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Extending Libya's Transitional Period: Capitalizing on the Constitutional Moment

Summary

- The National Transitional Council (NTC) new Constitutional Declaration is a critical development in Libya's transition to democracy. But while most features of the document are very positive, the relatively short timeline for the transition may create significant challenges.
- The current road map provides 60 days for the drafting of the constitution, followed by approval by the National Public Conference (NPC) and then ratification by national referendum. Sixty days is an almost impossibly short time to research, examine, negotiate and draft the numerous constitutional issues that must be addressed in the permanent constitution.
- The compressed timeline effectively guarantees there will be no public consultation on the constitutional draft.
- Transforming the process from a negotiation driven by the Libyan elite to a national dialogue, with public participation, can provide a framework for negotiation and reconciliation among political forces and other groups to develop, strengthen and promote national identity.
- The rush to complete Libya's transition to constitutional democracy is understandable. The NTC is attempting to assure Libyans it has no intention of dragging out the transitional period and holding on to power indefinitely, and it is protecting the legitimacy of the interim government—all laudable goals. Such considerations, however, should be balanced against the benefits of a longer and more participatory constitution-making process.

“If done properly and with sincerity, public participation can achieve more than just the adoption of a new constitution. By transforming the process from an elite-driven negotiation and drafting exercise into a national dialogue, public participation can provide a framework for building trust and can stimulate negotiation and reconciliation among political forces and other communities.”

Introduction

The National Transitional Council (NTC) release of a Constitutional Declaration is a significant development in Libya's transition to democracy. It provides the framework for functional democratic government upon the collapse of the regime of Col. Muammar al-Qaddafi, guarantees and respects human rights and the rule of law, and contains a roadmap for the drafting of a permanent constitution and subsequent election of a new government. But while most features of the document are positive, the compressed timeline for Libya's transition may create challenges for the interim government and hinder the development of a new constitutional order.

Libya's transition includes forming an interim council and government, establishing a constitutional commission to draft a new constitution, ratifying the new constitution by public referendum, and electing a new government. According to the Constitutional Declaration, all that must

be completed within approximately 19 months. This would be a daunting timeline under the most enviable circumstances. But it's particularly difficult given the myriad other tasks facing Libyans during their transition: the restoration of public order, security sector reform and disarmament, demobilization and reintegration (DDR), reconstruction of war-torn cities all must be considered. On top of that, there is the need to restore critical public services, reconstitute the economic and natural resource sector, and balance calls for justice with the need for stability, peace, and reconciliation.

The Constitution-Making Timeline and Public Participation

The negotiation, drafting and ratification of Libya's constitution, as articulated in Article 30 of the Constitutional Declaration, are done through an appointed Constitutional Commission, a National Public Conference (NPC, an elected interim legislature), and a national referendum. The commission is charged with drafting the constitution and submitting it to the NPC within 60 days. The NPC then approves the draft and submits it for ratification by public referendum within 30 days of its approval.

But 60 days is an almost impossibly short time to research, examine, digest, negotiate and draft the numerous constitutional issues that need to be addressed in Libya's new constitution. And, despite the considerable accomplishment of the Constitutional Declaration, there are still numerous difficult and contentious constitutional matters that will need to be resolved.

The pitfalls of a compressed timeline for a new constitution are lessons we've learned from Iraq. The compressed constitutional timeline there of about six months forced the parties to make decisions over complicated matters without fully appreciating the options and implications of the choices being made. Within a year of the ratification of the constitution, the parties' understanding and views of issues had evolved, and in many cases, they preferred different arrangements from the ones originally agreed to in the constitution. Unfortunately, the "constitutional moment" had passed—the Iraqi Constitution has proved much easier to pass the first time than amend later—and Iraqis are, in many cases, still struggling to reconcile their preferences with the constitutional text.

Furthermore, 60 days does not equal 60 days of actual drafting. There are dozens of administrative and logistical matters that will necessarily divert time and attention from the business of drafting the document. Selecting leadership, creating a secretariat, developing a media and outreach strategy, engaging the international community for support and a host of other issues will all take time.

The Benefits of Public Participation

The short timeline in Libya will also preclude substantive public consultation on the constitutional draft that has proved effective in places such as South Africa, Albania and Kenya. If done properly and with sincerity, public participation can achieve more than just the adoption of a new constitution. By transforming the process from an elite-driven negotiation and drafting exercise into a national dialogue, public participation can provide a framework for building trust and it can stimulate negotiation and reconciliation among political forces and other communities. A public conversation on the constitution can also help develop, strengthen and promote national identity based on the core values of the nation, educate citizens on the principles and practice of democracy, and demonstrate a commitment by the political leadership or government to those principles.

