

VIEWS & ASPIRATIONS OF CIVIL SOCIETY REGARDING THE CONSTITUTION OF LIBYA

EXECUTIVE SUMMARY

Libyan civil society organisations (CSOs) have widely different preferences for the future system of government (parliamentary vs. presidential; unicameral vs. bicameral). Similar splits are observed regarding the question of federalism and the extent of decentralisation. Most Libyan CSOs are not satisfied with the Sharia' provision in the draft constitution; many of them demand a clearer definition of the role of Sharia' in legislation to prevent the abuse by extremists. A few others demand the elimination of the provision, while preserving the Islamic identity of the state. Most CSOs demand more administrative and financial independence for the judiciary to be enforced by the new constitution.

Libyan CSOs approve that the draft constitution enhances the access of citizens to public life. However, they demand a clearer language to guarantee equal rights for women and minorities. CSOs strive for more constitutional guarantees for transparency in public finances and request further protection measures against corruption. While natural resource management and distribution were much debated, CSOs agree that the constitution should include further measures for transparency and equity.

1. INTRODUCTION

Civil society organisations (CSOs) in Libya have participated in debates on the constitution of their country ever since 2011. This paper brings together their views and aspirations based on the outcomes of a survey conducted by Libyan researchers and CSOs. The paper aims at exploring how Libyan CSOs see the future of the constitutional process: Their thoughts on the current text as well as on what could follow. The goal of the study is to contribute to enhance the participatory nature of the constitution-making process in Libya, and to support CSOs ensure a more efficient involvement for themselves in the entire process.

2. THE CONTEXT: CONSTITUTION- MAKING PROCESS

Libya's Constitution Drafting Assembly (CDA) was elected in February 2014. It issued a first draft of the constitution on 6 October 2015, followed by a second draft on 3 February 2016. At the time of writing it is reported that a third draft was endorsed by some CDA members on 19 April 2016. Once adopted, Libya's new constitution would replace the post-Gaddafi Constitutional Declaration of 3 August 2011 as amended, and the UN-brokered Libyan Political Agreement (LPA) of 17 December 2015.

In whatever way the constitution-making process progresses, the views, aspirations and perspectives of CSOs remain relevant, reflecting important views on the nature of the Libyan state.

3. CIVIL SOCIETY IN THE CONSTITUTION-MAKING PROCESS

Experience shows that inclusive constitution-making processes, especially in post conflict contexts, are more likely to result in an accepted and respected outcome. CSOs are one actor to be included in the process. In post-conflict countries, the requirements of 'inclusion', 'representation' and 'participation' are particularly relevant as a response to prior domination by specific groups: "Consultative and inclusive mechanisms, which facilitate bargaining and negotiation among elites and participation by the public, contribute to the acceptance of the transitional political process and its outcomes."¹ Thus, transition processes "that are broadly inclusive [...]"

¹ Katia Papagianni, "Power sharing, transitional governments and the role of mediation", *op. cit.*, p. 47. *Id.*, p. 58. Papagianni summarizes the policy reasons behind the requirements of inclusion or expansion of participation during the transition process as follows: "improving perceived legitimacy of a power-sharing government, representing newly formed opposition groups, enabling the emergence of new leaders, and laying foundations for long-term institutional development".

have the best chance of creating the legitimacy needed for effective post-war governance."²

In constitution-making processes worldwide, including CSOs is seen as a prerequisite for success. In addition, including civil society in the constitution-making process is increasingly seen as a legal obligation. A 2009 UNSG report notes the importance of "effective communication and an inclusive dialogue between national authorities and the population".³ More recently, the 2015 Review of the UN Peace-building architecture emphasised the importance of 'inclusive national ownership'.⁴

The views expressed in this paper do not reflect the vision or opinion of DRI.

4. METHODOLOGY

4.1. RESEARCH DESIGN

Interviews were conducted in the three historical regions of Libya. Using a semi-structured questionnaire, data collectors conducted a total of 31 interviews in the Eastern region of Cyrenaica, 23 in the Western region of Tripolitana and 16 in the Southern region of Fezzan. The questions were open-ended, thus not limiting respondents to pre-defined choices.

