

The Libyan Dialogues

Libya: The dilemmas and challenges of the upcoming elections

Introduction

The Libyan political process has gone through a long and winding course. Relative progress has been made recently on the political path, but several thorny issues remain unresolved, including the most sensitive ones related to national reconciliation, the constitutional process, security issues, and the new social contract. Uncoordinated and competing international mediation initiatives continue in the absence of a truly inclusive Libyan led political process.. It is against this background that the International Centre for Dialogue Initiatives (ICDI), at the request of many Libyan stakeholders, launched a Libyan Dialogues initiative -an ICDI-facilitated platform for Libyan experts and stakeholders to discuss and explore solutions to contentious issues affecting peace and security in their country. The Libyan Dialogues is now firmly established as a Libyan-owned space to reflect on Libyan experiences with foreign led peace efforts and to develop home-grown ideas and initiatives to advance the political process. The present report summarizes the discussions of the first session in the dialogue series, which was dedicated to the Libyan electoral process and the challenges facing the forthcoming presidential and legislative elections.

As agreed in the United Nations sponsored Libyan Political Dialogue Forum, Libya is due to hold general elections on December 24, 2021. However, the legal basis for holding the elections has been the subject of wide disagreements and controversies that threaten to obstruct the process unless the Libyan experts and other Libyan parties are able to reach a consensus very soon. The ongoing discussions indicate that the legal basis for the elections can be secured by new special parliamentary legislation, or on the basis of the existing draft permanent constitution, prepared

by an entity elected for that purpose, once it has been adopted in general referendum. Nonetheless, disagreements have widened to include whether only the election of a new legislative body should proceed, or whether the president of the country should also be elected either directly or indirectly. The Parliament and the State Council have been unable to agree and the Advisory Committee, established by the UN sponsored Libyan Political Dialogue Forum, has not been able to agree on a legal basis for that purpose. The Forum is supposed to continue discussions on this issue with a view to reaching an agreement in what seems to be an arduous path fraught with hurdles, given the widening disagreements and continued foreign interference.

Consequently, the prospects of achieving the electoral and constitutional requirements seem more complex and raise concern about the fate of the process led by the United Nations Support Mission in Libya. It therefore seems useful to tackle the issue from all its aspects, particularly its prospects, the challenges faced and the legislative and constitutional difficulties, in an approach that comprises the different contexts that make up the Libyan political scene.

This report is based on in-depth discussions among Libyan academics, legal and political experts, members of the former constitutional commission (The February Commission) and political activists, in addition to a member of the commission of the Constitution Drafting Assembly (CDA), and a member of the Libyan Political Dialogue Forum. The report provides a summary of the discussions, held on June 22nd, 2021, regarding the Libyan crisis and the challenge of the upcoming elections, and concludes with a number of relevant recommendations.

What are the different contexts that determine the fate of the elections?

The Libyan experts, who partook in this debate, believe that the process should start from the assumption that the conduct of the elections and its success depend on the context in which they occur. The Libyan political environment is characterized by a clear lack of democratic values and acceptance of the other, which pose many problems regarding the prospect of getting the different parties to accept the results of the elections.

As the past experiences have shown since 2011, a zero-sum approach has prevailed among the rivals. Furthermore, the performance of newly-born political parties has been rather poor and the absent role of a weak civil society and its reliance on the state or the parties to the conflict have been a constant feature of the Libyan political scene so far. Loyalties to non-state parties continue to be exploited by all and their negative impact has continued, while armed groups have dominated the scene. Some have used excessive force to impose their political views and interests. Libya faces simultaneous crises in terms of State-building as well as in terms of fractured national identity, legitimacy as well as a chronic institutional vacuum and weak performance of existing institutions. This has resulted in a prevalence of public mistrust, division and failure by the elite to reach an agreement.

