

Libya's Draft Constitutional Charter for the Transitional Stage: Promise and Drawbacks

Written by Stefan Wolff

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STEFAN WOLFF, SEP 3 2011

Circulated widely and well before the Libyan revolution reached its climax so far with the capture of Tripoli by rebel forces on 21 August 2011, the Draft Constitutional Charter reflects, by its very existence and publication, a remarkable degree of forward-planning by the National Transitional Council.

It is a bold break with the past, potentially paving the way towards a new and democratic Libya. Its promise, therefore, lies in its commitment to democracy, popular sovereignty and the protection of human rights and political and civil liberties. The declaration of Islam as the religion of the state, Shari'a law as the principal source of legislation and jurisprudence, and Arabic as the official language, worrying though it might be in one way, is at least off-set in part by an equally strong emphasis on the preservation of linguistic and cultural rights and religious freedoms of members of other, non-Arab or non-Muslim communities.

However, there are also some drawbacks, both in what is included in the Draft Constitutional Charter and what is missing from it. For example, there is an apparent contradiction in the Charter when it states in Article 17 that the "Transitional National Council shall consist of Representatives for the Local Councils", while Article 20 declares impermissible simultaneous membership of the national and any local council. Provisions for the procedure of "approving" Local Councils, (s)electing their members and determining representatives to the National Transitional Council (NTC) are at best vague (in Articles 17 and 28), but overall non-existent.

Determining the composition of the NTC is not an easy exercise given the political instability and division of Libya. While the NTC is right in not calling for early elections (the parameters of legislating for parliamentary and presidential elections are regulated separately in Article 28), the degree of secrecy, or at least the lack of transparency, surrounding NTC membership is a potentially serious problem. After all, it will be the NTC that, according to Article 28, shall appoint the members of the Constitutional Authority, although no NTC member will be eligible for membership in this body which is charged with drafting a permanent constitution. To the credit of the authors of the Draft Constitutional Charter, the approval of the permanent constitution will be by referendum, thus living up to the commitment to popular sovereignty.

Perhaps the most serious omission derives from the implications of Article 19 which states that the NTC "shall have its own statutes which shall regulate [its] methods of work and the manner to exercise [its] duties and functions." The problem here is that by not laying down key principles of how decisions will be made, but rather by explicitly deferring this issue, the authors of the Draft Constitutional Charter have potentially created a situation in which different factions within the NTC will become embroiled in protracted negotiations on how the NTC will work, for which decisions, other than those already specified, more (or less) than 50%+1 of the vote will be required, whether particular groups of representatives will have a right to veto certain decisions, etc. This could seriously incapacitate the NTC and harm Libya's prospects of a smooth transition period, not least as there is an expectation that political rivalries will soon surface in the NTC in light of the fact that the disposal of Gaddafi as the perhaps sole unifying factor has been accomplished now.

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A final point of some concern is a provision in the Draft Constitutional Charter that bans members of the NTC, the interim government, and of Local Councils from being elected to executive or legislative office after the transition period. So important did the authors of the Charter feel this to be that the provision actually occurs twice, in Articles 29 and 33, respectively. While the intention is clear (and noble), the problem is that not only will the legislative and presidential elections themselves be potentially divisive but its results will be additionally disruptive in that there will be no continuity of personnel. Perhaps the drafters of the Charter should have taken a dose of their medicine here and let the people of Libya decide.

To be sure, Libya's Draft Constitutional Charter for the Transitional Stage is a document of great promise. It reflects a clear commitment to a new and better Libya in which the people of the country can decide their own fate. It creates an enormous and unprecedented opportunity for them to shape their future in ways that will mark a clean and decisive break with the past. Yet, truly democratic state-building after conflict is not without perils, and democracy is not a foregone conclusion at the end of any authoritarian regime. The spirit of Libya's Draft Constitutional Charter now needs to be translated into a sustainable reality.

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