The questionnaire focuses on several themes that are central to the future constitution, such as the form and foundations of the state, the judiciary, rights and liberties under the future constitution, and the system of governance. Respondents were asked to explain how their future constitution should address and integrate these themes. As respondents did not need to engage with all matters, some topics (such as rights and liberties, or the form and foundations of the state) were addressed more than others. This gives an insight into priorities of the interviewed CSOs.

4.2. DEFINITION OF CIVIL SOCIETY / RESPONDENTS

A wide definition of CSOs was adopted for the purposes of identifying respondents in this study. Respondents are affiliated to organisations working on a wide range of topics and in diverse fields, including: the (independence of the) judiciary, heritage conservation, political advocacy,

social matters, health care, cultural affairs, democracy and elections, constitutional governance, universities and academic institutions, women's rights organisations, local governance, youth organisations, human rights advocacy, minority rights, rights for persons with disabilities, economic reform, press freedom and tribes.

The data collectors were required to approach all sides of the political spectrum, with no exceptions.

4.3. METHODOLOGICAL LIMITATIONS

The conduct of this study in a country in civil war faced some difficulties. The fact that the data collectors are local individuals, committed with and working for local CSOs, helped overcome many obstacles. However, some limitations merit special mention here, including:

- The study did not adopt a gendered perspective, however, where possible, the data collectors tried to ensure a gender balance and women empowerment organisations participated in the survey;
- Given the current circumstances in Libya, mainly the complex political environment coupled with fragile security conditions, it was more difficult to collect data in the Southern and Western regions, hence the higher number of interviews concluded in the Eastern region; and
- Several respondents had not had the opportunity to read the drafts of the constitution before the interviews; therefore, some responses show little awareness of the content of the latest drafts.

5. CIVIL SOCIETY VIEWS AND PERSPECTIVES

Some issues were discussed more than others. The form and foundation of the state as well as rights and liberties elicited many more comments by respondents. Constitutional issues relating to the judiciary, natural resources, system of governance and local governance were also discussed, but to a lesser degree. The survey respondents expressed fewer views on the establishment of constitutional bodies, including the Constitutional Court, financial governance and transitional measures. Finally, while the CSOs were asked to address the role of the military and police, the data collectors were not able to collect any views on this issue.

The opinions expressed were the following:

5.1. FORM AND FOUNDATION OF THE STATE

Constitution-makers should learn from other experiences that are comparable to what Libya has been experiencing

² T. D. Sisk, "Elections and Statebuilding after Civil War, Lurching toward legitimacy" in *Routledge Handbook of International Statebuilding*, eds. D. Chandler and T. D. Sisk, *op. cit.*, p. 259.

³ Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict' dd. 11 June 2009, A/63/881-S/2009/304, § 9.

⁴ 2015 Review of the UN Peacebuilding architecture, *op. cit.*, pp. 8-9; and Democracy Reporting International, "Briefing Paper 20: Lessons learned from Constitution-Making: Processes with broad based public participation" Berlin, November 2011, <[http:// dann.rewi.hu-berlin.de/doc/Dann_2011.pdf](http://dann.rewi.hu-berlin.de/doc/Dann_2011.pdf)>.

since 2011, some survey participants noted. For other respondents, the form of the state should be simplified.

5.1.1. THE SYSTEM OF GOVERNMENT

Survey respondents mentioned an array of options with regard to the system of government: a presidential system, a semi-presidential system and/or a parliamentary system. According to the current draft the President would have the power to appoint the Prime Minister and form or change the government, and may also propose draft legislation (art. 117). Although one survey participant suggests that the minimum age of the President be decreased to thirty years, the draft constitution provides that forty years is the minimum age to run for president. One CSO finds that, especially if a presidential system is adopted, a president should not serve more than two terms. The draft constitution indeed forbids "more than two complete, consecutive or non-consecutive terms" (art. 112).

CSOs do not agree on whether Libya should adopt a one-chamber or two-chamber system. CSOs from the East seem to privilege the former option. But the draft constitution foresees a bicameral system, with a House of Representatives and a Senate (art. 77). Members of both House of Representatives and Senate are directly elected. In both chambers the distribution of seats must reflect the geographical balance (art. 78; art. 86).

