

ASSESSMENT OF THE 1951 LIBYAN CONSTITUTION ACCORDING TO INTERNATIONAL STANDARDS

EXECUTIVE SUMMARY

The Libyan constitution of 1951 has emerged as an important reference point for political leaders important to that country's transitional to democracy. While re-establishing the past constitution's executive monarchy is not a viable policy option, some politicians have argued that the rest of the constitution can remain and the monarchy be transformed into a presidential system. The constitution appears to be attractive because it contains provisions that protect human rights, promote transparency, and safeguard against antidemocratic consolidations of power according to contemporary international standards.

While the 1951 constitution may be a useful reference point for the debate, it is not fit for serving as a model. Indeed the executive monarchy is not the only structural element of the constitution that is antidemocratic. Overall the 1951 constitution did not establish a balance of powers, a flaw that cannot be remedied by simply replacing the King with an elected president. Furthermore, the constitution leaves the door open for the abrogation of rights protections by non-constitutional law and provides for a weak judiciary. Also, it does not account for advancements in constitutional design since the 1950s, including clear definitions of the jurisdiction of the judiciary, the relationship with international law, and provisions for the management of credible elections. Libyan constitution-makers should take these features into account when evaluating the extent to which the 1951 constitution can be useful in the forthcoming drafting process.

1. INTRODUCTION

Some political leaders in Libya today have suggested that the 1951 constitution would be a good starting point for the work of the committee that will draft the country's new constitution. This paper analyses the 1951 Libyan constitution, identifying strengths and weaknesses according to international standards of constitutional design and political participation.

This paper is agnostic with regard to the use of the 1951 constitution as a starting point for the current debate. To be sure, principles of constitutional design have advanced significantly since the 1950s. Furthermore, key historical facts about the constitution — the foreign interference in its drafting, the institutionalization of the monarchy, its scant provisions on religion and the state — suggest that a significant revision would be necessary given Libyans' current policy priorities. The paper simply anticipates a place for the 1951 constitution in the forthcoming debate and illuminates certain characteristics that might be of interest to Libyans.

The paper bases its analysis in three key DRI reports relevant to constitutional design. "International Consensus: Essential Elements of Democracy" summarizes the key features that international law requires for a genuine democracy. "Preventing Dictatorship: Constitutional Safeguards against Antidemocratic Consolidations of Power" lists constitutional provisions that can protect democracies from one branch of government — especially the executive — from accumulating power to rule autocratically. Our forthcoming paper on advancements in constitutional design since the 1990s summarizes some key features of contemporary constitutional design.¹

The federal nature of the state, enshrined in the 1951 constitution, was repealed by constitutional amendment in 1963. This paper assesses the original document, not the amendments.

2. OVERVIEW OF THE 1951 LIBYAN CONSTITUTION

FEDERALISM

The Libyan constitution of 1951 calls for a federal constitutional monarchy that grants much authority to the provinces. The federal government is divided into three branches and shares power with the provincial governments. According to article 36, federal powers include:

- Foreign and military affairs
- International trade and commerce
- Immigration, customs, and nationality

- Marital law
- Science policy
- National transportation
- The federal bank, and economic and financial policy
- The national police force
- Higher education

The following powers are held jointly, with federal legislative authority and provincial executive authority:

- Companies, banks, and intellectual property
- Income tax
- Natural-resource management
- Weights and measures
- The national census
- Air and sea ports
- Civil, commercial, and criminal law
- Media
- Labour and social security
- General education
- Public health

Article 39 states that federal powers are to be interpreted strictly, and that provincial governments will assume all powers not constitutionally assigned to the federal government. Article 173 grants provinces the authority to levy taxes.

The constitution names both Libya and Benghazi as the national capital. The constitution implies that the provinces would have their own basic laws to determine the structure of the government. The constitution gives no specific requirements for the design of provincial constitutions beyond stating that the King will appoint provincial governors, and that decisions of the Supreme Court are binding on lower courts in the provinces.

Article 199 requires that the Legislative Council of each province approve any amendments relating to the federal nature of the state.

BRANCHES & THE BALANCE OF POWER

Chapter 4 outlines three branches of the federal government. Executive authority is vested in the King, legislative authority in Parliament, and judicial authority in the Supreme Court and other courts.

