforms in the MENA region since the Arab uprisings. She is a graduate in International Affairs and Political Science from Sciences Po Paris and the European University Institute, and has worked as a consultant for various international organisations.

Table of Contents

Executive Summary	1
Introduction	2
1. The making of Libya's constitution: a process shaped by challenges	2
A non-political body in a context of political division	2
Ensuring inclusive representation in a divided country	4
Separating constitution-making from politics: rationale and consequences	6
Heightened tensions and freezing of the process	8
Mediation efforts and the difficult birth of the final draft	9
2. The CDA's draft: a 'bargaining constitution'?	12
Fundamental principles	13
Identity, citizenship and minorities' issues	15
Form of the state and local governance	20
Natural resources	21
Conclusion	23
Bibliography	24

Executive Summary

In February 2014, Libya elected a Constitution Drafting Assembly (CDA) to produce a draft constitution that, once approved in a popular referendum, would drive the country away from the transitional phase initiated by the 2011 uprising and establish a permanent legal and constitutional basis for the country's political life. However, the outbreak of a civil war a few months later and the continual state of conflict and political division that has prevailed in Libya since then have delayed the completion of the constitution-making process, thus preventing a return to institutional stability in the country.

Proceeding in this complex and unstable environment and further burdened by its own internal flaws and divisions – including its members' lack of expertise, initial mistrust and diverging ideological views – Libya's constituent assembly struggled hard to overcome the many challenges facing it but eventually managed to complete its task and approve a final draft in July 2017. In spite of this, the last step in the constitutional process, namely the submission of the draft to a popular referendum, has been frozen since the adoption of a controversial referendum law by the parliament in late 2018.

With the resumption of peace negotiations under the auspices of the United Nations in autumn 2020 and the Libyan stakeholders' agreement to hold a general election in December 2021, renewed interest and debate have arisen on Libya's constitutional future and on whether the existing draft constitution could be used as relevant basis for holding the next election.

Based on first-hand testimonies from Libyan actors involved in the constitutional process and an extensive analysis of media reports and audio-visual material related to the issue, this paper attempts to provide some explanations of Libya's long delayed constitution-making process. It explores the various challenges, both internal and external, facing the constituent body and the drafters' efforts to draw up a consensual document that could reconcile their and the Libyans' multiple and diverging views on what a future Libyan state should look like.

The paper finds that:

- Despite the delay in its completion, persistent disagreement on a number of its provisions, the difficult conditions at the time of its adoption and several complaints raised before the judiciary, the draft constitution still received the support of a strengthened majority of CDA members representing a wide range of regional and ideological backgrounds, and remains the most legitimate constitutional document in Libya at the present time. Moreover, reaching such a consensus in a context of political division and undermined legitimacy of other state institutions undeniably constitutes an achievement that cannot and should not be overlooked in any discussion of the country's constitutional future.
- While holding a referendum on the CDA's draft constitution remains the most legal way and the 'normal path' to complete the constitution-making process, remaining contentious points in the draft – including issues that have fuelled the current conflict (identity, local governance, management of natural resources, etc.) – and its rejection by some actors need to be addressed sooner or later in order to ensure the effective implementation of the document and its long-term viability.
- Reaching a broader constitutional consensus, however, requires going beyond the mere technical work of the CDA, the members of which reached the limits of their capacities to compromise. Constitutional issues now need to be addressed from a political angle, as constitution-making remains at its core a political process, and the disconnection between the drafting of the constitution and politics has so far had a detrimental effect in Libya.

Introduction

The resumption of Libyan political dialogue under the auspices of the United Nations in autumn 2020 has raised renewed hopes and the prospects for reaching peace and restoring stability in a country that has been torn apart by conflicts and political divisions over the last decade. The recent agreement to hold a general election, planned for December 2021, has reopened the discussion on the ‘constitutional basis’ needed to hold this election. In this debate, the draft constitution completed by the Constitution Drafting Assembly (CDA) in July 2017, which has been frozen since then, has occupied a central place, sparking heated debates and raising criticism. While a number of Libyan actors have questioned the relevance of this draft in the current and coming periods, pointing out its assumed lack of popular and political support, and have been considering constitutional alternatives to hold the election, several questions about the CDA’s draft still remain unanswered. What has prevented the completion of the constitution-making process initiated by the CDA, i.e. the submission of the draft to a popular referendum and its entry into force in the last three years? Why have there been and are there still attempts to side-line the CDA’s draft? How was the draft produced and could it have reached a broader consensus?

This paper will attempt to address some of these questions by analysing the main challenges that shaped the drawing up of Libya’s draft constitution, and the drafters’ efforts and limits to produce a document that could reconcile the Libyans’ diversity of views and gather a broad consensus in a country marked by heightened political, social and cultural divisions. This research is based on a combination of a desk study of the existing literature on Libya’s constitution-making process; monitoring and analysis of Libya’s recent political and constitutional developments through media reports, social media platforms and audiovisual material; and a series of phone interviews conducted with Libyan stakeholders between November 2020 and February 2021.

1. The making of Libya’s constitution: a process shaped by challenges

Since its election in February 2014, the CDA has been faced with both internal and external challenges, which to a large extent have hampered the completion of the Libyan constitution-making process to date, but have also affected its perceived legitimacy in Libyan public opinion and among the political class.

A non-political body in a context of political division

The legal framework for the CDA election provided that the constituent body would be composed of 60 members, with 20 seats allocated to each of the three historical regions of the country (the western Tripolitania, the eastern Cyrenaica, and the southern Fezzan) – a division inherited from independence and used in the first constituent assembly of 1951.¹ Although not explicitly stated in the electoral law, it was understood that the CDA members would consist of independent figures rather than political party affiliates, as the former, it was thought, would be more committed to Libya’s superior interests and less keen to engage in partisan politics during the constitution-drafting process.²

1 The CDA elections were regulated by the Interim Constitutional Declaration (Libya’s interim constitution issued by the transitional authorities in August 2011) as amended on 9 April 2013, the electoral law (Law 17 of 2013) and the law establishing the High National Election Commission (Law 18 of 2013).

2 Al-Ali, Z., “Libya’s final draft constitution: a contextual analysis,” International IDEA, December 2020, p. 6.

Despite the positives of leaving aside personalities that had been involved in Libya's political turmoil since the 2011 uprising, the side-lining of political figures from the CDA combined with the absence of specific criteria for electing the members – notably as regards the future drafters' expertise or competences – except for their geographical origins, would eventually result in an assembly that lacked both a clear political vision for the country and strong constitutional experience (apart from a few legal scholars elected to the CDA).³ Additionally, the choice of a majoritarian electoral system (first-past-the-post in individual constituencies) meant that the drafters were generally elected by “a small number of voters reflecting their tribal or regional affiliations”⁴ – a weak point that would be used by the draft's detractors to question the legitimacy of the CDA.⁵

Moreover, this non-political body would have to operate in a context of growing political tension. Indeed, the CDA election did not occur in a climate of appeasement. The fragmentation and political instability of the General National Congress (GNC), Libya's first post-revolution parliament elected in July 2012, caused serious delays in the transitional process, including the elaboration of the legal framework for the CDA election. Moreover, the adoption of the controversial Political Isolation Law (May 2013), which aimed to prevent former regime affiliates from holding positions of power during the transition, not only affected the composition of both the GNC and the future CDA, but further fuelled tensions and divisions on the Libyan scene.⁶

As Libya was facing growing insecurity, caused in particular by the multiplication of armed militias, and mounting popular discontent about the path of the transition, the GNC's unilateral extension of its 18-month mandate, which was to expire in January 2014, triggered new divisions. With the support of eastern-based armed groups, General Khalifa Haftar launched the military 'Operation Dignity' (*Karama*) and pushed for a new legislative election to replace the GNC, which they claimed had lost legitimacy and no longer represented the Libyan people.⁷ The election of the new House of Representatives (HoR) held in June 2014, however, did little to solve the crisis. The election was marred by a low turnout and security issues, and the supporters of the outgoing GNC (mainly Islamists) rejected the result, accusing the new assembly of being dominated by partisans of the former regime, thus leading to an outbreak of violence between the two sides. Militias from several western cities and Islamist groups allied to launch the 'Libya Dawn' (*Fajr Libya*) military campaign on the capital, aimed at countering Haftar's operation and restoring the GNC. On their side, some of the newly-elected HoR members decided to establish the seat of the parliament in the eastern city of Tobruk. Having gained international recognition, the HoR started operating from there with a new government. The country was thus divided into two competing authorities and parliaments, while the situation on the ground had turned into a full-blown conflict.

Therefore, the CDA, which had barely started its work, was immediately faced with a complex and polarised political landscape and an uncertain legal situation. Devising a new constitution for the country in this context and maintaining the cohesion and political neutrality of the constituent body would become increasingly challenging as the country further slipped into civil war.

3 It is worth noting that in spite of this measure several political figures made it to the CDA by running as independents, including the CDA's first president, Ali Al-Tarhuni.

4 Hammady, O., “The role of civil society in the Libyan constitution-making process,” in Abbiate, T., Böckenförde, M. & Federico, V. (eds.), *Public Participation in African Constitutionalism*, London: Routledge, 2017, p. 162.

5 Many Libyan stakeholders today still regret that the CDA had not been composed of appointed experts, as according to them this would have both saved the process a significant amount of time and spared it unnecessary controversies. Author interviews with several Libyan actors, December 2020-January 2021.

6 Van Lier, F.-A., “Constitution-Making as a Tool for State-Building? Insights from an ethnographic analysis of the Libyan constitution-making process,” Max Planck Institute for Social Anthropology, Working Paper No. 19, 2018, p. 9.