5.1.2. THE STRUCTURE OF THE STATE (FEDERALISM, DECENTRALISATION, LOCAL GOVERNANCE)

The draft constitution emphasises the indivisible nature of the Libyan state (art. 1). A couple of survey respondents, especially from the West, insist on the adoption of a 'unity constitution'. The question whether Libya should become a federal state, or to what extent it should be decentralised, has been a bone of contention since the CDA started its work in 2014. Among the survey respondents, both voices from the East and from the West suggest that Libya become a federal state, with at least one participant proposing that each region should have its own capital. Another participant finds that there should be two capitals, namely Tripoli and Benghazi, while a couple of CSOs privilege either one of these cities as the capital. The draft constitution provides: "The political Capital of the Libyan Republic is Tripoli; the economic Capital is Benghazi; and the tourist and cultural Capital is Sabha." The draft constitution however does not adopt the terminology 'federal state' or 'federalism'; the constitutional draft does therefore not define the form of state as a federal state. Instead, the draft speaks of 'decentralisation' and links this to local governance. A number of CSOs also focus on decentralised governance, and suggest that governorates become the main governance units. The generic notion of decentralisation is thus sometimes preferred over federalism: "No federalism, but a good decentralised municipality-based system" suggests one respondent.

The issue of local governance is governed by chapter 6 of the draft constitution. As the level and extent of decentralisation remains a sensitive issue, a number of CSOs wish to open a constructive dialogue with groups and associations concerned with local administration issues. The draft constitution provides that "[l]ocal government units shall enjoy legal personality and financial and administrative Independence" (art. 156). Especially in the East, CSOs insist on more clarity regarding the legal and financial personality and responsibility of administrative units.

For some respondents, the constitution should be explicit about the borders of local governance units. It should also become clearer which instance would have jurisdiction over establishing, merging or diminishing local governance units. The 'Higher Council for Local Governance' foreseen in the draft constitution does not seem to have that specific competence (art. 164). As to the level of decentralised power, one CSO finds that the powers of local authorities should be less emphasised in tribal areas than in non-tribal areas (such as Benghazi and Tripoli). By contrast, a participant from the South demands that the development of rural areas be prioritised through supporting local governance. One interviewee specifically demands that local tax revenues be allocated to local authorities; this would also allow these units to create budgets for development.

The draft constitution provides that "local government councils shall enjoy autonomous, transferrable, and shared powers from and with the central government" (art. 158). Generally, CSOs agree that the distribution of powers and competences must be described in more detail. The nature of the hierarchy between governorates and municipalities must be addressed. Also, local government units' conduct should be supervised by the national legislative power without the interference of the central executive authority, one survey participant remarks, and the draft constitution indeed provides that "the executive authority shall not interfere with the competences of local government units" (art. 161). This is echoed by another interviewee who demands that the control of the central government over local government units be decreased. The issue of independence of local government units is much emphasised. CSOs generally agree that the administrative, budgetary and fiscal independence of these units must be guaranteed.

5.1.3. THE ROLE OF THE SHARIA'

Art. 8 of the draft constitution provides that "Islam shall be the religion of the State, and Islamic Sharia' shall be the source of legislation in accordance with the recognised doctrines and interpretations without being bound to a particular jurisprudential opinion on discretionary matters. The provisions of the Constitution shall be interpreted and bound in accordance with this." This approach has spurred controversy among CSOs. One

survey participant finds that the role of Sharia' and its relation to the constitutional texts and constitutional rights for men and women should be debated on the occasion of an Islamic conference gathering Islamist movements from inside and outside of Libya. Another participant fears that the provision promoting Sharia' as the source of legislation might be abused by extremists: "Islam should be the religion of the State, but not the only source of legislation." He fears the risk would also be that Islamist movements may take the cover of religion to allow for violations of the law and that *Jtehad* (the interpretation of Sharia') would open the door for such abuses. The draft constitution details that "particular jurisprudential opinions on discretionary matters" do not form the source of legislation, but this reservation might not be strong enough. Thus, a number of CSOs think that the part on interpretations of the Sharia' should be eliminated from the constitutional provisions, while other CSOs indicate that one specific interpretation of the religious texts should be assigned in the constitution. Some CSOs even demand that any reference to religion as a source of legislation be deleted from the text. Clearly, there is no agreement on this issue. One CSO suggests that the article on the role of Sharia' be voted on in a separate referendum.