Furthermore, the security structure is weak, the military establishment is divided, and the State has failed in extending its authority or providing security. The National Unity Government has been unable to deal with this situation. Participating experts have stressed another factor relating to the international aspect of

the crisis and of external interference, the absence of a united international position and international competition to exploit the internal situation in the interest of foreign powers, which raises serious questions whether the international community is in agreement on holding the elections or if there are international parties seeking to obstruct them.

In spite of the apparent unanimity of the Libyan parties and of international support as embodied in Security Council resolutions and the recent decisions of the Berlin Conference, with regard to holding the elections on time, it should be noted that apprehension and mistrust continue to prevail. This state of affairs is exacerbated by the dwindling possibility of a withdrawal of foreign troops from Libya, be they forces brought in by Turkey or by other countries such as Russia, as well as mercenaries of various nationalities fighting on either side of the conflict in the east and in the west of the country. While the agreements reached in the Libyan Dialogue



Forum under UN auspices stipulate that the first task of the National Unity Government is to prepare for the elections, that enjoy wide public support with a view to unifying state institutions, the government has not worked seriously, and its role has been limited to public statements rather than effective action. Sources indicate that the government has been seeking to postpone the elections and to extend its own mandate for at least two more years. As for the Presidential Council, tasked with the process of national reconciliation as a necessary precondition for peace, it has been preoccupied with external visits and has inundated itself with formalistic preparations for reconciliation, which it considered as an institutional process. In the meantime, it has been utterly unable to act as the supreme command of the armed forces, which raises doubts about its ability to act, given its failure to play a role in achieving peace, uniting institutions or securing a safe passage towards the elections.

Additionally, an insurmountable obstacle seems to be the disagreement of the parties on the objective of the December 2021 elections and whether it includes a referendum on the draft permanent constitution as prepared in 2017 by the Libyan Constitution Drafting Assembly (CDA), holding new legislative or parliamentary elections, or the election of a new



delaying the elections beyond December 2021, given the difficulty of organizing both the referendum and the elections within the remaining time, as stated by Electoral Commission. Thus, the country would be denied the benefit of an elected government that enjoys popular support, putting an end to the phase of fait-accompli political legitimacy that has continued since the end of previous mandates of elected entities in 2016. Also, holding the elections directly without holding a referendum might save time and allow the elections to take place on time, but it would only defer the disagreements on whether it would be better to hold legislative elections alone, or holding both legislative and presidential elections simultaneously. These disagreements are directly related to the controversy over the choice between a presidential or parliamentary system of government (noting that the draft constitution proposes a presidential system).



parliament and head of state simultaneously. Although holding a referendum on the constitution and its adoption would provide a basis or constitutional rule for a system of government and institutions, following a transitional period fraught with conflict, and a basis for holding the elections including the election of the president, it would practically mean

What are the legislative and legal requirements and are they available for holding the elections on time? What are the constitutional problems and what are the prospects of surmounting them? What is a possible constitutional rule that would allow holding the elections? Is it possible to rely on the draft constitution prepared by the Libyan Constitution Drafting Assembly (CDA)? What are the objections? Can a referendum on the draft constitution be held and will it receive the required popular support? Why and how this referendum should be safely held?

In spite of the importance of legal and constitutional rules, some participants in the dialogue considered that the main problem is one of a political nature. They also noted that strong political parties and a capable civil society, political will, agreement among the rivals, the existence of military and security establishments and comprehensive international support were the most important elements to make the elections possible. Yet, all of these do not seem to be available in practical terms currently. To them, holding the elections requires a determination of the legal, constitutional and legislative bases upon which the elections would be held. An agreement on holding the referendum first would open the flood gates to the dispute regarding the law(s) governing the process. This sheds light on Law 6 regarding the referendum that was enacted by the Parliament in 2018, as a major obstacle since it required the draft constitution to obtain a regional majority in all three regions and in the country as a whole.