7 Van Lier, op. cit., p. 12.

Ensuring inclusive representation in a divided country

Ensuring that Libya's social and cultural diversity would be represented in the country's next constitution was another challenge facing the constituent body. The electoral law for the CDA dedicated six seats to women and two seats to each of the Amazigh, Tuareg and Tebu communities as a way to offer some representation of Libya's 'cultural components.' The latter, however, contested this provision, and particularly the Amazighs, who felt underrepresented compared to the other groups, especially regarding their actual proportion of the population.⁸ Additionally, they demanded that the Interim Constitutional Declaration be amended so that decisions on a number of specific issues, including ones related to their "natural rights"⁹ (linguistic and cultural rights) and the symbols of the Libyan state (the name and the identity of the state, the flag, the national anthem) in the CDA would be taken by consensus rather than the initially envisioned 2/3+1 majority¹⁰ – a demand also supported by the Tuaregs and the Tebus. Considering the limited representation granted to the cultural groups in the CDA, they hoped to secure a say in the decision-making process, since they were not in a position "even combining together the cultural components' votes to impose anything on the Arab majority in the CDA."¹¹

The GNC's failure to address this demand led to the minorities boycotting the CDA election and suspending their participation in the GNC.¹² The Tuaregs eventually moved back and announced they would join the poll, whereas both the Supreme Amazigh Council and the Tebu National Assembly confirmed their boycotts. On the announcement of the final election results on 2 March 2014, 13 of the 60 CDA seats therefore remained unfilled, including 5 of the 6 seats reserved for the Amazigh, Tuareg and Tebu communities.¹³

Uncomfortable with the absence of minority representation in the CDA, the GNC eventually passed an amendment to the Interim Constitutional Declaration, which revised the CDA's decision-making procedures by adding that "it is necessary to come to an agreement with the distinct linguistic and cultural components of Libyan society on provisions that concern them."¹⁴ Deeming the change acceptable, Tebus and Tuaregs ran in a complementary election held on 26 April to fill their vacant seats in the CDA. On their side, the Amazighs pursued their boycott, as they considered the amendment insufficient, having demanded that the provisions related to the cultural components be explicitly named in the text.

Reaching consensus with the cultural components during the constitutional debates proved complex. When the Tebu and Tuareg representatives joined the CDA in May 2014, the other members had already moved forward on drawing up the body's rules of procedures. A section of article 60 of the

8 Although no accurate information exists on the size of the cultural communities in Libya, the Amazighs estimate that they represent about 10% of the Libyan population. Demographers believe this proportion instead ranges between 3% and 5%.

9 Author phone interview with a civil society activist from the Amazigh community, December 2020.

10 The Interim Constitutional Declaration, as amended in March 2012, indeed provided that the CDA should make its decisions by a 2/3+1 majority (art. 30).

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

12 Wahli, K., "Al-'aqaliyat fi al-dostor al-liby, al-tabu namudhaj" [Minorities in the Libyan constitution, the Tebu as a model], July 2018, p. 60.

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

14 Constitutional Amendment No. 7 of 11 March 2014.

rules stipulated that the voting procedures should “respect consensus with the representatives of Libya’s cultural and linguistic components on issues related to them” and that a (special) committee should be set up to “define the concept of consensus and mechanisms to reach it.”¹⁵ However, the time dedicated to this task and controversy around the mechanisms set, which had little effect in practice, came to be perceived by the cultural components as a reflection of “the Arabs’ lack of willingness to take our participation into serious consideration.”¹⁶

Another challenge was to cope with the CDA’s regional composition. Because of the way it had been elected, the CDA’s initial excessive focus on working along regional lines threatened to further enshrine divisions rather than bring the drafters’ views closer. As an eastern CDA member noted, as the members got used to working together, “we were eventually brought closer by our ideas than our regional belonging,”¹⁷ rendering some of the CDA’s working methods irrelevant. For instance, the initial idea of establishing regional working groups based on the three electoral regions, which would be required to provide each region’s view on the various articles of the draft – a way to simplify debates in the plenary by limiting discussions to three regional views rather than each member’s individual position – triggered tensions. Several members argued that the CDA had been elected “to prepare a draft constitution for all Libyans without distinction between their places of residence or opinions,” and deemed unacceptable any operational mechanisms that would differentiate between Libyans on a regional basis.¹⁸ The CDA presidency was eventually constrained to move backward and annul this decision.

This is not to say that the regional dimension was totally absent from the CDA’s debates. As the process moved forward, a number of issues with regional and local implications caused heated debates among the drafters, further fuelled by the political divisions on the Libyan scene and the competing authorities’ pressure on the CDA. In particular, the form of the state and local governance system remained a blocking point until late in the process, particularly because of the maximalist demands of some hardline eastern federalist members.

In June 2015, the setting up of a Working Committee (WC) with the aim of reconciling the diverging views and speeding up the completion of a first full draft, caused further divisions, both with the cultural components and along regional lines. Elected from among the CDA members on the basis of 4 members per electoral region, the WC was initially to include one additional member representing the cultural components. The minorities’ representatives however requested a representative each (one Tebu and one Tuareg).¹⁹ The rejection of this demand by the other members was received by the cultural components as an additional proof of their exclusion from the constitution-making process and of “the majority’s efforts to impose its will.”²⁰ On 28 June 2015, they announced their decision to boycott the CDA, leaving the constituent body without representation of the cultural communities, thus further undermining the body’s inclusiveness.

15 Wahli, *op. cit.*, p. 62.

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

17 Author phone interview with a CDA member from Benghazi, January 2021.

18 Libyan Organization of Policies and Strategies (LOOPS), “The Libyan Constitution Drafting Assembly (CDA): Path, Outcomes and Comments,” June 2016, p. 3.

19 Wahli, *op. cit.*, p. 62.

20 Author phone interview with a CDA member from the Tebu community, January 2021. As another CDA member noted, this demand for specific representation of the cultural components in the WC was deemed “unjustified” as the Interim Constitutional Declaration imposed reaching consensus with these components in the final draft, but did not grant them any privileged position during the preparatory work. Author interview with a CDA member from Sirte, February 2021.

Despite the CDA's efforts to reach out to them, these groups took a tougher stance, warning the body against adopting "a non-comprehensive, non-concord constitution"²¹ and joining forces in a front composed of Tuaregs, Tebus and Amazighs to put pressure on the CDA and defend their common interests. In a joint statement issued on 30 January 2016, they clearly stated their rejection of any constitution that would not include a consensus with the cultural minorities.²² A dedicated committee set up by the CDA pursued its efforts to negotiate with the boycotters, and eventually made some progress with the Tuaregs, while the Tebus refused to join and continued their street mobilisations, notably in the main cities of the south (Murzuq, Sabha, Ubari and Kufra).²³

The working methods of the WC were also subject to criticism from other CDA members, who denounced the "secrecy" of its deliberations and attempts by some of its members to impose their will rather than seek consensus.²⁴ They also criticized the WC's decision to start drafting new constitutional provisions instead of relying on the chapters prepared by the CDA's technical committees and released in December 2014.²⁵ Moreover, the committee faced divisions over a number of sensitive issues, in particular the question of the form of the state. On 28 January 2016, another 11 members mainly from the west announced a boycott of the CDA, denouncing the "federalist inclinations" of the WC and accusing it of dividing Libya with "regional quotas."²⁶

Despite these contestations and the further shrinking of the CDA's membership, the body's President, Ali Al-Tarhuni, pushed to adopt the controversial draft that came out of the WC's deliberations, as the CDA was under much time pressure to complete its work.²⁷ Issued on 3 February 2016, the draft was rejected by the boycotting members, who conditioned their return to the CDA on it being discarded.²⁸ Moreover, as Al-Tarhuni's management of the CDA had already caused resentment among a number of CDA members, a legal complaint filed by the boycotters resulted in his dismissal.²⁹ Regardless of this decision and of their own internal divides and because of the growing political and public pressure on them, the remaining CDA members committed to complete their work and produce a final draft constitution.

Separating constitution-making from politics: rationale and consequences

Despite its attempts to isolate itself from external tensions, the CDA was not immune from the country's divisions. The drafters' initial and intentional decision to keep some distance and abstain from any involvement in the political process, however, had both positive and negative effects.

Eager to maintain the CDA's independence from the military and political factions, and also from the

21 Van Lier, op. cit., p. 14.

22 Wahli, op. cit., p. 63.

23 LOOPS, op. cit., p. 5.

24 LOOPS, op. cit., p. 7.

25 Ibrahim, S. "Libya's long awaited constitution," *Constitution Net*, 22 March 2016: <http://www.constitutionnet.org/news/libyas-long-awaited-constitution-will-it-finally-see-light-day>

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

27 As will be explained at greater length in the next section, a UN-sponsored political agreement reached in December 2015 set 24 March 2016 as the CDA's new deadline to finalise its work.

28 Assad, A., "CDA boycotters: rejoining the CDA is conditioned to getting rid of Work Committee's draft," *Libya Observer*, 5 March 2016: <https://www.libyaobserver.ly/news/cda-boycotters-rejoining-cda-conditioned-getting-rid-work-committees-draft>

29 The Al-Bayda's Court of Appeals cancelled Al-Tarhuni's CDA membership over his dual citizenship (Libyan and American). See "Al-Bayda Appeal Court sacks Head of Constitution Drafting Assembly," *The Libya Observer*, 15 February 2016: <https://www.libyaobserver.ly/news/al-bayda-appeals-court-sacks-head-constitution-drafting-assembly>

other (divided) state institutions, which were exerting pressure to control the constitutional process,³⁰ the drafters' isolation in the eastern city of Al-Bayda initially succeeded in keeping the constituent body together and in it retaining a significant amount of legitimacy, something that other institutions were crucially lacking during this period. However, as the process moved forward, sustaining this neutrality would be increasingly difficult in addition to becoming politically irrelevant.