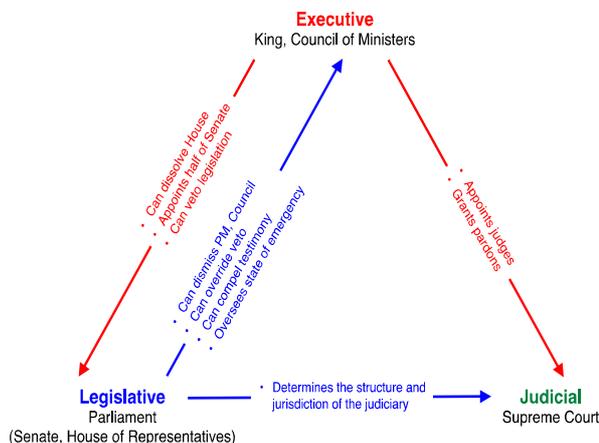
The monarchy is hereditary, passing to the eldest son of the previous King. The King appoints a prime minister and, with his consultation, a Council of Ministers appointed by and responsible to the King.

Parliament is divided into a Senate and a House of Representatives. Eight senators represent each of the three provinces — Tripolitania, Cyrenaica, and the Fezzan — with four appointed by the King and four selected by the provincial legislatures. Representatives are assigned to each province at a ratio of one to every 20,000 residents, with no province to receive fewer than five representatives. Representatives are the only elected officials in the Libyan federal government.

¹ Key advancements in constitution-making since the 1990s include stronger provisions for democratic institutions, reference to norms of international law, and extensive protections of rights and liberties as well as a consultative constitution-making process.

The size of the Supreme Court is left to non-constitutional law, but the judges are appointed by the King. The structure of the rest of the judicial system is left to non-constitutional law.

The constitution establishes a weak system of checks and balances among the three branches of government by giving the King significant power and little to the judiciary. The relationship between the three branches is summarized in the chart below.



3. DEMOCRATIC FEATURES

The Libyan constitution of 1951 contains many provisions that are consistent with international standards of democracy, advancements in constitutional design, and safeguards against anti-democratic consolidation. The most democratic features of the constitution are generally protections of specific rights, the guarantee of equality before the law, and the right to recourse before the courts. See the Table of Rights Protections in the appendix.

The constitution provides for certain essential elements of democracy.² Although insufficient, it describes some checks and balances between the branches. Article 142 states: “The judges shall be independent; in the administration of justice, they shall be answerable only to the law.” A similar clause in article 108 protects the autonomy of legislators: “Each member of Parliament represents the whole people; his electors or the authority that appoints him may not make his mandate subject to any conditions or restrictions.” Article 136 provides two mechanisms for overturning a veto by the King: a law can be passed by a two-thirds majority of legislators in both houses, or it can be passed by a simple majority vote of two consecutive legislatures in both houses. Bills passed by the legislature do not enter force until the King signs them or the King’s veto is overridden.

Certain principles of transparency and accountability are also enshrined in the constitution. Article 90 bans ministers from holding other offices in the government and from taking an “active part in any commercial or financial enterprise,” including serving on a board of directors, an anticorruption mechanism. Article 114 requires that all meetings of the Senate and House be public, unless a chamber votes to go into secret session. Article 122 authorizes Parliament to call in ministers to testify in an open session.

The constitution contains several provisions that safeguard against antidemocratic consolidations of power³:

- Article 26 guarantees the right to form political parties, but it bans organizations that seek to achieve their aims by organizing a military force. Impartially enforced objective criteria for banning militant parties can be an effective tool against parties looking to grab power undemocratically.
- Article 198 requires a two-thirds supermajority in both houses of Parliament to amend the constitution.
- Article 197 prohibits amendments that would change “the representative form of government or the principles of liberty and equality guaranteed by this Constitution.”
- Article 70 requires approval from Parliament for the King to declare martial law or a state of emergency, and Article 195 prohibits the King from dissolving either chamber of Parliament during a state of emergency.
- Chapter IX (articles 159 to 175) outlines a detailed procedure for parliamentary approval of the federal budget.

4. NON-DEMOCRATIC FEATURES

While the constitution contains strong rights protections and safeguards against antidemocratic consolidations of power, there are other elements of the constitution that pose more structural challenges to democracy. Many rights can be restricted “according to the manner prescribed by law,” “except in cases prescribed by law,” or “so long as it is not a breach of public order and is not contrary to morality.” A summary of rights and the ways that the legislature can circumvent them is provided in the Table of Rights Protections in the appendix.

Clauses such as these are not unusual in democratic constitutions and international law. Article 29 (2) of the Universal Declaration of Human Rights states:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

² “International Consensus: Essential Elements of Democracy,” Democracy Reporting International, December 2011.

³ “Preventing Dictatorship: Constitutional Safeguards against Antidemocratic Consolidations of Power,” Democracy Reporting International, July 2012.

In other human rights instruments, such as the ICCPR, such limitations can be found across the various articles. Such clauses are helpful in that they place the authority to define or to limit rights exclusively in the hands of the legislature and not the executive. In other words any limitation needs to be grounded in law.

