



How to Engage with Governance Issues in Libya?

Jan Michiel OTTO
University of Leiden

1. Governance challenges

As all of you know, Libya faces a complex problem of state building. Five huge challenges of governance coincide, i.e. a lack of security, a lack of unity, a lack of state capacity to deliver, a lack of democracy, and finally there is a lack of justice. Since mid-February 2011 a number of committed Libyans, brave politicians, higher civil servants, professional jurists, academics and NGO activists have done their utmost best to meet these challenges. The United Nations support mission in Libya (UNSMIL) has made many efforts to support them. But with a divided country and a divided international community, successes have been very limited. Before I further discuss this in more detail, I would like to make some observations about Russia's role in state formation and constitutional development of countries in the MENA region such as Libya.

2. The Russian involvement in Syria's constitution making process

Gianluca brought to our attention a publication by William Partlett, an expert in Russian constitutional law. The author suggests that Russia has now joined international efforts to promote a rule of law abroad, in Syria in this case. Partlett concludes that Russia in doing so seems to work with a specific non-liberal 'Eurasian' model.¹ This conclusion is based on his

¹ William Partlett, Understanding the origins of Russia's constitutional solution to the Syrian conflict, Constitutionnet, International IDEA, 24 February 2017 <http://www.constitutionnet.org/news/understanding-origins-russias-constitutional-solution-syrian-conflict>, accessed on 10 March 2017

analysis of a draft constitutional text for Syria, which was presented by the Russians during a conference on peace-building and state formation in Syria in Astana, Kazakhstan, in January 2017.

Partlett's article finds that this Russian text lacks certain constitutional principles common in the West and concludes that Russia has 'put forward as a solution' a draft that 'draws on uniquely Eurasian conceptions of public power'. The author notes that most Eurasian countries have 'hybrid' constitutions, in which 'western ideas' appear alongside 'their own distinctive' tradition. This tradition stems in his view from a persistent and powerful Eurasian obsession with unity and cohesiveness of state power. Partlett recognises these features in provisions emphasizing state integrity, a strong sovereign leader, the unity of people and state, and the acceptance of ethnic, religious and regional pluralism within a centralized unitary state.

All of this worries the author as he fears erosion of democracy and human rights. He seems to suggest that the West should rather not leave this kind of rule of law promotion to the Russians. I find his argument not fully convincing. What Partlett attributes to a typically Eurasian model, is in fact common constitutional style in most countries in Asia, Africa, and the Middle East. They usually have such 'hybrid' constitutions which combine elements that refer to the ethnic and religious pluralism of their societies with prescriptions for the strong state that the drafters want to establish. The late Anthony Allott in his 1980 book 'The Limits of Law' convincingly argued that political elites of most developing countries have been obsessed with unification, precisely because of the many ethnic, religious, political, linguistic and social cleavages. The huge challenges of state-building in these societies are obvious, and experience does not exactly tell us that western constitutional models have been successful in the developing world.

Yet, many politicians and activists in the Middle East still share a preference for most constitutional values that are common in the West. Be that as it is, one should not deny Russia the right to share its models with other countries, as much as one should not accept Russia denying that right to others. The USA under Trump has left a wide geopolitical space for Russia to extend its influence in the MENA region, and one way to use such power is the promotion and support of legal reform. For Russia this regional role is not completely new. In the 1960s and early 1970s the legal and constitutional systems of countries like Syria, Egypt, Libya were heavily influenced by Soviet-based ideology, called Arab Socialism which was translated in national constitutions, laws and institutions. Libya has actually continued this socialist tradition throughout Gaddafi's 42 years in power, until 2011.

3. The 2011 Revolution and the emergence of a transitional government

The 2011 uprising which started from Benghazi was homegrown and authentic. It was a reaction to a despotic regime. Gaddafi had created a society of distrust and incapacitated most state institutions. All of this occurred in the name of Gaddafi's personal ideological theory laid down in his infamous Green Book.

Given the regime's overwhelming power it was immensely courageous to start an armed revolt. That the revolutionaries after months of hard struggle succeeded in bringing the tyrant down, was a remarkable achievement indeed. Subsequently, they made it clear that the new Libya should rest on the rule of law. To this end the revolutionaries' National Transitional Council (NTC) issued in August 2011 a Constitutional Declaration. This interim Constitution laid down a legal roadmap to a new democratic Libya. The NTC and its Executive Bureau formed a sort of interim-government 'until Gaddafi would be defeated and elections could be held'.

4. The 2012 Elections and Cabinet Formation

2011, 2012 and the first half of 2013 were years of hope. The elections of 2012 were a huge success, both the local elections as well as the parliamentary elections. The international community, led by UNSMIL, was very supportive. International NGOs from all over the world flocked into Libya to give assistance to local groups turning into Libyan civil society organisations. To reconstruct a better Libya it seemed that the huge revenues from the export of oil and gas could be used.