While the CDA initially attempted to focus exclusively on its drafting task, it was somewhat unrealistic to believe that it could address all constitutional issues while remaining disconnected from the main political factions. Far from being merely technical, some issues were indeed highly political and actually at the heart of the ongoing conflict, including debates on the country's national unity, identity and local governance and on the fair distribution of natural resources. The CDA's efforts to shield itself from the political competition, however, meant that the various political views could hardly be taken into consideration in their discussions, which in turn would prevent any strong political support for the draft constitution in the future.

The CDA's popular mandate also progressively started to erode as the body's interaction with Libyan citizens and civil society became scarcer. The remoteness of Al-Bayda and the tense security situation on the ground limited the accessibility of the CDA and rendered outreach events difficult to organise. Limited communication with the drafters further contributed to undermining positive perceptions of the CDA in the eyes of Libyans, as they felt that their concerns and demands were not seriously taken into consideration in the constitution-making process.³¹ It also resulted in limited popular knowledge of the constitutional issues and achievements, which is still visible today in the persistent misconceptions that many Libyan citizens have on the CDA's final draft.

Therefore, the CDA's isolation affected not only the extent to which the final draft could design an effective and politically sustainable functioning of Libya's future institutions, but also how much it could reflect the people's aspirations for their country. Eventually, it also further limited the place and relevance of the constitutional track in the broader political and peace negotiations.

As violence continued in the country, solving Libya's political crisis and institutional division became the focus of international mediation efforts. A political dialogue launched under the aegis of the United Nations (UN) at the end of 2014 with the goal of reaching a comprehensive peace agreement, including the reunification of the country's divided institutions, took place in parallel rather than in coordination with the constitutional process. The CDA members' decision to distance themselves from the political negotiations and their exclusion from them, however, became problematic as it resulted in the side-lining of the CDA, although the terms of the political dialogue were constitutional ones *par excellence*. Moreover, it meant that the CDA would have to operate and complete its work within any new framework that emanated from the dialogue without having a chance to contribute to its design or share its opinion on it. Only later did some of the CDA members realise the irrelevance of their choice and attempt to reconnect with the dialogue, but to no avail.³²

The Libya Political Agreement (LPA) that was reached in Skhirat, Morocco in December 2015 would indeed constitute the new roadmap for the remainder of the transition, and part of its legal framework. Interestingly, while it had been drawn up in complete disconnection from the constitutional process,

30 For instance, throughout the drafting process, Libya's competing parliaments both requested updates on the CDA's progress, putting the drafters in a difficult situation as reporting to one or the other parliament could be interpreted as taking a side in the conflict. Another concern of the drafters was to understand which of the rival legislatures would have the authority to review the final draft and submit it to a referendum.

31 Democracy Reporting International (DRI), "Civil society's sober assessment of the Libyan constitution-making process," Briefing Paper 71, April 2016. p. 3-4; p. 7.

32 Hammady, *op. cit.*, p. 159.

the LPA granted significant attention to the completion of the constitution. The document notably encouraged all parties to support the CDA's independence and enjoined the new unity government (GNA) to provide the constituent body with sufficient financial and logistical resources and to ensure its security.³³ However, it also set new regulations on the process, including the need to find a "suitable way for all the cultural components to participate in the work of the Assembly"³⁴ and the new deadline of 24 March 2016 for the CDA to complete its work. Should the CDA fail to conclude its task by this deadline, it would be replaced by a new committee composed of HoR and HSC members working jointly with the Presidency Council to reach a final decision on constitutional matters.³⁵ Thus, the UN was putting increased pressure on the CDA to finalise its work, pressure it would continue to sustain over the following months.

Heightened tensions and freezing of the process

In view of the growing tension within the CDA and as the UN-sponsored Skhirat agreement had set the completion of the constitution as an essential step in the transition, the United Nations Support Mission in Libya (UNSMIL), which had so far refrained from directly intervening in the constitution-making process, decided to take a firmer step to prevent its collapse. Hoping to speed up the process and to help solve the disagreements between the CDA members, and in view of the tense security situation in Libya, in March 2016 UNSMIL Head Martin Kobler convened them to a retreat in Salalah, Oman. This initiative, which had the aims of moving the process forward and also bringing back the boycotting cultural components, would eventually prove counter-productive and instead of solving the dissensions would create additional rifts.

Indeed, only 33 of the 58 CDA members agreed to take part in the negotiations, the others considering the UN involvement illegitimate and an infringement of Libyan national sovereignty.³⁶ On the side of the cultural components the invitation was received with suspicion. As a member of the Amazigh community noted, "the purpose of the meeting was not clear, and we did not receive an official invitation from the UN but instead from the Omani ambassador."³⁷ The Amazighs opted not to participate, but still communicated their views and demands to the other CDA members. The Tebus and Tuaregs agreed to negotiate but made it clear that this should not be interpreted as a return to the CDA, which they conditioned on being provided with clear guarantees and that any agreement reached in Oman should be considered binding on the CDA.³⁸ After several days of negotiations with a small delegation of CDA members on the constitutional provisions which they disagreed with, an agreement could be reached with the Tuaregs but not with the Tebus.³⁹ The latter reaffirmed their boycott of the CDA and their rejection of any of its outcomes not reached with consensus with the cultural components.⁴⁰

On their return to Libya and having reached consensus on several contentious issues, the CDA members resumed their meetings to move forward with the adoption of a new draft. As they still did not achieve the required majority of 2/3+1 to adopt the draft, the CDA members decided to amend the body's rules of procedure and lower the threshold to 2/3 of the CDA's effective members (57) rather than of

33 LPA, articles 48-49.

34 LPA, article 50.

35 LPA, article 52. To solve Libya's division between two parliaments, the LPA had provided for the establishment of a High State Council (HSC) composed in large part of former GNC members, alongside the elected House of Representatives (HoR).

36 Van Lier, *op. cit.*, p. 15.

37 Author phone interview with a member of the Constitutional Amazigh Movement, December 2021.

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

39 The persistent points of disagreement with the Tebus mainly related to the issues of identity, citizenship, the cultural components' languages and their representation in parliament and other state institutions, as well as local governance.

40 Wahli, *op. cit.*, p. 63.

the official members (60). The draft was eventually adopted on 19 April 2016 but was immediately rejected by the boycotters, who deemed the Salalah meetings and unfolding proceedings to be “illegal” and contradicting the Interim Constitutional Declaration.⁴¹ They denounced their colleagues’ attempt to impose “a flawed draft” based on a false consensus and decided to bring the case to the courts. The Administrative Chamber of Al-Bayda’s Court of Appeals eventually ruled against the changing of the CDA’s voting quorum and annulled the adoption of the draft.

The CDA members bowed to the court’s decision, but after this first judicial challenge the constitution-making process remained frozen for close to a year.

Mediation efforts and the difficult birth of the final draft

The court’s decision constrained the drafters to reopen and revise the draft constitution, a demand of the boycotters that would eventually pave the way to their return to the negotiation table. This achievement and the resumption of the constitutional process, however, were also results of intensive mediation efforts conducted during this period to put the constitution-making process back on track.

The Libyan non-political organisation known as the ‘Peacemakers’⁴² was at the centre of these efforts and undertook two parallel initiatives: one aiming to resolve the divisions between the CDA members, and in particular between the supporters and boycotters of the April 2016 draft (or Salalah draft); the other intending to bridge the gap between the CDA and the various components of Libyan society.

Several encounters took place in Tunis between October 2016 and May 2017 to reach these objectives. On the one hand, the Peacemakers mediated between the CDA members, helping to rebuild trust between them and identifying the points of contention in the draft and possible ways to address them. On the other hand, the meetings brought together CDA members with several social leaders and representatives of cultural minorities, state institutions (HSC, HoR...) and political parties, etc., to discuss their views and concerns about the draft. Extensive efforts were also conducted on the ground to reach out to local communities during this period.⁴³

Both the CDA members and the mediators were aware of the need to move the process forward and reach its completion, as the CDA was being put under significant pressure. The drafters’ inability to produce a consensual draft after their years of work was being increasingly criticised in Libyan public opinion and on the political scene, and calls to dissolve the CDA and replace it with a new body could already be heard. These efforts thus appeared to be the last chance to keep the constitutional track in the hands of the CDA. Therefore, their ultimate goal was either to ensure the production of a truly consensual draft constitution that could be adopted as Libya’s permanent constitution or to reach the most advanced level of consensus on a draft that could later serve as a basis for the future authorities that would be in charge of completing the constitutional path.

The Peacemakers’ efforts eventually enabled the resumption of the CDA’s work, and in particular the setting-up of a Consensus Committee (CC) within the CDA. In March 2017, the drafters elected from among themselves a 12-member committee (6 supporters and 6 opponents of the Salalah draft), whose main task was to address the contentious points in the draft and come up with a unified document to be debated by the CDA plenary. While the committee failed to solve all the issues – the form of the state and local governance remaining the main bones of contention – it was still able to present

41 Boycotters’ press conference, 19 April 2016: <https://www.youtube.com/watch?v=uKjEdKvObt4>

42 The ‘Peacemakers’ network is an initiative launched in 2015 by young activists from different regions of Libya with the aim of fostering reconciliation and building a peace culture in the conflicting country. They have acted as mediators between communities involved in various local conflicts and between 2016 and 2017 between the constitution drafters.

43 Peacemakers’ meeting reports, November 2016; March 2018.

a revised draft for discussion in the plenary. However, members of the CC who had objected to the chosen structure of the state and local governance and others demanded that not only the CC's draft but also alternative drafts be discussed and voted on by the plenary, thus leading to a further delay in the adoption process.