As article 29 (2) of the UDHR also makes clear, however, there must be clear limits to the restrictions of human rights. Here the 1951 constitution is insufficient, as it established no limits to these restrictions. Constitutions in emerging democracies in particular should be clear and specific on legitimate restrictions to human rights.

Article 19 of the German constitution addresses these problems by imposing limitations on the circumstances under which rights can be restricted “by law”: Restrictions must apply generally and not specifically in one case and “the essence of a basic right” should not be affected. Furthermore, the German constitution guarantees an effective remedy to the courts to people who feel that their rights have been violated. The German constitutional court developed detailed case law on these provisions. The UN Human Rights Committee has established similar limitations for the restriction of ICCPR rights, including a need to respect the essence of a right and a requirement that restrictions are actually necessary to serve a legitimate purpose (principle of proportionality).⁴

The second major non-democratic feature is that the 1951 constitution provides for a weak judicial system, tilting the balance of power away from the courts. The constitution does not explicitly grant the Supreme Court judicial review, or the authority to rule on the constitutionality of laws or executive orders. Indeed, the constitution is vague on the Supreme Court’s jurisdiction. Article 43 states that the Supreme Court and other courts “shall give judgments within the limits of this Constitution,” but Chapter VIII on the judiciary gives little further guidance. The Supreme Court is only given explicit jurisdiction over “disputes which may arise between the Federal Government and one or more Provinces or between two or more Provinces” (article 151). Article 152 entitles the King to refer “important constitutional and legislative questions to the Supreme Court,” but there are no criteria for referral and it is unclear whether the court’s rulings are binding in such cases. Article 153 grants the Supreme Court appellate authority over lower courts in “civil or criminal proceedings” if the decision involves constitutional law. In all other cases, the delineation of the Supreme Court’s jurisdiction is left to non-constitutional law. These constitutional provisions run the risk of leaving the Supreme Court without any power to be part of and to uphold the constitutional balance of powers.

Checks and balances are especially important in systems with strong executives, as stipulated by the Libyan constitution. The constitution, which outlines a monarchical system of government, naturally invests much authority in the King. The King is inviolable in the constitution, with appointment privileges over the Council of Ministers, the Supreme Court, and half of the Senate; he can also dismiss the House of Representatives. The prime minister and Council of Ministers are subject to no-confidence votes by Parliament.

Third, the power between the three branches of government is unbalanced under the 1951 constitution. The King enjoys broad powers over the courts and legislature through appointment and veto, while his power is hardly checked at all. The combination of the King’s inviolability with his broad executive powers characterizes the political system as a type of executive monarchy; the King is placed above the law and granted broad powers in a way that even an elected president should not have in a democracy. Therefore, even replacing the King in a new constitution with a president and dispersing some of the King’s former powers would not fix the underlying imbalance of powers, especially with regard to the courts.⁵

5. MISSING DEMOCRATIC FEATURES

The 1951 constitution does not account for several advancements in constitutional design made since the 1950s. One such development is judicial review and clear jurisdiction for the judiciary, as discussed above. The Libyan constitution provides for a weak Supreme Court and leaves questions of judicial review up to non-constitutional law.

A second development is the relationship between national and international law. Articles 189 and 191 subject refugee status and extradition to international law, but the rest of the constitution does not account for the large body of international law that has been developed since the 1950s, including the International Covenant on Civil and Political Rights. The constitution says nothing about the relationship between national and international law except with regard to refugee status and extradition.

Finally, the constitution includes no provision for principles or mechanisms for genuinely democratic elections. Many contemporary constitutions enshrine the obligations of article 25 of the ICCPR, namely the free choice of representatives, the right to vote in secret and periodic elections, and equal opportunity to run for office. Other constitutions stipulate principles or election-management bodies that go beyond ICCPR obligations to ensure transparency.

⁴ See for example the UN Human Rights Committee’s General Comment on article 12 (1999).

⁵ For more on options for power distribution in executive systems, see “Systems of Government: Semi-Presidential Models,” Democracy Reporting International, March 2012.

6. CONCLUSION

The Libyan constitution of 1951 contains features of a democratic constitution, but it also has undemocratic elements beyond establishing a monarchy. Despite many provisions that by themselves meet international standards, the structure of the government as described does not reflect international standards of democracy or advancements in constitutional design. The most problematic structural features are the strong executive, the weak judiciary, and the doors left open for non-constitutional law to circumvent rights protections. Simply revising the 1951 constitution therefore may not be a good option for Libya's constitution-makers. It would be worthwhile however to consider the constitutional legacy of 1951 in terms of rights-based principles.

ABOUT DEMOCRACY REPORTING INTERNATIONAL

Democracy Reporting International (DRI) is a non-partisan, independent, not-for-profit organisation registered in Berlin, Germany. DRI promotes political participation of citizens, accountability of state bodies and the development of democratic institutions world-wide. DRI helps find local ways of promoting the universal right of citizens to participate in the political life of their country, as enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

With financial support by the German Federal Foreign Office, DRI supports Libya's democratisation, in particular by partnering with civil society organisations to inform public policy choices related to democratic institutions.