Most participants in the debate believe that regardless of attempts by some to obstruct the elections, a referendum on the draft constitution does not seem feasible at this juncture. Substance of the constitution aside, there were many objections to the draft proposed by the CDA, whose work was boycotted by representatives of some cultural groups and a number of whose

membership objected to the draft as non-consensual. Other parties viewed it as a draft that reflects the division, conflict, exclusion, and marginalization of large swaths of the population. Even if agreement could be reached on holding the referendum, it is possible that the required quorum may not occur and that the referendum would be rejected. This would cause another problem with regard to which entity should be responsible for amending the draft, particularly that some are invoking the expired mandate of the CDA since 2016, and that the matter should be returned to the Parliament; a thorny issue on which views have widely diverged.

One participant believes that the CDA was right to insist on holding a referendum on its draft and that its position was based on an interpretation of the decision by the Supreme Court of April 2019, which



the CDA considers as a confirmation of its continued mandate, supported by an advisory opinion of the Legal Department at the Ministry of Justice. But many legal experts object to such interpretation. This opinion coincides with the views of CDA members calling for the referendum to the effect that Para. 12(2), Article 30 of the Constitutional Declaration states that the referendum should be held once the CDA has finished the draft with no need to return to the Parliament. However, these arguments do not contribute to the solution but are rather a reflection of the degree of polarization surrounding the draft and the referendum and that, according to a constitutional law expert participating in the debate, makes the issue predominantly political rather than legal.

A number of participants also indicated that the CDA has chosen to refer the draft to the Parliament and to the Electoral Commission twice in 2016 and 2017, resulting in dispute and division within the CDA and prompting some of its members to resort to litigation and legal complications. It has also undermined the credibility of the CDA although it was fairly elected and its mandate freely determined, albeit by popular vote of no more than 15% of the electorate.

Hence, holding the referendum on the constitution in lieu of the elections should be viewed in the context of complementarity of the constitutional process

that does not conclude with the drafting of the constitution by the CDA since the tenth constitutional amendment by the Parliament limits the purview of the CDA and refers the task of adopting and issuance of the draft constitution to the Parliament, not the CDA. If the referendum enjoys popular support and the draft constitution is adopted, the need would arise for a constitutional rule as well as laws and legislation that complement the process, requiring no less than 120 days to be completed. The call for a referendum therefore becomes procedurally impossible, for it is not possible to conclude the constitutional process in the time remaining until December 24, 2021.

It is also not possible for the current situation to continue in view of the objections to the draft constitution, as indicated by a majority of those participating in the debate. One legal expert among the participants believes that following the path of holding the referendum would be a deviation from the UN path for the constitutional process, it being the Libyan Political Agreement (Skheirat), the Berlin Outcomes and the political agreement reached at the Libyan Dialogue Forum, all of which stress the need for elections to establish constitutional legitimacy and the peaceful transfer of power, and not the legitimacy of the fait-accompli that has prevailed since 2016 and has caused instability and war. This means that there is no alternative to elections based on constitutional

rules or on other laws and rules that remain in force such as Law 4 of 2012, that governed the election of the National Congress so as to prevent further deterioration and continue the democratic process.

The debate among the Libyan experts highlights two emerging options: Agreement on a provisional constitutional rule by virtue of a constitutional amendment that meets urgent needs, determines the powers of the president of the state and provides a method for his/her election. This may include the establishment of a comprehensive system of governance and the determination of electoral rules and regulations that would remove the need for a new electoral law and avoid further dispute stemming from opposing views on electoral districts and seats. The apparent suitability of this option notwithstanding, it would require an agreement between the Parliament and the State, an agreement that seems difficult to attain in view of the existing division and the possibility of unilateral action by the Parliament, that would probably lead to further division and a new transitional period extending for five more years, as viewed by all participants.