The CDA, however, made a decision to leave room for anyone who had an alternative proposal to present it for discussion, so that no member would consider that he/she had been marginalised and neither would the final draft be regarded as having been imposed by one side.⁴⁴ Various options were therefore debated in depth, but only the CC's draft eventually obtained the required majority, and was approved by 43 of the 44 attending members on 29 July 2017.⁴⁵

This last stretch of the constitution-making process, however, took place in a context of heightened political tension, and efforts to hamper the completion of the process came not only from within the CDA but also from outside. In June 2017, as the CDA had made significant progress and was close to completing its final draft, HoR Speaker Aguila Saleh called for the dissolution of the constituent body and its replacement with an appointed body. While this call was welcomed and supported by the eastern federalist current, it provoked the ire of the CDA, and in particular its president Noah Al-Maghribi, who denounced this attempt to put an end to the work of an elected body as an "infringement against the will of the people who elected the CDA members" and called on security forces and civil society to protect the CDA members.⁴⁶ This was indicative of the political tensions that surrounded the constitutional process, but further emboldened the CDA members in their determination to complete their work and prove wrong those who were expecting them to fail.

The call to protect the CDA was actually not misplaced as on the day of the vote protesters and rioters stormed the CDA building in an obvious attempt to prevent the vote. The CDA president, however, refused to interrupt or postpone the procedure and the vote was completed with the support not only of more than 2/3 of the CDA members but even a majority from each of the three regions.⁴⁷ The CDA immediately notified the state authorities, calling on them to take the necessary steps to hold the constitutional referendum.

Challenges were, however, still lying in the path towards the referendum. Ten of the CDA's original members issued a declaration that rejected the draft and several cases were brought to the courts to invalidate the vote. The Administrative Court of Al-Bayda ruled in August 2017 against the validity of the draft,⁴⁸ a ruling that was eventually overturned by the Supreme Court in February 2018 with the argument that administrative courts had no jurisdiction over matters related to the CDA. However, while this decision should have closed the debate and paved the way for the adoption of the draft constitution in a popular referendum, the process has remained blocked since then.

The court's decision, indeed, was deemed invalid by several eastern members of the HoR, who also

44 CDA member H. Abu Hamra in the TV programme "Liqa' khas" [Special encounter], Part 1, *Libya Al-Ahrar TV*, 29 April 2018: <https://www.youtube.com/watch?v=qpE2y3TjZG8>

45 A CDA member noted that the support for the draft was even greater and that some members who were in favour of it could not attend the voting session for logistical reasons.

46 "Ra'is al-barlaman al-liby yotlob hal hay'at siyaghat al-dostor" [The president of the Libyan parliament demands the dissolution of the constitution drafting body], *Al-Arab*, 17 June 2017: <https://alarab.co.uk/يبيلل-اناملربلا-سييئر-روتسدللا-ةغايص-ةي-ه-لح-بيلطي>

47 15 members from the west, 11 members from the east and 17 members from the south. The CDA members who voted in favour of the draft also represented all the electoral constituencies.

48 The Court's main argument was that there had been a violation of procedure as the vote took place at a weekend (Saturday) in violation of the CDA's working rules. The cultural components also argued that the vote infringed the provision in the Interim Constitutional Declaration requiring consensus to be reached with the cultural minorities on issues related to them – an argument that they continue to use today to contest the validity of the draft.

rejected the draft constitution that was submitted to the parliament for approval. They demanded instead that the 1951 Constitution be amended and used as the constitutional basis for the country. Their staunch opposition was also among the reasons that contributed to the late adoption of the referendum law by the HoR in September 2018, i.e. more than a year after the completion of the draft constitution by the CDA. Delays in passing this legislation, caused in particular by the repeated lack of a quorum and disagreement among parliamentarians over several articles,⁴⁹ were denounced by the CDA members and other Libyan actors as intentional “delaying tactics” by some HoR members, including the Speaker, to prevent the adoption of a draft constitution which they disapproved of.⁵⁰ It was even less understandable in their eyes that a mixed committee composed of members from the CDA, the HoR and the Libyan High National Election Commission (HNEC) had already prepared a draft law for discussion in the parliament, which should have fastened the passing of this law.⁵¹

The law adopted also proved highly controversial as it provided for Libya to be divided into three electoral constituencies for the referendum (Tripolitania, Cyrenaica and Fezzan) with a requirement that the draft constitution had to be approved by a 50%+1 majority of the voters in each region in addition to the 2/3 national majority stipulated in the Interim Constitutional Declaration. This addition necessitated an amendment to the Constitutional Declaration that was passed by the HoR in November 2018 amidst intense contestation.⁵² Not only were doubts raised about the quorum to pass the amendment but the lack of consultation with the HSC on this issue was also considered a violation of the LPA.⁵³ The content of the amendment itself was deemed discriminatory and unconstitutional as, with the division of the country in three constituencies, it introduced an electoral system in which votes had unequal weights according to the region, thus contradicting the principle of equality of citizens enshrined in the Constitutional Declaration.⁵⁴ Both the referendum law and the constitutional amendment were therefore rejected not only by the CDA and the HSC but also by some HoR members, further widening the political divide between the two chambers and also within the HoR. Despite the filing of a lawsuit before the Constitutional Chamber of the Supreme Court in this regard and a revision of the referendum law in January 2019, the controversial issue remained unresolved. This point of disagreement and other practical challenges (including the HNEC’s lack of funding) eventually hampered the holding of the constitutional referendum, the fate of which now remains in

49 One of the main points of contention was whether the draft constitution should be sent back to the CDA for revision if it were rejected by the people in the referendum, as provided for in the Interim Constitutional Declaration. Some parliamentarians opposing the draft pushed to move this prerogative to the HoR. The final version of the referendum law remained unclear on this point.

50 Najjair, H., “Parliament blocking all alternatives to pass referendum law,” *The Libya Observer*, 5 July 2018: <https://www.libyaobserver.ly/inbrief/parliament-blocking-all-alternatives-pass-referendum-law>; “Mashru’ qanun al-’astafta’ karthy” [The draft referendum law is ‘catastrophic’], *218TV*, 17 January 2019: <https://www.218tv.net/عورشم-يروضنملا-بشراك-ءاتفتسالا-نوناق>

51 CDA member H. Abu Hamra on the TV programme “Liqā’ khas” [Special encounter], Part 2, *Libya Al-Ahrar TV*, 29 April 2018: <https://www.youtube.com/watch?v=apLryEb4sdc>

52 Constitutional Amendment No. 10 of November 2018.

53 The LPA indeed stipulates that the HoR and HSC “shall commit to achieve consensus among themselves” to agree on any amendment to the Constitutional Declaration. LPA, Additional Provisions, art. 12.

54 American Bar Association, “In Search of Lost Legitimacy: The Constitutional Process in Libya. Legal Analysis and Review of the Possible Constitutional Basis for Future Elections in Libya,” 2019, p. 41; Alharathy, S., “MP Sayala: Recent amendments on constitutional declaration run against basic norm of citizenship rights,” *The Libya Observer*, 29 November 2018: <https://www.libyaobserver.ly/inbrief/mp-sayala-recent-amendments-constitutional-declaration-run-against-basic-norm-citizenship>

the hands of the UN-led political dialogue.⁵⁵

Despite the difficulties and pressure facing the CDA over the three years of the drafting process and until the last moment, and despite the drafters' initial divisions, which at first seemed unbridgeable, and the blockages that reached their peak in 2016, the drafters eventually made the decision to come back to the negotiation table, compromise and produce a final draft that a broad majority of them supported – to general surprise. The main questions here are therefore: Why did the drafters make the choice to compromise? What is the compromise about? How does it reflect in the final draft?

2. The CDA's draft: a 'bargaining constitution'?

The content of the CDA's final draft inevitably reflected the difficult conditions of its emergence. Overcoming initial and long-standing disagreements between extremely diverging views and conceptions of what a future Libyan state should look like and reaching a common ground that could satisfy most groups' demands and assuage their concerns proved a challenging exercise. Despite the drafters' ultimate efforts to iron out some of the major controversies, as a Libyan scholar noted, the final result appears more a "bargaining constitution" than a coherent national project or social contract.⁵⁶

Consensus was mainly reached at the expense of providing clear and specific solutions to Libya's most crucial problems. The wording of the constitutional articles often remains general and sometimes imprecise. The most sensitive issues have been deferred to future legislation rather than being addressed head on, and even some provisions enshrined in previous drafts (notably the preceding April 2016 draft) and regarded by some as achievements (on citizenship rights for instance) have been cancelled.

This way out of the constitution-making process can legitimately be understood, as the CDA members were faced with the challenging task of completing their drafting task and restoring constitutional life to the country – a key condition for a return to institutional stability – while they could not reach agreement on a number of sensitive issues. Nevertheless, it left some actors uncomfortable with the draft and may also render effective implementation of the constitution in the future more complex.

Leaving aside the technical flaws of the document, this section will attempt to shed light on some of the remaining conflicting points in the draft and how they reflect the drafters' efforts to compromise but also their limits. It does not aim, however, to provide an extensive assessment of the CDA's draft, which can be found elsewhere.⁵⁷

55 The members of the constitutional committee within the Libyan political dialogue (LPDF) eventually reached an agreement to retain the 50%+1 majority requirement per region while removing the 2/3 majority nationwide from the referendum law, and to cancel lawsuits against the referendum law and the constitutional amendment (Hurghada meeting, 19-22 January 2021). However, at this point in the negotiations, it remains unclear whether these arrangements will be retained in the final outcomes of the LPDF and whether the referendum will take place at all. Participants in the dialogue indeed have recently acknowledged the practical difficulties in holding the referendum before the general election planned for December 2021 and made it clear that priority would be given to the election if the referendum could not be held on time (Hurghada meeting, 9-11 February 2021).

