



## Constitution Making in Post Gaddafi Libya

Suliman IBRAHIM

Benghazi University, Libya / Van Vollenhoven Institute, Leiden University

On 29 July 2017, more than three years after it was elected, Libya's Constitution Drafting Assembly (CDA) announced its final draft. 44 out of the CDA's 58 members attended the session, and only one voted against the draft. There were other rejecters but they boycotted the session. The CDA then sent the draft to the House of Representatives (HoR) so it would enact a law regulating the public referendum required for approving the draft. If two-thirds of the voters say yes, the draft will become Libya's permanent constitution; this will mark the end of Libya's transition from Gaddafi's rule. Yet, the process since the announcement of the draft has been far from smooth. CDA members rejecting the draft challenged the decision to adopt it, and obtained a court ruling suspending this decision, thereby putting on hold the enactment of the referendum law. The draft also received wide negative reception, especially from regional, ethnic and religious factions. As of now, the chances of the draft getting approved seem rather slim. In fact, reasons for pessimism about Libya's constitution making can be traced to the birth of the CDA.

Initially, the Constitutional Declaration that the National Transitional Congress (NTC) issued in 2011 established the CDA as a body appointed by the NTC's successor: the General National Congress (GNC). The GNC would also review and approve the draft before putting it to a yes-or-no public referendum. However, in response to calls for equality in constitution making between Libya's three historical regions: Tripolitania (west): the poorest in natural resources and the most populated, Cyrenaica (east): the richest in natural resources, and Fezzan (south), the Declaration was amended so the CDA would consist of 60 members equally divided between these regions. The GNC would still choose those members. Fearing that the GNC was dominated by Tripolitania members supposedly disfavoured federalism, Cyrenaica's federalists successfully pressured the NTC into amending the Declaration so the CDA would be directly elected by the Libyan people. The GNC would have no say in the constitution making process apart from issuing the referendum law.

Troubles surrounded the CDA election. It witnessed a very low turnout; only 45% of the registered voters went to the polls, meaning that the actual voting percentage was below 14% of

those eligible to vote, and below 10% of the whole population. This raised questions about whether the CDA was entitled to write a constitution for the whole nation. Also, in a clear indication of ethnic dissatisfactions, the Amazigh minority boycotted the election. They demanded seats reflecting their proportion in the population, and a consensus-based mechanism for making decisions related to issues such as the name of the state, its identity and language rights. Their act left two seats unoccupied. Indicating another division, based on religious convictions this time, some extremist Islamist groups in the city of Darnah prevented people from voting. For them, democracy as a whole is an un-Islamic concept.

Amongst the challenges the CDA experienced in performing its task, building consensus was a major one. The elected body represented various factions of Libyan society, which is currently polarised and deeply divided over issues at the heart of the constitution being made, including for example local governance, political system, transitional justice, and the role of religion. Thus, no single draft received popular support within the CDA. In 2014 the Assembly was divided into eight thematic committees, each dealing with a particular theme, for example system of governance, judicial authority and rights and basic freedoms. There was no clear mechanism for coordinating the work of these various committees, and the end result was disconnected and at times contradictory chapters. To solve this problem, the CDA formed a Working Committee in June 2015 from amongst its members, including 4 members from each of the three regions. The Committee was to review the Thematic Committees’ chapters, identify provisions on which there was consensus, and propose provisions on controversial ones. However, as they were not represented in this Committee, the Tebu and Tuareg boycotted it, worsening the CDA’s representation and inclusiveness challenges. Furthermore, eleven members of the CDA, predominately from the western region, boycotted the Assembly for the “regional allocation” featuring its work.

