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Constitution Making in a Revolution: the Case of Libya

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It was a great pleasure to be able to participate in this panel, and to comment on Professor Suliman Ibrahim's excellent paper, whose convincing presentation of the facts I will here presuppose. Of course I was invited to participate not as an expert on Libya, but as someone who could bring a larger comparative experience to the topic.¹

I wish to start by comparing the so-called revolutions of 1989 with the Arab Revolutions of 2011. In my view, the former, in spite of international nomenclature, along with South Africa's transition, were post-revolutionary processes relying on legal continuity, comprehensive negotiations, and multi stage democratic forms of constitution making. As against sovereign constituent assemblies, their typical constitution making organ was the round table, involving the presence and eventual agreement of previously opposed political forces in society. I refer to the constitution making processes as post sovereign in that at no stage did a body, a movement, an institution or a leader claim to alone represent and embody the will of the sovereign people. In contrast, in 2011, provisional governments and in some countries constituent assemblies at least attempted to alone speak in the name of the people as a whole. These were genuine revolutions involving legal rupture, classical forms of dual power rightly stressed by students and participants of the Russian Revolution 100 years ago. As I would have predicted on the bases of historical experience (as well as the theory of Hannah Arendt in *On Revolution*) these revolutions were successful in carrying out acts of liberation, but had difficulties establishing democratic constitutions. So far only one, Tunisia, succeeded in such an effort. Elsewhere, in Egypt, two undemocratically made and highly deficient constitutions emerged, while in Syria, Yemen and Libya ongoing civil wars without constitutional consolidation have been the main result, so far.

Yet, according to my first thesis here, the revolutions of 2011 took place in an international historical context marked by the post-revolutionary normative achievements of the previous epoch of transformations. This has meant the attempt even in revolutions to import and transplant elements and features of the post-revolutionary paradigm. This was done well in Tunisia, where early negotiations and agreements have put the main revolutionary and reformist forces on a path of often difficult coming to agreement and compromise. The

¹ I have written on constitutional politics in Central Europe, South Africa, Iraq, and more recently on Latin America, as well as on two Arab countries neighboring Libya, namely Egypt and Tunisia. See *Civil Society, Constitution and Legitimacy* (2000), *Constitution Making under Occupation* (2006); *Post Sovereign Constitution making* (2016), and *Adventures of the Constituent Power* (2017).

operation of importation was less successful in Egypt both with respect to the process and its result.²

Libya has been and remains a very different country when compared to these two neighbours. I cannot and have no need to go into all the many details of difference, except for stressing three elements: the unique nature of the previous authoritarian regime, the less than fully integrated character of the three main regions of the country, and the significant role of international intervention in the success of the also quite diverse forces of liberation.

Nevertheless, in spite of these differences there was in Libya a similar revolutionary process to those in Tunisia and Egypt characterised by full legal breaks as well as the presence of a unique if not unified revolutionary organ, the (Interim) Transitional National Council (TNC). This self-appointed body began the process by its Interim Constitutional Declaration (ICD) of March 2011 (repeated in August 2011), still in a setting of dual power. This Declaration contained rules of constitution making (art. 30) that were subsequently amended by a new elected body, the General National Congress (GNC) itself established under the same set of rules. And here too, in Libya, there were significant efforts of importation or transplantation of post-revolutionary or post sovereign ideas in the midst of revolutionary constitution making. These were the following:

1. The Interim Constitutional Declaration (ICD), more developed than most revolutionary documents, established forms of limitation on even the transitional legislative authority, and was in this sense an attempt to establish constitutionalism during the transition itself.
2. The Supreme Court, an institution inherited from the previous regime whose independence was confirmed (or rather: established) by the ICD (art. 32), became a player whose role was meant to be the enforcement of the transition rules against the holders of power.
3. With respect to earlier post-revolutionary transitions, there was a more determined attempt to keep constituent (the Constituent or more accurately the Constitution Drafting Assembly or CDA) and legislative organs (first the General National Council and then the House of Representatives) separate and differentiated, with the CDA resisting any attempts within to take over all the power.
4. Even if not in the beginning, comprehensive negotiations played a role in attempting to overcome the great difficulties of the transition as they emerged.

Unfortunately, in Libya post sovereign features 2 and 3 destabilised the constitutionalist project of 1, while making the project of 4 extremely difficult. Thus, as in Egypt (as against Tunisia), the combination of revolutionary and post sovereign elements was incoherent and unstable. Leaving aside the background cleavages and antagonisms so well described in Ibrahim’s paper, that even on their own may have subverted the process so far, I believe the incoherence was based on two bad choices at the level of constitutional politics. The first of these, obviously, was the choice by the GNC to elect a second representative assembly, the House of Representatives (HoR), when it itself was stymied by sharp internal conflicts. Personally I do sympathize with the liberal and secular forces that sought this move, and who succeeded in electing a body more to their liking. Yet I note that elections with their possibly majoritarian consequences are not a good way to solve fundamental conflicts over the nature of the state that here had to do with not only Islam vs. secularism, but also federalism vs.

² See *Adventures* chapter 4.

unitary ideals. The outcome in any case led to the renewal of classical dual power in a country, having the two legislatures (the GNC part of which refused to disband; and the HoR) and two governments based on them, not to mention the several armies and militias supporting each.