56 Dr. Ibrahim Abu Khazam's comments on the draft constitution at the Libyan Institute for Advanced Studies conference, 18 October 2017, available at: <https://www.youtube.com/watch?v=PsYRN9my9xM>

57 See, for instance, Al-Ali, Z., "Libya's final draft constitution: a contextual analysis," International IDEA, December 2020: <https://constitutionnet.org/vl/item/libyas-final-draft-constitution-contextual-analysis>

Fundamental principles

The chapter entitled ‘Form of the state and its fundamental principles’ that opens the CDA’s draft constitution is an immediate illustration of the difficulties faced by the drafters in agreeing on a shared vision for Libya. While constitutions usually start with a preamble that offers a common narrative of the country’s history, identity and core values, the lack of agreement between the drafters on the one-page preamble contained in the April 2016 draft eventually resulted in it being dropped.⁵⁸ Some of its main elements were relocated in Chapter 1, while the most controversial ones were simply removed. The first chapter also contains a number of provisions reflecting the drafters’ difficulties in reaching a common agreement, including core elements of what constitutes the basis of a state (flag, anthem, capital, source of legislation), which were addressed by working around the difficulties and providing consensual (non-)solutions.

a. The flag and anthem

These topics proved divisive both within the CDA and beyond, and count among the issues that best reflect the drafters’ efforts but also their limits in agreeing on a common understanding. Debates around the symbols of the Libyan state go beyond the sole CDA frame and are underlined by the deep ideological divides that shape Libyan society. Making a decision in favour of one view or another was therefore a risky exercise that the drafters eventually decided to avoid.

The main fault line in the constitutional debates was between supporters and opponents of the flag and anthem currently in use in Libya. These were the ones used on the country’s accession to independence in 1951 and they re-emerged during the 2011 uprising after Qadhafi had side-lined them during his rule. Therefore, for their supporters, and in particular the easterners, they represent both historical continuity and symbols of liberation from the authoritarian regime, which explains their uncompromising demand to constitutionalise these symbols and no others.⁵⁹ On their side, sympathisers of the former regime and others who had been oppressed under the post-independence monarchy could hardly accept them as the symbols of the nation. Exploiting this debate, some Amazighs also expressed the hope that their own flag could enter the picture.

After intense negotiations and consultations with Libyan citizens through outreach events, and in view of the context of heightened tension and regional division in which the drafting process took place, the drafters eventually opted for what they deemed the most reasonable and less conflictual solution. It was twofold:

- to maintain the status quo by keeping the current flag and anthem for the time being (art. 197);
- to leave the final decision to be taken by the future parliament (art. 5), i.e. a body that would be democratically elected by the people and would therefore represent the diversity of their views. Moreover, a condition that the related legislation must be approved by a strengthened 2/3 majority of the members of the Chamber of Deputies was an additional guarantee to ensure broad national support for any future decision and avoid the final choice being perceived as having been imposed by one side or another.

58 One of the main issues of disagreement on the preamble between the drafters was about which historical references to mention, with diverging views being defended by monarchists, supporters of the former Qadhafi regime, revolutionaries and others.

59 CDA member A. Qaddura from Benghazi on the TV programme “Nafidha ‘ala al-watan” [A window on the nation], *Libya Al-Watan TV*, 16 June 2017: <https://www.youtube.com/watch?v=AefmoMnN09U>

b. The capital

Establishing Libya's capital was another controversial issue that triggered heated debates in the CDA – as much as it had done in the 1951 constitutional committee – and remained a serious bone of contention until late in the drafting process.

This issue has a strong symbolic dimension but also a practical one in the Libyan context, in particular in view of the country's historical background and the more recent political developments. The independence constitution of 1951 had initially established a federal state – thus giving some weight to the country's three regions – and enshrined Benghazi as the country's second capital (although more symbolically than effectively),⁶⁰ before Qadhafi replaced it with a regime centralised around Tripoli. Since 2011, with the outbreak of the February uprising in the east, demands for greater regional autonomy and to restore Benghazi as a capital have grown more vocal, especially in the ranks of the federalists.

The constitutional debates therefore had to address the aspirations of the various sides, in particular the easterners' concern that their region could face renewed marginalisation, while the westerners favoured maintaining the centralisation of power in Tripoli that had prevailed over the previous decades. The options envisioned therefore ranged from defining Tripoli or Benghazi as the sole capital to defining both cities as capitals, or excluding both cities and choosing one in the centre of the country such as Sirte. The context of ongoing conflict and regional division, where calls for secession could be heard from the east and, to a lesser extent from the south, also weighed on the drafters' final decision.

The agreement reached was actually in line with the drafters' whole vision for the state structure (see below), which aimed both at ensuring the unity of the state and at addressing local and regional concerns for recognition and a greater share of power. The CDA members therefore explicitly excluded the choice of multiple capitals for the sake of maintaining the symbolic unity of the country, and defined Tripoli as Libya's sole capital (art. 3). In practice, however, they enshrined additional unofficial capitals by spreading the main state institutions among other cities – both chambers of parliament in Benghazi (east) (art. 90), which would become the “legislative capital” of the country, and the Constitutional Court in Sabha (South) (art. 135), the “judicial capital.”⁶¹ This appeared to be a clear concession made to the regions, offering them more weight in the country's decision-making process and a guarantee that a return to a centralisation of power in the west would be avoided.

c. Sharia as a source of legislation

The issue of the place of Sharia in the constitution proved controversial during the drafting process, as the drafters had to take into consideration not only their own diverging positions on this sensitive matter, but also the Libyan society's and in particular the religious institutions' views.

However, the general debate in Libya had less to do with whether Sharia should have a role in the country's legislation and more with which role it should play and what level of detail needed to be included in the draft constitution.⁶² With opinions ranging from considering Sharia the sole or main

60 Al-Baba, I., “Benghazi fi mashru' al-dostor al-liby” [Benghazi in the Libyan constitution project], 23 October 2020: <https://www.facebook.com/ibrahim.elbaba.5/posts/3445220175545286>

61 CDA member H. Abu Hamra on the TV programme “Liqa' khas” [Special encounter], Part 2, op. cit.

62 Studies have shown that an overwhelming majority of Libyans support enshrining Sharia in the constitution and believe that it should be a source of legislation including, for a significant number of them, a main source of legislation. Secular-minded currents that believe Sharia has no place in the constitution do exist in Libya but they remain extremely marginal. For details, see the 2013 National Comprehensive Survey on the Constitution conducted by the University of Benghazi, February-March 2013, available at: <https://constitutionnet.org/vl/item/lybya-ntayj-almsh-alwtny-alshaml-hwl-aldstwr-jamt-bnghazy-2013>

source of legislation to enshrining additional sources, including “international agreements that do not contradict the Sharia,”⁶³ reconciling all views was no easy exercise.

Efforts to reach an agreed formula appeared in the evolution of the text, which, after having experienced several changes, ended up with a very general formula defining Islamic Sharia as a “source of legislation” (art. 6) without any further specification. Despite constituting a simplified and less controversial version of the previous draft,⁶⁴ and aiming to satisfying all, this formula still remains contested, especially when read alongside other provisions in the draft. For some religious authorities, the draft contains several provisions that would contradict the principles of Sharia (notably the freedoms of thought, expression and association without legal restrictions and the principle of equality between men and women before the law, etc.).⁶⁵ Other groups argue that the drafters, with this and other provisions (such as the condition that the president must be a Muslim from both Muslim parents, and parliament members must be Muslim too) attempted to “impose a religious stamp,” which could lead to the “establishment of an Islamic system in the long run.”⁶⁶

On their side, however, the drafters consider that they reached an acceptable balance regarding the place of religion in the draft, as the Sharia provision is only part of a larger whole that also includes an extensive catalogue of rights and freedoms protected by the State (arts. 31-66), the supremacy of international agreements over the law (but still below the constitution; art. 13) and a constitutional court tasked with both safeguarding these rights and ensuring the compliance of any legislation with the constitution (art. 139) – including Sharia.⁶⁷

Identity, citizenship and minorities' issues

The complexity of these issues is rooted in large part in Libya's long history of social, regional and ethnic discrimination and marginalisation, but also in their current political and social implications. The related constitutional debates therefore proved difficult, in particular taking into consideration each side's sensitivities, addressing high demands and expectations, and reconciling legitimate but sometimes uncompromising positions with what could realistically be included in the draft constitution. Continuing discussion with the cultural components on issues related to them and keeping channels of communication open even after they boycotted the CDA was another challenge that further encumbered the debate.

a. State identity

Reaching a commonly accepted definition of the Libyan State identity and overcoming a deeply entrenched feeling of exclusion, particularly among the country's cultural and linguistic components, proved to be one of the CDA's most challenging tasks. The cultural components were the most demanding, wishing to make a definition that could be sufficiently comprehensive to include their own specificities and curb the perceived 'Arab domination' that had prevailed during the Qadhafi regime. The drafters made efforts to address these concerns, but the related provisions reflect their difficulties in meeting sometimes high demands.

63 Ibid.

64 The April 2016 draft provided that “(...) Islamic Sharia shall be the source of legislation in accordance with the recognised doctrines and interpretations without being bound to a particular jurisprudential opinion on discretionary matters (...)” (art. 8) and raised serious controversy about the risk of manipulation of the “recognised doctrines and interpretations.”