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APPENDIX: TABLE OF RIGHTS PROTECTIONS

This table lists protections of rights and liberties provided by the constitution. Words in italics grant the legislature to circumvent constitutional protections through non-constitutional law.

Article	Text
11	Libyans shall be equal before the law. They shall enjoy equal civil and political rights, shall the same opportunities and be subject to the same public duties and obligations, without distinction of religion, belief, race, language, wealth, kinship, or political or social opinion.
12	Personal liberty shall be guaranteed and everyone shall be entitled to equal protection of the law.
13	No forced labour shall be imposed upon anyone <i>save in accordance with law in cases of emergency, catastrophe or circumstances, which may endanger the safety of the whole or part of the population.</i>
14	Everyone shall have the right to recourse to the Courts, in accordance with the provisions of the law.
15	Everyone charged with an offence shall be presumed to be innocent until proved guilty according to law in a trial at which he has the guarantees necessary for his defence. The trial shall be public save in exceptional cases prescribed by law.
16	No one may be arrested, detained, imprisoned or searched except in the cases prescribed by law. No one shall under any circumstances be tortured by anyone or subjected to punishment degrading to him.
17	No offence may be established or penalty inflicted except shall be subject to the penalties specified therein for those offences; the penalty inflicted shall not be heavier than the penalty that was applicable at the time the offence was committed.
18	No Libyan may be deported from Libya under any circumstances nor may he be forbidden to reside in any locality or compelled to reside in any specific place or prohibited from moving in Libya except as prescribed by law.
19	Dwelling houses are inviolable; they shall not be entered or searched <i>except in cases and according to the manner prescribed by law.</i>
20	The secrecy of letters, telegrams, telephone communications and all correspondences in whatever form and by whatever means shall be guaranteed; they shall not be censored or delayed <i>except in cases prescribed by law.</i>
21	Freedom of conscience shall be absolute. The State shall respect all religions and faiths and shall ensure to foreigners residing in its territory freedom of conscience and the right freely to practice religion <i>so long as it is not a breach of public order and is not contrary to morality.</i>
22	Freedom of thought shall be guaranteed. Everyone shall have the right to express his opinion and to publish it by all means and methods. <i>But this freedom may not be abused in any way which is contrary to public order and morality.</i>
23	Freedom of press and of printing shall be guaranteed <i>within the limits of the law.</i>
24	Everyone shall be free to use any language in his private transactions or religious or cultural matters or in the Press or any other publications or in public meetings.
25	The right of peaceful meetings is guaranteed <i>within the limits of law.</i>
26	The right of peaceful associations shall be guaranteed. The exercise of that right shall be regulated by law.
27	Individuals shall have the right to address public authorities by means of letters signed by them in connection with matters which concern them but only organised bodies or justice persons may address the authorities on behalf of a number of persons.
28	Every Libyan shall have the right to education. The State shall ensure the diffusion of education by means of establishment of public schools and of private schools which it may permit to be established under its supervision, for Libyans and foreigners.
29	Teaching shall be unrestricted <i>so long as it does not constitute a breach of public order and is not contrary to morality.</i> Public education shall be regulated by law.
30	Elementary education shall be compulsory for Libyan children of both sexes; elementary and primary education in the public schools shall be free.
31	Property shall be inviolable. No owner may be prevented from disposing of his property <i>except within the limits of the law.</i> No property of any person shall be expropriated except in the public interest and in the cases and in the manner determined by law and provided such person is awarded fair compensation.
32	The penalty of general confiscation of property shall be prohibited.
33	The family is the basis of society and shall be entitled to protection by the State. The State shall also protect and encourage marriage.
34	Work is one of the basic elements of life. It shall be protected by the State and shall be the right of all Libyans. Every individual who works shall be entitled to fair remuneration.
35	The State shall endeavour to provide as far as possible for every Libyan and his family an appropriate standard of living.
189	The extradition of political refugees shall be prohibited. International treaties and the federal laws shall prescribe the grounds for the extradition of ordinary criminals.
190	Foreigners shall be deported only in accordance with the provisions of the federal law.
191	The legal status of foreigners shall be prescribed by federal law in accordance with the principles of international law.
192	The State shall guarantee respect for the systems of personal status of non-Muslims.
195	No provision of this Constitution may be suspended under any circumstances <i>except where such suspension is temporary in time of war or during the operation of martial law and is in accordance with law.</i> In any event a parliamentary session may not be suspended when the conditions prescribed by this Constitution for the holding of such a session exist.