5.1.4. THE ROLE OF THE JUDICIARY

5.1.4.1. The Judiciary in general, the Constitutional Court and the High Judicial Council

As to the organisation of the judiciary, one CSO representative observes that it was an imperfect replica of the Egyptian judiciary. One survey participant remarks that the Constitutional Court should stand above all other state bodies. The draft constitution indeed provides that the Constitutional Court exercises "[j]udicial oversight of the constitutionality of laws and the regulations of the House of Representatives and the Senate" (art. 150). Several CSOs insist on the independence of the judiciary. This is echoed in the draft constitution, which provides that the judiciary shall be independent (art. 131). For the same reason, the constitution should forbid any discrimination when it comes to appointing judges, and the selection procedure should be based on qualification and expertise only, as argued by one CSO. Furthermore, the right to a fair process must be guaranteed, and for this reason the state should appoint lawyers for those who cannot afford it, a couple of survey respondents say.

The independence of the High Judicial Council was much mentioned. This Council has the competence over appointing, promoting, moving, and disciplining the members of the judiciary (art. 138). Given these significant powers, CSOs find that the constitution should ensure the administrative and fiscal independence of the High Judicial Council, so as to avoid that it can be influenced by any other state body. In addition, one CSO contends that the High Judicial Council cannot comprise anyone from outside the judiciary. The draft constitution

however provides that "two individuals with legal specialisation outside of the judiciary" should be included in the High Judicial Council (art. 139). One CSO insists that women be fairly represented in this council.

Another CSO thinks that the appointment competence of the High Judicial Council should be limited to appointing the heads of judicial entities and state prosecutors. For one CSO, the constitution should not be too detailed about the High Judicial Council; a law should regulate it. The draft constitution indeed provides that the High Council shall be regulated by law (art. 138).

5.1.4.2. Transitional justice

The draft constitution provides that the state shall be committed to "uncover and document human rights violations" (art. 197). CSOs explicitly request constitutional guarantees that transitional justice be applied and accountability measures implemented against those who conducted crimes (or "wasted public money", one survey participant adds). The state should commit to a number of transitional measures to ensure a peaceful transition. This includes organising a national-level reconciliation process.

5.2. RIGHTS AND LIBERTIES

The draft constitution enshrines a bill of rights and liberties for Libyan citizens. CSOs insist that the Libyan citizens (or human beings) –and no other affiliation or criteria for identification– be the basis for granting these rights and liberties. Also, they insist on "clear and reasonable constraints on the limitation of rights".

A number of survey respondents demand that the supremacy of international human rights treaties be explicitly enshrined in the constitution. The draft constitution recognises the superiority over national laws (but not the constitution) of "international treaties and conventions that the State ratifies" (art. 17), but does not specify that human rights treaties take precedence over the constitution. Regardless of this specific issue, CSOs have exchanged views about political rights (5.2.1.), women's rights (5.2.2.), the freedom of expression and religious freedom (5.2.3.) and the protection of minorities, languages, youth, civil society, and vulnerable persons such as the disabled and elderly (5.2.4.).

5.2.1. POLITICAL RIGHTS AND PROTECTION OF CSOS

The draft constitution provides that each citizen has the right to vote and run for office (art. 48). CSOs have tabled a number of suggestions to facilitate the access to public functions: reducing the candidacy age for the House of Representatives to 21 years to allow youth participation; ensuring that physical health is not a criterion for candidacy; and allowing the Diaspora to participate in the electoral process (a right already protected by art. 54 of the draft constitution).