65 “’Ifta’ al-hokoma al-mo’aqata: hadha howa al-ra’y al-shar’i fi meswadat al-dostor” [Ifta of the temporary government: this is the legal opinion on the draft constitution], *Al Marsad*, 2 August 2017: <https://almarsad.co/2017/08/02/اءاتف-شلال-يأزل-وه-اذه-تتقوئل-اموكحل>

66 Author phone interview with a member of the Constitutional Amazigh Movement, December 2020.

67 Author phone interview with a CDA member from Sirte, February 2021.

As a direct answer to the cultural groups' concerns, the name of the State was kept as the 'Libyan Republic' (art. 1), dropping the "Arab" element from the Qadhafi era, which was considered to be discriminatory against Libya's non-Arab communities. Libya's Arab belonging was only referred to in a successive article, among and on an equal footing with Libya's other geographical and ideological affiliations ("the Arab nation, Africa, the Islamic World and the Mediterranean basin," art. 2). However, this definition is still contested by the Amazighs, who see it as denying the Berbers' place in Libya's history and, as a member of the Amazigh Supreme Council noted, as an attempt to forcibly integrate the Amazighs in a common narrative and "into a state that does not reflect the reality of the Libyan people."⁶⁸

Libya's multiculturalism and multilingualism were also acknowledged and enshrined as part of the Libyan identity in the draft constitution (art. 2), a step that has been positively received by both external observers and Libyan minorities, except for the Tebus, who demanded that the various components making up the Libyan identity (Amazighs, Tuaregs and Tebus) be named in the draft, as was done in the Interim Constitutional Declaration (art. 30).⁶⁹ The CDA drafters instead opted for the more general formulation "social, cultural and linguistic components."

b. Citizenship

Even more challenging for the drafters was to delimitate who is to be considered a Libyan. Citizenship remains a highly sensitive topic in Libya in view of its broad political and social implications. Libya inherited a legacy of complex and constantly changing citizenship rules, combined with often arbitrary administrative implementation shaped by local rivalries and interests, which left thousands of people in legal limbo, including large fringes of Libya's cultural and linguistic minorities.

In view of this background, in the aftermath of Libya's 2011 uprising expectations were high that citizenship issues could be solved and more clearly defined in the country's new constitution. This explains the heated constitutional debates that arose and the difficulties facing the drafters in reaching a consensual formula. The compromise reached in the final draft was eventually to defer citizenship regulation to legislation (art. 10) – thus moving backwards from the previous draft, which provided a more specific definition of Libyan citizenship and rules for its attribution and removal – while also deciding to freeze citizenship attribution for the next ten years (art. 186). Both articles could have significant consequences for different groups of actors, explaining their current opposition to the draft.

Women: Despite the CDA's significant achievements in the field of women's rights, no agreement could be reached on the right of women to transmit their nationality to their children. This remains a touchy subject in Libyan public debate⁷⁰ and despite the hopes and pressure from women rights organisations to reach an improvement in this regard, the drafters found it more appropriate to defer the issue to the next parliament. This constituted a move backward from the wording of the April 2016 draft, which stipulated more explicitly that "is Libyan anyone born from a Libyan mother (as regulated by the law)" (art. 12), but the drafters insisted that despite the lighter formulation the intent was still the

68 "Al-'amazigh wa al-tawaraq yo'aliqona mostaqbal doston Libya al-jadid" [The Amazighs and Tuaregs suspend the future of Libya's new constitution], *Maghreb Voices*, 31 July 2018: <https://www.maghrebvoices.com/2018/07/31/الغيزامال-ديدجلال-ايبي-ل-روتسد-د-لبقتسم-ن-وقل-غي-قراوطل-او>

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

70 According to existing legislation (Law No. 24 of 2010 on Libyan Nationality), Libyan women can theoretically transfer their nationality to their children even if married to a non-Libyan. In practice, however, the implementing regulations include complex procedures and restrictions that render the legal provision ineffective and perpetuate a discriminatory approach to women. For further details on this issue, see "Libyan Women Married to Foreign Nationals: Oppression and Stateless Children," Euro-Mediterranean Human Rights Monitor Report, January 2019: <https://euromedmonitor.org/uploads/reports/libyanwomanENG.pdf>

same. According to them, any future legislation preventing women from transmitting their citizenship to their children would run against the constitution since article 7 stipulates that “men and women are equal before the law.”⁷¹ This is a clear example of how the drafters, while still convinced of their objective, had to compromise and find a less controversial wording to ensure that the final draft would gather the largest consensus.

Holders of dual citizenship: While the CDA achieved a breakthrough by allowing the possibility for Libyans to acquire a second citizenship without losing that of Libya,⁷² the prohibition of a person holding dual nationality from occupying several senior positions in the state institutions triggered heated debates between the drafters and continues to raise controversy on the Libyan scene.⁷³ This issue remains sensitive as it directly relates to the ongoing political dynamics in Libya, and in particular to the declared presidential or government ambitions of a number of prominent bi-national figures, including Khalifa Haftar. The staunchest opposition during the constitutional debates therefore mainly came from Haftar’s supporters and eastern federalists, who believed that the provision intentionally aimed to exclude specific personalities from the presidency and asked for its removal. Other CDA members remained uncompromising on this point, deeming it unacceptable that elected representatives, and in particular the president of the republic, could have dual loyalties.⁷⁴ The only concession made to rally the easterners was to reduce the period for presidential candidates to renounce their second nationality from five years to one. However, they persisted in their demand to have this provision removed, thus preventing any further agreement from being reached.

Cultural minorities: Libya’s cultural minorities are probably those who suffered the most from Qadhafi’s inconsistent nationality regulations, particularly his policy of forced Arabisation, which resulted in non-Arab minorities often being discriminated against and even those living in the border regions being pushed to move to neighbouring countries.⁷⁵ During the 2011 uprising, the collapsing Qadhafi regime attempted to reverse these policies in order to regain support among the cultural communities, but it is alleged that Libyan citizenship was also granted to foreign mercenaries backing the regime forces during this period.⁷⁶ This explains the later efforts by the transition authorities to revise what they regarded as fraudulent citizenship attributions, but which in turn negatively impacted large fringes of the cultural communities, leaving some of them in a situation worse than before.

The constitutional debates therefore took place against this complex background and were shaped by the tension between the cultural minorities’ demand to redress this historical injustice and unflinching determination to be recognised as part of the Libyan nation, and the drafters’ concern that liberalising the rules governing citizenship could weaken the Libyan social fabric. The eventual way out for the drafters was to transfer the responsibility to settle such a sensitive issue to the next legislature, and

71 See Altubuly, A., “Miswadat al-dostor al-’akhira wa tasa’ulat al-shabab wa al-shabat” [The last constitution draft and young men and women’s questions], Together We Built It Organisation, 17 May 2017: <https://togetherwebuildit.org/ar/يل-ال-يف-وض-ع-عم-امي-بن-بن-عم-ت-اباش-راوح/>

72 This possibility was tightly restricted under previous legislation and forbidden under the 1951 constitution.

73 The restriction included in the CDA’s final draft applies to members of both parliamentary chambers (art. 69; art. 76), government members (art. 113), members of the constitutional court (art. 138) and above all presidential candidates. The latter shall “not have previously acquired any other nationality, unless they legally relinquished it a year before the date of opening candidatures” (art. 99).

74 CDA member H. Abu Hamra on the TV programme “Liq’ khas” [Special encounter], Part 2, op. cit. As Abu Hamra noted, this restriction had also been “a recurrent demand of the people” during the encounters of the CDA members with Libyan citizens.

75 Van Waas, L., “The Stateless Tebu of Libya?,” Tilburg Law School Legal Studies, Research Paper Series No. 010/2013, p. 5.

76 Stocker, V., “Citizenship on hold: Undermined legal status and implications for Libya’s peace process,” European Institute of Peace, Policy Paper, July 2019, p. 9-10.

also to the judiciary. Indeed, in addition to freezing citizenship attribution and leaving the decision on citizenship regulation to the next parliament, the drafters also included a transitional provision requiring the creation of a judiciary committee established by the High Judicial Council tasked with reviewing the cases of citizenship attribution since 15 February 2011 (art. 186, para. 4). These provisions, and in particular the last one, which seemingly aimed to address the issue of naturalisation of foreign fighters, however, failed to be accepted by the cultural components as temporary alternatives until a long-lasting political solution could be found. The Tebus in particular, as the largest group that had benefited from regularisation since 2011, felt directly targeted by the revision measure, and considered the drafters' decision to be a mere continuation of the Arab majority's discriminatory policies against their community. Although the wording was softened in the final draft in order to appease their concerns – an earlier version of the article stated that “all post-2011 naturalisations contrary to the [2010] citizenship law shall be repealed” – it was still deemed unacceptable by the Tebus, who consider the citizenship issue non-negotiable, and was one of the main causes of their boycott and of their current opposition to the final draft. On their side, the Tuaregs, another group that has been affected by nationality issues, are more divided. While some consider that some positive progress has been made in the constitution draft, which has been endorsed by one of the two Tuareg CDA members, Tuareg constituencies are somewhat mistrustful that these provisions would give an incentive to the state authorities to move actively in settling citizenship issues.⁷⁷

c. Minorities' rights and representation

Issues related to the rights and representation of Libya's cultural and linguistic components have been sensitive from the outset. The constitutional debates were shaped by mistrust as a consequence not only of the marginalisation experienced by local communities under the Qadhafi regime but also by controversy around their limited representation and participation in the constitution-making process.

Moreover, the discussions were rendered more complex by the drafters' divergent perspectives on what could be legitimately required and enshrined in the final draft. The cultural components, in view of their past experience, could hardly compromise on what they considered to be their 'natural rights.' For other drafters, however, these groups were regarded as sometimes too demanding despite their efforts to address their demands to the extent possible and to reach out to them even while they were boycotting the CDA's debates.