South Sudan, for example, offers a cautionary tale on what can happen when even the best-intentioned constitution-making process excludes the public. The government of South Sudan had limited time to draft and ratify a transitional constitution before independence on July 9, 2011,

and it appointed a committee to do the work in just four months. As a result, the process did not include any civic education or public consultation. Unfortunately, even though the government promised substantial public participation in the later process to draft the permanent constitution, large segments of the public—the media, the Council of Churches, opposition political parties, state and local government officials, and numerous nongovernmental organizations, among others—publicly criticized the transitional process for being exclusionary and lacking transparency. Where they disagreed with certain provisions, many groups accused the government of promoting its own self-interest, and thus undermined the legitimacy of the transitional constitution.

The lesson is that *process matters*. There will always be difficult and controversial constitutional choices. When processes are inclusive and participatory, groups that “lose” on an issue are more likely to accept the outcome and less likely to condemn and delegitimize the entire process, because they know their voices were heard and understand the rationale behind why difficult choices were made.

But a process that invites the public to participate requires considerably more time than one driven only by elites. In South Africa, for example, there was approximately 17 months of civic education and consultations before the first draft was produced, with an additional five months of public comment on subsequent drafts *before* the final draft was submitted to the legislature for ratification. In Eritrea it took even more time: civic education, public consultation, and debate were almost continuous throughout a process that took three years. Sixty days simply will not allow for meaningful public input into Libya's constitution-making process.

Ensuring Inclusiveness

The Constitutional Declaration goes to great efforts to ensure Libya's transitional bodies are inclusive and representative of Libyan society. The Interim National Transitional Council (INTC), for example, is to be made up of representatives from the local councils from all cities and areas of Libya (Article 18), while the NPC is to consist of about 200 elected members “from amongst all the sons of the Libyan People.” (Article 30) One body, however, for which inclusiveness is not explicitly required, is the Constitutional Commission, which is to be appointed by the NPC without any further guidance on its membership.

As the body mandated to negotiate and draft the constitution, it is imperative that the Constitutional Commission reflect the range of diversity in Libya, from a geographic, tribal, linguistic, ethnic and socioeconomic point of view. It should also include women, youth, civil society and political parties.

The fact that the document will be approved by the NPC does not mitigate the need for representation on the commission. Here, again, the example of South Sudan is illustrative. South Sudan's democratically elected legislature approved the Transitional Constitution, but this did not assuage grievances and concerns by those who were excluded from the drafting process. Similarly, final ratification by public referendum should not be seen as a substitute for ensuring all interests are included in the drafting process. The Iraqi Constitution, for example, was negotiated and drafted without participation from the Sunni minority. Though it passed at referendum, the Sunni's exclusion prevented genuine compromise and consensus on fundamental constitutional issues, which, in the opinion of many analysts and observers, directly contributed to Iraq's widespread sectarian violence in 2006-07.

Given the generosity and representativeness of the Constitutional Declaration in other areas, it is reasonable to believe the NTC intends the Constitutional Commission to be inclusive and representative of all Libyans. Special care by the NPC to ensure such inclusion is realized, or,

ABOUT THIS BRIEF

This Peace Brief examines the timeline for constitutional reform in Libya's August 2011 Constitutional Declaration with an eye towards ensuring Libyans have sufficient time to negotiate and draft a new constitution that will support Libya's transformation towards constitutional democracy. The views expressed in it do not necessarily reflect the views of the United States Institute of Peace, which does not advocate specific policy positions.

even better, an explicit constitutional requirement for inclusiveness and representation would be prudent.

Options for Lengthening the Constitutional Timeline

The rush to complete Libya's transition to constitutional democracy is understandable. By committing to a shorter transition, the NTC is attempting to assure Libyans it has no intention of dragging out the transitional period and holding on to power indefinitely. The NTC is protecting the legitimacy of revolution and the interim government and demonstrating its commitment to constitutional democracy, and for this it should be applauded. Such considerations, however, should be balanced against the benefits of including the public in the constitution-making process, even if it does take more time.

There are reports that the Constitutional Declaration is merely an early iteration of the NTC's evolving thinking on Libya's transition, and that a second document—perhaps entitled “Constituent Covenant for the Transitional Period”—might be promulgated. That could lengthen the time for constitutional negotiation and drafting. Alternatively, the post-liberation Interim National Transitional Council could expand the constitution-making timeline by amending the Constitutional Declaration itself, as set forth in Article 36. Finally, within the existing framework of Article 30, the NPC could take a substantial amount of time to “approve” the commission's draft (it could even conduct its own civic education and public consultation). Given the short timeline of overall transition, it seems unlikely the NTC intends for the NCP to have long deliberations in the course of its approval. Furthermore, this approach would miss the opportunity of engaging with the public at the front end of the drafting process.

Instead of undermining the legitimacy of Libya's transitional government, a carefully orchestrated public information campaign explaining the rationale for lengthening the transitional period—to successfully negotiate and resolve critical constitutional matters and give the public the time to participate—would likely be greeted favorably. This could lead to a more legitimate constitution that better reflects the needs and aspirations of the Libyan people, help promote trust and reconciliation after the fall of the Qaddafi regime and strengthen Libya's national identity. Most important, it would demonstrate that all Libyans have a place in their new nation.



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