As foreseen by the constitutional declaration, the parliamentary elections resulted in a democratically elected General National Congress (GNC), which in turn appointed a Prime Minister (PM) and approved his cabinet. The PM was Ali Zeidan and under his leadership, in 2012 and 2013 the beginnings of good governance seemed to appear.

5. Armed groups, assassinations, the 2013 Political Isolation Law and increasing instability

Unfortunately, these successes were gradually overshadowed by unfavorable developments. Many hundreds of armed groups, which had fought for Libya's revolt and liberation, obtained much well deserved praise from the population but then gradually underwent a problematic transformation. Whereas numerous men who had joined the revolutionary struggle, returned to work or studies, tens of thousands of others preferred to continue in their roles of – or newly join – armed groups controlling certain areas and 'solving problems' with their weapons. 'For the time being' the government depended on the support of these groups to keep order solve local conflicts. So, it began to pay them monthly salaries, which were even higher than that of an ordinary soldier or policeman. In retrospect this has created an enormous problem.

In addition, it proved impossible to detect those behind series of assassinations, notably in Benghazi, since late 2011 targeting a broad range of innocent Libyans. People suspected either Gaddafi loyalists, or Islamic extremists, or even criminal organisations. This has created an atmosphere of fear, and concern about the capacity of the government to provide security.

At the same time all kinds of local conflicts between tribes, between cities, between political opponents erupted throughout the country. The government had to respond and intervene constantly, which limited its capacity to start with serious reconstruction. Politically, the GNC began to assert a political role independent of the government. In several cases it simply refused cooperation with Ali Zeidan's cabinet, which was in fact a coalition government of nationalist and Islamist-leaning parties. Gradually, the latter withdrew their support and became an opposition, supported by certain Islamist-leaning armed groups. The latter threatened and sometimes actually occupied ministries and parliamentary buildings.

Other armed groups put pressure on the government by blocking oil and gas outlets and demanding financial support. When in late 2013 Prime Minister Ali Zeidan was even kidnapped and held hostage by an armed group, the end of organized governance seemed already to be close. Popular demonstrations then accused the GNC of obstructing the government and the country was about to face a constitutional crisis.

6. The February 2014 rescue effort, and the unfortunate bifurcation

The crisis was overcome thanks to a committee of constitutional experts, the so-called February Committee, which was able to come up with a set of solutions. Upon their advice, new parliamentary elections were planned for June 2014. Also a separate Constitutional Drafting Assembly (CDA) was to be elected and mandated with drafting a

a permanent constitution for Libya. Both elections were held but with a poor turnout. The new GNC was elected as well as the CDA.

However, the little grip government had was further weakened, anarchy spread, and in the summer of 2014, Tripoli was taken over by Islamist-leaning armed groups, mostly from Misrata. They clearly opposed the newly elected GNC and the cabinet led by caretaker PM Thinni, which both had to flee the capital and seek refuge and settle in the Eastern region - the legislature in Tobruk, and the executive in Al-Bayda. So, even though they did not originate from the Eastern Region, both would be known for years as 'the government in the East'.

Meanwhile in the West, members of the old GNC, whose term had already ended, resurrected themselves with the support of the Islamist militias, and appointed a 'government of national salvation, under Khalifa al-Ghawil. This would become known during the next year as 'the government in the West'; it would never play an important role. In any case, Libya, instead of being united and reconstructed, was now bifurcated.

7. The 2015 reconciliation efforts, the Political Agreement, and the rise of Haftar in the East, and the threat of Daesh/IS.

After the bifurcation of 2014, some politicians from both sides tried to reconcile for the sake of national unity. This turned out to be an uphill task. In fact, it now also became the main task of the Special Representative of the Secretary-General of the UN to Libya, also the head of UNSMIL, to help reconcile the two sides. Subsequent SRSG's - Tarek Mitri was succeeded in 2014 by Bernardino de Leon, who was succeeded in 2015 by Martin Kobler - tried hard.

In the course of 2015 a new constitutional design emerged from talks with and between representatives of both sides. The parliament in the East, named House of Representatives, would become the new legislature. The parliament in the west would turn into a kind of upper house called High State Council. There would be a transitional Presidency Council (PC) which would temporarily lead the executive and form a Government of National Accord (GNA).

After lengthy negotiations, involving both the main Libyan actors and many international stakeholders, including neighboring and Arab states, USA, Russia, the EU, UK, Italy, Germany, France, the African Union etc., on 17 December 2015 the Libyan Political Agreement or LPA was finally concluded in Skhirat, Morocco. It details the abovementioned constitutional design and is to be in force for a period of two years.

Meanwhile, another major actor had appeared on the scene. Khalifa Haftar, a former general of Gaddafi, who had long lived in exile in the USA, had now returned to Libya, and announced publicly that he would restore order and stability in the country. Initially he was not taken very serious but in 2014-5 he gradually built up a conglomerate of armed groups, called the Libyan National Army (LNA). He moved his headquarters to the East to fight groups of Islamist extremists, notably those who had occupied parts of Benghazi.