The Working Committee produced its first draft in October 2015. It opted for a strong role of Sharia: it would be the source of legislation and the basis upon which “the provisions of the constitution are to be interpreted and restricted.” The draft recognised languages spoken by sections of the Libyan people as “national” languages and as part of Libya’s cultural and linguistic heritage, while deeming Arabic the “official” language. It provided for a strong executive headed by a popularly elected president. Although the draft did not opt for federalism, it recognised the “principle of extended decentralisation.” However, the central authorities would still exercise great powers over decentralised entities. In particular, the national legislature would have the power to form local government entities based on broad and imprecise criteria. The draft did not please many. Regarding the United Nations Support Mission in Libya (UNSMIL), the draft contained provisions that were contradictory to international standards and Libyan laws, and others that were incompatible with international best practices, or which were otherwise difficult to implement. For example, the draft provided for a strict interpretation of Sharia; discriminated against Libyan women married to foreigners by not allowing them, like Libyan men, to pass on

their nationality to their children; did not establish a quota for women in political posts; and was vague on important details concerning local governance.

In February 2016, the Working Committee announced a new draft in an attempt to address criticisms of the October draft. However, the February draft still introduced provisions that further deepened concerns of both minority groups and those opposed to “regional allocation”. For example, the draft declared Libya a part of the Arab world which raised concerns among non-Arab Libyans. It angered individuals opposed to “regional allocation” by proposals for the establishment of three capitals and the geographical distribution of the seats of important institutions: Tripoli would be the seat of the executive; the constitutional court would sit in Sabha; and Benghazi would host the legislative body. The draft kept the composition of the first house of the legislative body, the Elders Council, as it was in the first draft: 72 members equally divided between the three regions. The provisions in the October draft relating to Sharia were largely retained. While women would still be unable to pass their Libyan nationality to their children, the state would be obliged to take necessary measures to protect the rights they already enjoy under existing laws. It also guaranteed equality of opportunity for male and female citizens. Notably, unlike the October draft, the February draft guaranteed women a quota of not less than 25% in all elected councils for three consecutive terms.

Given the number of boycotters, it was clear that the draft would get the majority required by the CDA’s Internal Regulation. The only way out, it seemed, was to amend this Regulation. Indeed, on 16 April 2016, it was amended so it explicitly stated that the required quorum would be two-thirds plus one of the present, rather than actual, members, and on 19 April, 34 members out of 39 present approved as final an amended version of the February draft. However, the Appellate Court based in Beida city struck down the amendment decision on 7 December 2016.

The CDA was apparently back to square one. It then formed a Consensus Committee to build consensus on a new draft constitution. The Committee included 12 members: 6 in favour of the April 2016 draft and 6 against, including 3 boycotters. 9 of the Committee members agreed on an amended version of the April 2016 draft. While maintaining most of the provisions of the April 2016 draft, the new draft introduced important changes. For example, the Legislative Assembly (Shoura Council) is still composed of two chambers: a House of Representatives and an Elder Council; yet, the membership of the latter, which is not based on population criteria, is no longer equally divided between the three regions. Out of 78 seats, 32 are now allocated to the western region; 26 and 20 seats are assigned to the eastern and southern regions respectively. The draft still considers Sharia the source of legislation, but the relevant article is much shorter and no longer has a lengthy provision that defines Sharia as the recognised interpretation, requiring the interpretation of the constitution provisions to be conducted accordingly. In terms of languages, the draft avoids describing any as “official” or “national”. Rather, it describes languages spoken by all or parts of the Libyan population including Arabic, Tamazight, Tebu and Tuareg as part of

Libya’s cultural and linguistic heritage. However, it still deems Arabic as “the language of the state”.

On 29 July 2017, the CDA adopted a slightly amended version of the April 2017 draft. While most members from the western region praised it, including the former boycotters, the Tebu and Tuareg representatives were dismissive of the draft. Most of the eastern members refused the draft for, in their view, marginalising the east by not opting for federalism or a truly decentralised system, and changing the composition of the Elders’ Council. Some of them challenged the CDA’s decision to adopt the draft on procedural grounds; the relevant court precautiously suspended it. It is not clear yet what the court ruling will be on the substance of the appeal. Even if the court rejects the appeal in the end, it is doubtful whether in such a polarised society, the draft will get the required approval of the two-third majority in the public referendum. In sum, there is obviously still a long way to go before Libya’s constitution will see the light of the day.