The second bad choice compounded the first. On the bases of technicalities (correct or not) the Supreme Court of Libya invalidated the election of the House of Representatives, and some of the amendments on which its election was based. Perhaps this was an attempt to remedy the first bad choice, but two wrongs do not usually make a right. After a more recent election and its distributional consequences the effort at dissolution could work no better in Libya than in Egypt, where something similar was attempted by the Supreme Constitutional Court (in that case against an Islamist majority). As against Egypt, both legislatures (and worse: two governments) continued to operate, both with much reduced legitimacy, and indeed carrying out destructive military operations against one another based on the two parts of the country (Tripolitania in the West and Cyrenaica in the East, with several militias struggling over the control of the third, Fezzan in the South). None of these forces could, however, establish a monopoly over the forces of violence, even in small territories and individual cities.

It is my second thesis that the two bad choices, by re-opening the duality or multiplicity of power, but this time between or among new forces, made the task of negotiating a solution that almost everyone could have supported in principle very difficult. The process of *liberation*, in Arendt’s terminology, required overcoming the forces of a discredited and crumbling old regime, and was relatively easy with international help. The process of *constitution*, however, now arrayed forces against one another, with liberation credits, fully assuming their own legitimacy and justified aspirations. Worse, this time international actors supported different sides according to their own interests and values.

Nevertheless, it was right to try comprehensive negotiations even if very unfortunately now out of the best sequence, namely in the middle rather than in the beginning. And formally in July of 2015 the most important round of negotiations under UNSMIL supervision, leading to the Shkirat Agreements,³ seemed to be successful. The two legislatures were combined in a new scheme (HoR and Council of State), and a new Government of National Accord was formed by January of 2016. Unfortunately, many of the components of each political side refused to recognise this new arrangement, with the result that Libya now had, arguably, three governments in place, warring with one another. Only the Constitutional Drafting Assembly seemed to have survived the political anarchy intact, remaining differentiated from each of the legislatures. And as Ibrahim’s paper nicely showed, this body managed to produce several drafts, involving increasing consensus in spite of boycotts and protests. Ibrahim is cautiously optimistic about the possible outcome. I am less so.⁴ Indeed, I do not think, as he seems to, that the solution can come from a general constitution drafting body. In my view, a constitution can only be made once a state structure has been agreed upon, and established.

My reasons for pessimism have not so much to do with the drafts and their many problems. These drafts are adequate, to say the very least. However, even if a referendum were held on

³ https://unsmil.unmissions.org/sites/default/files/Libyan_Political_Agreement_2_July_15.pdf

⁴ A critical report on a previous draft, by the International Commission of Jurists:
<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/12/Lybia-Draft-Constitution-Flaws-Deficiencies-Publications-Reports-2015-ENG.pdf>

one of them, and the required 2/3 support could be attained - a very big if - how is adherence to the result to be enforced under present conditions of disunity and conflict? I return to the issue of sequence. Had agreements under international sponsorship and with potential UN enforcement been generated early in the process, the problem of the structure of the state could have been handled separately in a first stage. While the solution of some kind of federalism, based on strong regional constitutional self-government along with a sufficient level of economic integration to guarantee some resource equality would have been the same whether then or now, it is now much harder to attain than before. In 2011 it was a question of devolution, what A. Stepan and J. Linz called “holding together” federalism.⁵ Such a change in a previously unified state can be accomplished even with great concessions to regions and provinces, as significant authority is retained by the centre that already has institutions to rely on. Once we have reached a level of high decentralisation however, in the midst of civil war, with increasingly consolidated local and regional institutions, it becomes a question of establishing a “coming together federation” in the terminology of these authors. Such a task is difficult even under conditions of social, linguistic, religious and political homogeneity. In strongly divided societies as Libya now, the task becomes all the more formidable.

It is my third and last thesis that, if convincing, needs to be recognised by all sides, including the international actors involved. This is that only a more decentralised version of federalism can work now as a form of “coming together”. I recognise that there are many advocates of a more unified state in Libya, who even if they could have accepted some form of genuine devolution early on, think they can never live with a more decentralised form with regional constitutions, and relatively few reserved powers in the central government. They may wish to fight to the death against such a solution. But it is till death they are likely to wind up fighting. And in the end those who survive will more likely get partition rather than any kind of federation.

It is hazardous to try to convince by relying on an example under decolonisation, but I can think of nothing better. In 1930s India,⁶ the Government of India Act (1937) offered a fairly balanced federation to the whole of British India, including the princely states. Yet, the deal was denounced by nationalists including Nehru, a man of considerable prudence and enlightenment, as another Colonial attempt to divide and conquer. Eight years and many struggles later, after each side, Muslim and Hindu, became more differentiated and consolidated, a much more decentralised proposal, the Cabinet Mission Plan, was offered by the outgoing colonial power. When this too was rejected after initially being accepted in very bad faith, partition became the only option in a form desired by neither side. Everyone lost. The lesson is unfortunately simple, if difficult to follow. When it comes to federal solutions it is all important to choose the right version, at the right time. Yes, a negotiated solution to the civil war is still possible in Libya, especially under international influence, supervision and perhaps enforcement. However, it will be based not on more participation from below, but on the agreement of the most important elites. Yes, a decentralised federation with economic redistribution may still be possible. It is up to Libyans to convince one another of the version they can all live with, even if only a second or third best. In such a situation, aiming at the best can only produce its exact contrary, continued civil war, and when all the warriors grow tired, partition among units that are likely to consolidate military based authoritarian forms.

⁵ Stepan, Alfred, Juan J. Linz, and Yogendra Yadav. *Crafting state-nations: India and other multinational democracies*. JHU Press, 2011.

⁶ I could have used Ireland as well as Mandatory Palestine to make the same point. In my view, federalism would have been the answer in both cases, and instead the result was two failed partitions.