Overall, most CDA members consider the final draft to be “balanced with regard to minorities' rights” and even that significant achievements have been made on this matter.⁷⁸ The cultural components are themselves divided. Some eventually commended the efforts made by the CDA in this regard⁷⁹ and deemed the acknowledgment of minorities' rights and specificities in the constitution as a breakthrough in Libya's history and a step in the right direction.⁸⁰ Others, however, still consider that these issues were “not given serious consideration by the CDA members” and that the draft is below their expectation of being granted their complete rights.⁸¹

Cultural and linguistic rights: These were controversial topics during the constitutional debates and one of the reasons for the Amazighs' boycott of the constitution-making process from its outset. As

77 Stocker, op. cit. p. 21.

78 Author phone interviews with various CDA members. See also CDA member I. Al-Baba on the TV programme “Niqash Libya” [Libya's Talk], *Youtube*, 17 May 2016: https://www.youtube.com/watch?v=Wyban2_NRnA

79 Author phone interview with a civil society activist from the Amazigh community, December 2020.

80 I. Hallaq, CDA member from the Tuareg community, quoted in “Al-'amazigh wa al-tawaraq yo'aliqona...,” op. cit.

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

the largest minority group in Libya, they felt that the limited representation granted to them and other cultural components in the CDA and the decision-making procedures chosen would hardly enable the fulfilment of their specific demands.⁸² The Amazighs were the most demanding regarding the recognition and promotion of their language and culture, in particular requesting that the Tamazigh language be elevated to the level of a state language alongside Arabic. While this could not be achieved, the drafters still made significant steps to improve the cultural components' status at the constitutional level, particularly by enshrining Libya's multiculturalism and multilingualism in the draft and explicitly referring to the Tamazigh, Targhey and Tebu languages as part of a common Libyan heritage that must be protected by the state (art. 2; art. 55). Nevertheless, provisions related to the expansion and integration of these languages in Libya's public life proved more complex to address and were eventually deferred to the next parliament. This choice remains a concern for the cultural components, which fear that it could remain mere ink on paper as a forthcoming parliament may not be favourably disposed towards the cultural minorities, and that they themselves may only have limited representation in the next parliament to be able to defend their rights.

Representation in state institutions: The representation of minorities in state institutions was part of the broader debate on Libya's future political system, and was a cause for heated discussions among the drafters. Having been deprived of any significant political participation under the former regime, the cultural components demanded to be granted specific representation in the state's main bodies. However, the provisions eventually retained in the final draft remain below their expectations, therefore seemingly justifying their initial concerns that their voices would remain marginal in the CDA and their eventual boycott.

Regarding their representation in the Chamber of Deputies (the lower chamber of parliament), the text enshrined a general formula, stipulating that the composition of the Chamber shall "ensure a minimum representation of the cultural and linguistic components" (art. 68) without providing a specific threshold. Amazighs and Tebus in particular insisted that the draft should include a clear quota⁸³ – the Amazighs suggested 3% for themselves and 3% for other communities⁸⁴ – while other drafters opposed the idea of including any quotas in the draft since the total number of deputies had not yet been defined.⁸⁵ For the Senate (the upper chamber of parliament), the relevant article is slightly more detailed, ensuring a minimum representation of "two members for each component" (art. 75), a figure, however, deemed insufficient by these communities. This specification was justified by the fact that the number of Senate members was known (78) and explicitly mentioned in the draft. Nevertheless, the Amazighs suggested that the figure should be raised to 3 or possibly 4 seats.⁸⁶

Another of their concerns related to their representation in the independent constitutional bodies enshrined in Chapter 7 of the draft. While the draft provided that the National Council for Human Rights (art. 159) and the National Council for the Protection of the Cultural and Linguistic Heritage (art. 160) shall both "take into account the representation of cultural and linguistic components," these groups and notably the Tebus, wanted to broaden this representation requirement to additional bodies, including the High National Election Commission, the Commission for Sustainable Development and

82 Author phone interview with a civil society activist from the Amazigh community, December 2020.

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

84 Over the last few months, the Amazigh community has organised several meetings in the southern city of Yefren to discuss the CDA's final draft and collect views and demands on possible revisions of the draft to be transmitted to the national authorities. The outcomes of these meetings were consolidated in a common document, hereinafter referred to as 'the Yefren document.'

85 CDA member H. Abu Hamra on the TV programme "Liqā' khas [Special encounter]," Part 1, op. cit.

86 The Yefren document.

the High Council on Information and Media, which they consider essential to safeguard their rights.⁸⁷ The whole debate in this regard, however, was biased by the drafters' different views on which issues are directly related to the minorities and on which ones they can have a say. The cultural components therefore regret that their representation in the constitutional bodies has been limited to the bodies that were considered to be directly related to the protection of their rights, but in a restrictive sense.

Form of the state and local governance

This has been one of the most divisive issues within and outside the CDA during the last few years, and remains a serious point of disagreement between the supporters and opponents of the final draft. The wording of this chapter is probably the one that most reflects the drafters' efforts at compromise.

The drafters had to work against the background of previous regional inequalities and marginalisation by an overly centralised power in Tripoli, and to reconcile demands for greater autonomy from the eastern federalists and some cultural components, on the one side, with the need to maintain the country's national unity on the other. This task was rendered even more challenging in the context of political and territorial division in which the constitution-making process took place.

Among the drafters, views ranged from a federal state on the model of the 1951 constitution to a unitary one with different levels and forms of decentralisation. Positions were, however, not clear-cut and kept evolving during the negotiations, while also being influenced by the changing political context, which most probably determined the drafters' final decision. Reaching an agreement on this issue also became more complex as divisions started to appear among representatives from each region (in particular after the Salalah retreat). On the eastern side in particular, as one of their representatives observed, "there has never been a clear consensus" and some eastern members who initially staunchly advocated for a federalist model eventually rallied to the idea of a unitary but decentralised state.⁸⁸

Compromise clearly appears in the form of state eventually chosen which, as a CDA member noted, does not "fit into any specific academic categorisation" but "displays features of both a federal state and a unitary state while being adapted to the specificities of Libya."⁸⁹ While a federal structure had been seriously envisioned, the final draft instead provides for a unitary state – insisting on its indivisible nature (art. 1) – with an "expanded" decentralisation based on governorates and municipalities (art. 143-144). However, the text only mentions the main guidelines and principles on which to build this system (the legal personality, administrative and financial independence of the local units, the principle of subsidiarity in the repartition of prerogatives, the elections for local assemblies, etc.) and remains silent on the core of the model, i.e. the prerogatives of each level of power.

While some drafters argued that they intentionally only focused on "constitutionalising the main lines and principles" and that further details should be left to the future legislature that will be bound by these principles,⁹⁰ others acknowledged that entering into more detail would have proven too conflictual and triggered endless debates.⁹¹ One example in this regard relates to the names and delimitations of the

87 This demand is however limited to including a general provision and not a specific quota, as has been done for other constitutional bodies. See the Yefren document.

88 As a CDA member from Benghazi stated in the interview, "we came to realise that we do not even have a nation, so how could we defend the right of one single region?"

89 CDA member I. Al-Baba on the TV programme "Nafidha 'ala al-watan" [A window on the nation], *Libya Al-Watan TV*, 3 November 2018, available at: <https://www.facebook.com/Lwonlinetv/videos/1733456806764594>

90 CDA member H. Abu Hamra on the TV programme "Liqa' khas" [Special encounter], Part 2, op. cit.

91 CDA member I. Al-Baba on the TV programme "Nafidha 'ala al-watan" [A window on the nation], *Libya Al-Watan TV*, 3 November 2018, op. cit.

different governorates, which proved controversial during the constitutional debates and still remains contested today. The drafters opted not to name any governorate in the draft, as this could prove risky at this stage of the conflict and could turn into a source of contestation, in particular in view of the current rivalries between localities that could geographically be part of the same governorate (e.g. Bani Walid vs. Misrata). However, some groups demanded the enshrinement of the governorates in the draft, and the Tebus in particular went as far as to demand to be granted specific governorates (the ones with their greatest demographic concentration) – a redline deemed unacceptable by other CDA members and one of the reasons for the Tebus’ boycott.

The establishment of a second chamber of parliament (the Senate) is another embodiment of compromise reached on this chapter, as an explicit concession made to the federalists, together with the delocalisation of several state institutions in the east and the south. In its composition (78 seats, of which 32 are granted to the west, 26 to the east and 20 to the south), its decision-making procedures (an absolute majority of members with at least 8 members from each region) and its prerogatives (particularly reviewing and approving legislation related to local governance and to contracts and agreements related to natural resources), the Senate is intended to offer a voice and representation to the three historical regions at the central level as an alternative to a purely federal state.⁹²

While most drafters considered this to be the best compromise formula, other possible options (federalism, a monarchy, a centralised state...) still had to go through extensive debates and eventually be decided on in votes, with none eventually gathering sufficient support, in particular because of divisions among the easterners.⁹³ In spite of this, some actors favouring federalism or centralism are still opposed to the model chosen, while others are somewhat concerned about the lack of precision and details in the draft.

Natural resources

The management of natural resources has historically been a sensitive issue in Libya. As a rentier state, the country is highly dependent on these resources (oil and gas in particular) – which represent the largest share of the country’s exports – and their revenue. This, in particular, contributed to the entrenchment of a centralised and state-controlled economic system in Libya, which, however, failed to ensure a fair distribution of the natural resource revenue, particularly to the producing regions (east and south), which remained marginalised under the Qadhafi regime.