Obstruction of the elections also seems more probable as gleaned from objections to direct presidential election. It is quite interesting, though, that the parties that made that claim are one and the same as those who call for holding a referendum on the constitution first although they know, or perhaps ignore, the fact that the constitution mentions direct presidential election, thus suggesting that their real intent is to obstruct the elections. As one participant asserts the view that the real problem is not a legal one and that the proposal made by the February Commission was testimony to that, since it was not acceptable to elect a president from among the people who could have exerted pressure on the Parliament. However, it remains possible to return to the proposal of the February Commission to bypass the divided institutions and avoid the risk

of holding a referendum on the draft constitution that may not achieve consensus or help realize national reconciliation. In brief, all parties must make concessions and continued international pressure must remain. Popular movements and civil society must continue to push toward the option of elections in accordance with a constitutional amendment that adopts parliamentary and presidential elections to put an end to existing illegitimate entities and allow peace to prevail.

Another option was proposed by some members of the CDA to avoid any questioning of the legitimacy of the Dialogue Forum and the possibility of legal challenges against it. According to this proposed option, The United Nations would organize a forum or electoral caucus that would comprise members of elected entities (the Parliament, the State Council and the CDA). This forum or caucus would decide on the draft constitution by accepting or amending it with a view to holding parliamentary and presidential elections accordingly. However, this option faces objections that the documents adopted under UN auspices and were accepted by elected entities, including the Parliament, mean that those entities have conceded their constitutional legitimacy and accepted political legitimacy and the implementation of the roadmap.

A legal expert who participated in the debate made a proposal based on a jurisprudence of necessity or exceptional circumstances. According to this proposal, the executive branch, represented by the Presidential Council and the National Unity Government would address the Libyan people to inform them of attempts to obstruct the elections, of the obstacles facing the elections and of the dangers facing Libya, thus using the state of necessity to permit a deviation from the rules that apply in normal circumstances and take the necessary measures for the elections to take place. Clearly, this would require unity, coordination and the ability of both sides of the executive branch to work together, all of which seem to be lacking at present. If the executive branch could reach an agreement on working together, it could base its actions on the 1970 decisions of the Supreme Court that allow the executive branch to issue legal decrees on the above issues and on the state of necessity. This option seems possible to bypass obstruction, in consultation with constitutional authorities, and to appeal to popular support and the civil movement, as the case had been with the "No to Extensions" popular movement that forced the National Congress to end its mandate and hold the elections.

What role can the Political Dialogue Forum play to overcome obstacles? Will the outcome of the Forum help solve problems, and will it be accepted and implemented by the parties? In case agreement is not reached at the Forum, will that mean the collapse of the United Nations led process in Libya? What is the appropriate way to prevent a resumption of conflict and violence?

Most participants agreed that the Libyan Political Dialogue Forum has been able to accomplish what other existing entities could not for several years. Nevertheless, it seems to be divided with regard to the above-mentioned problems and challenges. So far, successive meetings were held to overcome division and disagreement without any notable success. It is also clear that the Legal Committee established to prepare urgent suggestions to tackle the elections and the constitutional rules that will govern them, has not been able to agree and has referred the matter to the Forum, again. The Forum met in Geneva (late last June) but could not settle the issue, heralding a new political crisis in light of announcements by various political personalities and leaders of their rejection of the election of a president and of their threat to derail the political process in its entirety, even if it leads to war and territorial division. This undoubtedly confirms the views of the participants in the debate that there would be no room for elections unless military forces are unified and foreign forces and mercenaries are withdrawn.