It took Haftar much more time and effort than was initially announced. But with strong support of Egypt and the UAE, condoned by several European countries, he gradually made progress until by mid 2017 he controlled most of the Eastern region. Haftar has framed his opponents invariably as dangerous Islamists, thus successfully soliciting popular and foreign support. As democracy and human rights were never his priority, he then replaced elected mayors of eastern cities by military administrators of his choice establishing a rather authoritarian if not oppressive style of governance in the east.

8. 2016-7: Division continued; rise and fall of IS; a new constitution?

In early 2016 it had looked as if the 2015 Libyan Political Agreement (LPA) would soon be implemented. This would only require the composition of a Presidency Council, the ratification of the LPA by the House of Representatives (HoR) in the east, and the formation of a GNA-cabinet by the PC to be approved by the HoR. The PC had been composed of nine members, representing Libya's major political currents, regions and cities, thus including both nationalists as islamist-leaning members. In 2016 and 2017 the PC managed to be recognized by the international community as the legitimate government of Libya. Its head, Fayeaz Serraj, and his deputies, became the main interlocutors of foreign powers. Serraj's PC could dispose of the national income, mainly revenues from oil and gas. According to the LPA the PC would also have the supreme command over Libya's armed forces, but this was rejected by Haftar and the politicians in the east he controlled. So, the HoR never ratified the LPA nor did it approve the GNA-cabinet proposed by the PC. General Haftar referred to the PC as islamists and put pressure on the eastern government and legislature to not collaborate with the PC, and instead appoint him to lead the national armed forces. In some ways Haftar's ideas coincided with those of federalists in the East who feared that the PC/GNA would become yet another centralized regime in the West and control revenues from oil produced in the East.

During this impasse Daesh/IS, which was about to be defeated in Iraq and Syria, created in 2015-6 a new stronghold in Libya's central region by occupying the city of Sirte and its surroundings. Here Gaddafi and his tribe had always played a leading role, and after his downfall the local population had felt lost. IS in Sirte was finally defeated in battle which took most of 2016. Armed troops from Misrata with US air support, finally managed to liberate Sirte in December 2016.

Another positive development was that the CDA had produced draft texts for a new Libyan constitution. The CDA had long been able to stay free from the bifurcation and remain reasonably united. From 2015 onwards various drafts were circulated, mostly following the governance structure of the LPA. However in the course of 2017 this unity seemed to come to an end. A 'final' draft was produced by the CDA, but the CDA was divided about the draft. The CDA's chairman had been dismissed, and the final draft was appealed against in a court. Also it seemed unlikely that the HoR would approve it and put it to a referendum as required by the 2011 Constitutional Declaration.

So the impasse continued. Meanwhile, the actual power of formal state institutions to run the country is quite limited. This goes for the elected legislature in the East, the HoR, for the PC's government in the West, as well as for the Thinni-government in the East. Local powerholders and militias and Hafter's LNA continue to fill part of the vacuum. Now, back to the question of how to engage with governance in Libya?

9. How to engage with governance in Libya: the role of law and socio-legal scholarship in reconciliation

The five governance challenges I mentioned at the beginning - security, unity, state capacity to deliver, democracy, and justice – are considerable. From the past few years we have learned that these goals are interrelated, and hard to achieve. Both the democratic structures and the justice system have been paralysed since armed groups have taken the law in their own hands. Therefore, the first priority is reconciliation and the formation of a legitimate government possessing the monopoly of force in the whole of Libya and the capacity to get things done. This requires careful analysis and action based on knowledge of Libya's formal and informal politics, economics, military, administration, and socio-cultural features.

How to engage? Is there any way us academics in the West can contribute? My answer is: yes, certainly, as long as Libyan academics are willing to take the lead. I have had the privilege of working with colleagues at universities in Benghazi, Tripoli and elsewhere. Many of them have closely been involved in policy-relevant research and consultancy, even before the revolution. Since 2011 some of them have temporarily taken up roles in state institutions, as ministers, legal drafters, parliamentarians, diplomats, or civil servants. Others remained active as academics. Their engagement with the international academic world can be encouraged. Libya and its universities have lacked an open communication with the international academic world for over four decades. Now they are, in spite of practical difficulties, open to it.

One example is the collaboration between the University of Benghazi and Leiden University in the area of law and socio-legal studies. We have conducted several joint projects, and are now preparing a research on the role of law in reconciliation processes in Libya. Our focus will be on the remaining bones of contestation in the draft constitution, the Libyan Political Agreement, and Libyan laws, and the potential of legally worded solutions. Hopefully, my Libyan colleague dr. Suliman Ibrahim or I can return some day to your distinguished institution and report on progress made in Libya with reconciliation and state-formation, and the results of our research. For now, thank you so much for your attention.