The constitutional debates on natural resources therefore took place against the background of both claims for fairer management and redistribution of this revenue, particularly from the eastern and southern regions, and a context of civil and internationalised conflict, which has further fuelled competition over control of the country’s resources between the warring parties, both national and foreign.

Interestingly though, within the CDA, the chapter related to natural resources (Chap. 9) was less a place for political disputes than a source of technical difficulties to find the appropriate solutions to address Libya’s long-standing flaws on this matter. The greatest difficulty was the drafters’ lack of expertise, as the issue was both technically complex and politically sensitive. Resolution came late in the process, and several changes were made during the drafting process, as the initial proposals were “poorly drafted and technically weak.”⁹⁴

92 Other elements of the draft supporting this conception of the state include the addition of a geographical criterion to the composition of the lower chamber of parliament alongside the demographic criteria (art. 68) and a geographical repartition of the votes to elect the president of the republic (art. 100). However, both provisions are described in very general terms in the draft and should be further specified by future legislation.

93 CDA member H. Abu Hamra on the TV programme “Liq’ khas” [Special encounter], Part 1, op. cit.; author phone interview with a CDA member from Benghazi, February 2021.

94 Author phone interview with a CDA member from Benghazi, February 2021.

The main bone of contention related to the choice to enshrine a form of positive discrimination in favour of the producing regions. As a CDA member noted, while there was relatively broad agreement within the CDA that these regions needed to be treated more fairly, a few members from the west initially rejected the idea of positive discrimination, arguing that it would contradict the principle of equality among all citizens. This was in fact one of the last issues to be solved in the constitution-making process, and these members' agreement to compromise was eventually achieved through late one-to-one negotiations with other CDA members.⁹⁵

As with many other provisions in the draft, the CDA members eventually provided general guidelines and principles aimed at solving the main issues and preventing new disputes around resources, while leaving more complex details to be addressed in future legislation. Natural resources are therefore defined as "the property of the Libyan people" rather than of any specific region (neither the ruling centre nor the producing regions) and should be managed in a way that ensures "the general interest" and that "all regions benefit from them fairly" (art.169). The management of the resources and revenue is left to "the state," but without any mention of specific institutions⁹⁶ or of the role of local authorities in this management – an issue that will most probably be dealt with in the future law on decentralisation.

Positive discrimination in favour of the producing regions has been enshrined, not by granting a specific share of revenue to these regions – as was initially suggested by some drafters and still is demanded by some detractors of the CDA's draft – but instead by implementing development projects in the producing regions that can constitute an alternative to non-renewable resources (art. 171). The drafters reached a common agreement that setting explicit quotas in the constitution could be both difficult (how to agree on a specific share?) and risky, further fuelling corruption and conflict.⁹⁷ They also acknowledged the urgency of addressing this issue and the need to provide a guarantee to these regions as an alternative to specific quotas by stipulating that legislation "allocating a share of the revenue of the public treasury to finance these projects" should be issued during the first parliamentary term. Unlike other provisions in the draft for which no timeframe was provided to issue the implementing legislation, this specific mention clearly reflects the drafters' awareness of the importance of this topic.

A last essential element in this chapter concerns contracts and agreements related to natural resources. Here again, the draft must be read in the light of the country's past practices and current conflict around natural resources, as the drafters aimed to target both the national stakeholders and foreign actors involved in Libya. In the CDA's final draft, these contracts and agreements must be submitted for approval by the Senate (art. 170) and not remain under the sole scrutiny of the executive, as was traditionally the case (and unlike other financial resources, the management of which remains centralised at the executive level). Although this may render the whole process "bureaucratically heavier" as a drafter noted, this decision was made both to ensure greater transparency in the decision-making process and to limit the risk of corruption, which has so far prevailed in these types of agreements.⁹⁸

95 Ibid.

96 In particular, the drafters made a decision not to enshrine the National Oil Corporation (NOC) in the draft, as there are current discussions about the possibility of dissolving this flawed institution and replacing it with a more efficient body. Explicitly mentioning the NOC in the draft constitution could therefore prevent any future reform.

97 Author's phone interview with a CDA member from Benghazi, February 2021.

98 Author's phone interview with a CDA member from Benghazi, February 2021. According to this and other CDA members, this provision is not to the taste of some foreign powers, as it renders the making of agreements (and possible deals) on resources-related contracts more complex. This provision, however, was deemed even more essential by the drafters since the idea of a federal state, which could have constituted an alternative safeguard against possible deals between foreign actors and the Libyan executive, was excluded.

Conclusion

Libya is a complex case combining the challenges of constitution-making in a context of transition from an authoritarian regime, a civil war and a divided society. While designing a constitution in just one of these situations would be highly difficult, addressing all these complexities together almost seems like an impossible undertaking. This is, nevertheless, the challenge that Libyans have had to face over the last few years.

The elaboration of a draft constitution by the elected CDA therefore turned out to be a complex exercise that many observers believed was doomed to fail. The drafters had to cope with their own initial mistrust and lack of expertise, arbitrate between sometimes highly diverging views and take into consideration the requirements and risks of the context of conflict and political division in which they had to operate. Put under high pressure to complete their work, the drafters eventually opted for understandable but disputable tools to address the most complex issues, including deferring most of the conflicting points to the next legislature, thus acknowledging their own limits in building a broader consensus and reaching a better constitutional agreement.

The result is therefore, as a CDA member stated, a draft constitution “in which everybody gets something but nobody gets everything.”⁹⁹ However, precisely because it is a compromise solution the CDA’s final draft could neither be technically perfect nor unanimously approved, and several of its provisions continue to be contested by different actors. Nevertheless, in view of the difficult conditions in which the draft was produced, its completion and adoption by a strengthened majority of drafters from all corners of Libya and with widely different ideological backgrounds is already an achievement in itself,¹⁰⁰ and, as various Libyan interlocutors noted, probably the “best (and last) consensus that could be reached in the current situation.”¹⁰¹

Whether the CDA’s final draft will be submitted to a referendum as such, revised before adoption or amended at a later stage, the remaining contentious issues in the draft and the concerns of its detractors will need to be addressed sooner or later in order to garner sufficient support for the constitution to be viable. But, as a CDA member stated, the last controversial issues in the draft are “not technical but instead ones that need a political consensus.”¹⁰² Therefore, considering alternative political frameworks to debate these issues and reconnecting constitution-making with the broader political process have become more urgent than ever to build a stable future for Libya.

99 CDA member O. Al-Naas, quoted in “New draft constitution ‘gives everyone something and nobody everything,’ ” *Libya Herald*, 16 July 2016: <https://www.libyaherald.com/2016/07/16/new-draft-constitution-gives-everyone-something-and-nobody-everything/>

100 Author phone interviews with several Libyan actors. See also CDA member H. Abu Hamra on the TV programme “Liqā’ khas” [Special encounter], Part 2, op. cit.

101 Author phone interview with a civil society activist from the Amazigh community, December 2020.

102 Author phone interview with a CDA member from Benghazi, January 2021.

Bibliography

Al-Ali, Z., “Libya’s final draft constitution: a contextual analysis,” International IDEA, December 2020: <https://constitutionnet.org/vl/item/libyas-final-draft-constitution-contextual-analysis>

American Bar Association, “In Search of Lost Legitimacy: The Constitutional Process in Libya. Legal Analysis and Review of the Possible Constitutional Basis for Future Elections in Libya,” 2019.

Democracy Reporting International (DRI), “Civil society’s sober assessment of the Libyan constitution-making process,” Briefing Paper 71, April 2016: <http://democracy-reporting.org/wp-content/uploads/2016/10/CSO-Study-Sober-Assessment-Libya-Constitution-making-BP71.pdf>

Hammady, O., “The role of civil society in the Libyan constitution-making process,” in Abbiate, T., Böckenförde, M. & Federico, V. (eds.), *Public Participation in African Constitutionalism*, London: Routledge, 2017.

Johnson, D.E.W., “Conflict Constitution-Making in Libya and Yemen,” *U. PA. J. INT’L L*, Vol. 39, Issue 2, 2017, pp. 293-354.

Libyan Organization of Policies and Strategies (LOOPS), “The Libyan Constitution Drafting Assembly (CDA): Path, Outcomes and Comments,” June 2016: <http://loopsresearch.org/projects/view/81/?lang=eng>

Stocker, V., “Citizenship on hold: Undermined legal status and implications for Libya’s peace process,” European Institute of Peace, Policy Paper, July 2019: <https://www.eip.org/wp-content/uploads/2020/06/Citizenship-on-hold-EIP-policy-paper-July-2019.pdf>

The Carter Center, “The 2014 Constitutional Drafting Assembly Elections in Libya: Final Report,” May 2014: https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/libya-06112014-final-rpt.pdf

Van Lier, F.-A., “Constitution-Making as a Tool for State-Building? Insights from an ethnographic analysis of the Libyan constitution-making process,” Max Planck Institute for Social Anthropology, Working Paper No. 19, 2018: <https://www.eth.mpg.de/pubs/wps/pdf/mpi-eth-working-paper-0192>

Van Waas, L., “The Stateless Tebu of Libya?,” Tilburg Law School Legal Studies, Research Paper Series No. 010/2013: <https://www.refworld.org/pdffd/52aace474.pdf>

Wahli, K., “Al-’aqaliyat fi al-dostor al-liby, al-tabu namudhaj” [Minorities in the Libyan constitution, the Tebu as a model], July 2018: <http://daamdth.org/wp-content/uploads/2018/07/%D8%AE%D8%A7%D9%84%D8%AF-%D9%88%D9%87%D9%84%D9%8A.pdf>



Research Project Report
March 2021
2021/02



ISBN:978-92-9084-997-1
doi:10.2870/975134



Publications Office
of the European Union