It is the participants' view that the Political Dialogue Forum bears great responsibility for finding an appropriate way out of the bottleneck through constructive consensus as it did previously in selecting the executive authority. Although the Forum could not agree or obtain a majority vote on the options proposed by the Legal Committee, as feared by most participants, such agreement or vote would not be acceptable to the parties on the ground. It has become clear in the Forum's Geneva meeting that the main issue appears to be an agreement on the method of electing the president, either by direct popular election or indirectly by the Parliament that will be elected in December 2021. This implicitly means a deferral of presidential elections and of the controversy surrounding qualification, conditions for nomination and other issues to be tackled by the next parliament, which could create further challenges and new divisions. If the Forum could agree on constitutional and legal rules, it is duty-bound to stipulate the steps to be taken next leading up to the December elections, including the roles of various institutions and the





particularly since any agreement on constitutional rules, parliamentary and presidential nominee qualifications, purview and method of election of the president, method and composition of the legislative branch, whether the parliament will be elected before the president (directly or indirectly) (simultaneously or successively) and determination of appropriate electoral laws, all remain sources of conflict and discord.

In addition, all agreements need to be approved by the Parliament, in consonance with the Higher

anticipated support by the international community and the United Nations Support Mission in Libya.

In light of the deliberations among members of the Forum over the past weeks in preparation for the next meeting in Geneva, the Forum is in a difficult position and needs to reach agreement on all controversial issues. This appears to be fraught with risk,

State Council, which seems unlikely to happen. In such case, the Forum will have to refer the matter to itself or request the weak Presidential Council to issue a decree on it but lacks the ability to implement without the approval of the parties to the conflict. Add to that the ambiguity of whether the Parliament will approve such political agreement and include it as a constitutional amendment, it becomes increasingly

difficult to determine whether the Presidential Council is prepared to act as a supreme commander of the armed forces, which in turn threatens to foil any agreement and heralds a return to violence, in particular if the elections are not held on time. It is therefore expected that the Dialogue Forum, which lacks the ability and the capacity to impose what it sees fit, will instead focus on reaching agreement on these issues by virtue of the wide popular support that rejects existing institutions and by relying on international support.



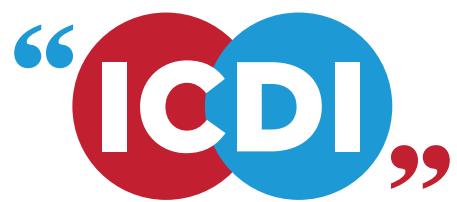
Conclusion

In this session of the Libyan Dialogues, the widely shared view is that prospects of achieving the electoral and constitutional requirements for the electoral process are fraught with challenges. This raises concern about the fate of the entire process led by the United Nations Support Mission in Libya. Holding the elections in December carries with it several challenges and dangers in terms of outcomes and potential post-electoral complications, as much

as not holding them. All told, even though elections are a necessary element for strengthening legitimacy of institutions and ending the transitional period according to the agreed road map governing the transitional phase, several fundamental issues are still pending and should be addressed by Libyans, sooner rather than later, lest Libya relapses into protracted violent conflict.

Recommendations

1. The Government of National Unity should make every possible effort to create the necessary conditions for holding free, fair and transparent elections, including through securing the legal framework and the technical and security arrangements for the voting process to take place, in accordance with the roadmap agreed for the "Preparatory Phase for a Comprehensive Solution."
2. The independence and protection of the High National Elections Commission (HNEC) must be ensured to safeguard the fairness and credibility of the electoral process. The executive authority should provide all necessary support and guarantee the necessary logistical and security conditions for the High National Elections Commission and state institutions involved in the electoral process, to enable them to carry out their tasks in the best way possible.
3. The international community should refrain from pressuring Libyans to hold elections at any cost, despite the challenging context, and in the absence of the legal and security conditions necessary for their success. While elections are an important element to establish and strengthen legitimacy, they are no panacea for ending the ongoing strife and conflict in Libya.
4. The international community should provide adequate assistance and support to Libyan parties to overcome, in the context of a Libyan led process, their ongoing disputes and their tendency to defer controversial issues (such as the referendum of the draft constitution) to avoid a relapse into violent conflict.
5. The United Nations should work to ensure the full respect by all parties, in particular candidates to the forthcoming elections, of the requirements and commitments made under the road map for the preparatory phase of a comprehensive solution.



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