At the same time, the draft constitution limits the possibility of participating in public life: "all political parties shall be dissolved and procedures for their establishment shall be suspended for a period of four years, during which a law shall be passed according to which they shall be re-formed" (art. 204). For one survey participant, this article "should be removed and replaced with an article on monitoring party financing". Another participant supports the provision, while a third even suggests that parties be "permanently prohibited".

Participation in public life can be facilitated by CSOs. The interviewees generally agree that the freedom of CSOs' work should be guaranteed, and the parliament should allocate funds for CSOs. The draft constitution provides that "[t]he State shall guarantee the freedom to form civil society organisations and right of affiliation according to the necessary standards for balancing the requirements of independence and the needs of transparency. They may not be suspended except by court order or dissolved except by court ruling." Another demand is that an independent commission for the protection of CSOs be established in the constitution, and that a law regulate their work.

5.2.2. WOMEN'S RIGHTS

The draft constitution provides that "[m]ale and female citizens shall be equal in and before the law. There shall be no discrimination between them by way of diminishing, restricting, or depriving [of rights] in accordance with the provisions of this Constitution" (art. 9). It furthermore provides that "women are sisters of men" and that the state must commit to support and protect them against discrimination "in all sectors" (art. 58).

The draft constitution introduces a 25% women quota of the total seats in elected councils, but only for two terms following the enactment of the constitution (art. 205). CSOs argue that the constitution does not provide enough protection for women's rights. This already stems from the language of the constitution. All constitutional texts should be 'genderised' by including references to "Libyan men and women", one survey participant said, and the equality of men and women should be explicitly recognised.

In addition, rights (notably the right to education, protected under art. 61 of the draft constitution) should be explicitly granted to women who are in a vulnerable position, such as unmarried and elderly women and women with disabilities, a women's rights CSO contends. Finally, because the Sharia' is currently the source of legislation, the CSO fears that this may impact the constitution's provisions forbidding discrimination against women – these provisions, and especially those allowing women access to high positions, might become

ineffective if the constitution is deemed inferior to the Islamic Sharia'.

One particular issue of debate in relation to women's rights concerns their right to pass the Libyan nationality on to their children. Several CSOs demand that women should have that right. The draft constitution currently allows for double nationality (art. 12§3), despite the objections of some of the survey respondents. Some of the respondents advise that, because the issue of nationality concerns a *right*, it should be moved to the draft constitution's chapter on rights and liberties (currently, Chapter 2 of the draft).

5.2.3. FREEDOM OF EXPRESSION AND RELIGIOUS FREEDOM

The draft constitution protects the freedom of expression and of press and media (art. 46 & 47). The freedom of assembly, association and demonstration are also protected (art. 52). Several CSOs approve this. Specifically in relation to the freedom of media, one survey participant applauds the draft constitution's pledge to create a High Council for the Media and Press as a constitutional body (art. 174).

Survey respondents both from the West and the East request that the constitution must explicitly respect other religions, and that the freedom of religion be explicitly recognised. Other CSOs demand to eliminate the reference to the Sharia' as the source of legislation, which might affect religious freedom. Individual rights should be disassociated from Islamic Sharia', and all articles that refer to Islam or Sharia' should be carefully rephrased to avoid the risk of extremism. For one CSO, "religion lives within each Libyan and there is no need to constitutionalise that".

5.2.4. MINORITY AND LANGUAGE PROTECTION AND GUARANTEES FOR VULNERABLE POPULATION

As perceived by many respondents, the current draft constitution does not explicitly and sufficiently protect minorities' rights. The words 'minority' or 'minorities' are not mentioned. Some CSOs want this to change. A number of survey respondents also demand that minorities "be granted the right to use their own languages". The draft constitution provides that "the languages spoken by a part of the Libyan people shall be considered national languages, a part of its cultural and linguistic heritage, and a common asset for all Libyans. Arabic shall be the official language of the State" (art. 32). It also provides for the establishment of a Cultural and Linguistic Heritage National Council (art. 171). One survey participant recognises that Arabic should be the official language, but requests that the official use of Amazigh be regulated by a law. For another interviewee, the constitution must make mention of all languages used in Libya, including Domari and Tedaga, by name.

Another vulnerable population group are children and youth. The draft constitution provides that “the State shall create the appropriate environment to develop children and youth, provide ways to increase their capacities, and support their effective role in national life” (art. 34). It also provides that the state “shall adopt legislation and policies based on the child’s best interest” (art. 69). Youth CSOs interviewed ask for a better, and more concrete, protection, notably: the creation of a youth entity (as a constitutional body); the identification (by national ID numbers) of all children residing in care centres; the development of a detailed text about children’s rights; the minimum representation of 30% of youth in local governance councils (and perhaps in other state bodies).

The draft constitution provides that the state shall protect the rights of persons with disabilities (art. 70). CSOs demand that their political rights be explicitly protected. Also, their right to free education should not be questioned. They request that in order to protect these and other rights of disabled persons, a High Council for persons with disabilities shall be created by the constitution. In addition, the state must ensure the reparation for the families of the martyrs and wounded. The draft constitution provides that harmed persons must be compensated “proportionately to the harm” but adds that compensation may also be symbolic (art. 197), which is not perceived as convincing.

The victims of war include orphans, displaced people and refugees (both Libyans and non-Libyan). The latter category – refugees – is not defined by the draft constitution, which should integrate a definition that is in line with the standards of international law, one interviewee remarks. Apart from protecting victims of war, the state should also protect prisoners, and guarantee a form of social security for the elderly, the sick, the unemployed, orphans and widows, CSOs explain.

On a more general note, the interviewees suggest that the state pay due regard to socio-economic rights. The right to free education should be granted (art. 61 of the draft constitution enshrines the right to education) as well as the right to housing for Libyans. The draft constitution provides that the state must commit to adequate housing (art. 36). Other socio-economic rights, such as the right to food, water and health, are also protected by the draft constitution (art. 56 & 57).

5.3. FINANCIAL SYSTEM AND NATURAL RESOURCES

Discussions with interviewees also touched upon the future financial system of Libya. Partly in relation to this, the management of Libya’s resources was discussed.

5.3.1. FINANCIAL SYSTEM

Most survey respondents ask for more transparency in public finances as a basis for financial accountability.

Increased transparency must concern both domestic and foreign investments. The draft constitution indeed provides that “the State’s public finance shall be subject to principles of transparency and accountability” (art. 175). The draft constitution provides for the establishment of an ‘Accounts Department’ (art. 169) which must respect these principles.

Furthermore, however, there should be measures for assuring an early approval of budgetary expenditure to avoid that interests on late payments add up. This is why an independent development planning and budgeting body should be set up as a constitutional body. The taxation system should take public and societal concerns into account so as to achieve a form of social justice. Strong measures should be adopted against corruption (art. 28 of the draft constitution provides that “The State shall adopt the necessary measures to combat administrative and financial corruption”).

5.3.2. NATURAL RESOURCES

A last topic for discussion concerns the management of natural resources. The draft constitution ensures the transparency of natural resource management (art. 185), and provides that “all regions benefit from natural resources in an equitable manner, thus preserving the rights of future generations” (art. 184). Several interviewees from the East and from the South request a special treatment for resource-rich areas; some add that marginalised areas should also obtain this treatment.

Several CSOs however insist on the fair distribution of resource revenues, both to other (including more populated) areas and to the next generations (through legally regulated sovereignty funds). But a clear mechanism must be provided to calculate the shares in natural resources. In fact, the draft constitution provides that “[n]ational revenues shall be distributed fairly and equitably between local and national levels of governance, taking into account population density, local population distribution, levels of infrastructure and services, and indexes of spatial and human development” (art. 175, § 2). More generally, the efficient use of resources should contribute to achieving sustainable and balanced development in Libya, which is one of the core tasks of the ‘Body of Sustainable Development’, the establishment of which is foreseen by the draft constitution (art. 173).

ABOUT DEMOCRACY REPORTING INTERNATIONAL

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This publication has been produced with the assistance of the Foreign & Commonwealth Office and the Swiss Federal Department of Foreign Affairs. The contents of this publication are the sole responsibility of Democracy Reporting International and can in no way be taken to reflect the views of the Swiss Federal Department of Foreign Affairs or the Foreign & Commonwealth Office.



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