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REPORT AND RECOMMENDATIONS

محامون من أجل العدالة في ليبيا

LFJL
LAWYERS FOR JUSTICE IN LIBYA

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EXECUTIVE SUMMARY

Key Findings

Forms of Government

- Participants highlighted the need for power to be balanced between the executive, legislature and judiciary.
- Participants were unclear in their preference for a presidential or parliamentary system.
 - Our survey revealed a narrow preference for a presidential system (53%) with an executive independent in his or her powers from the legislature.
 - In contrast, when carrying out an interactive activity that asked participants to reorganise cards on the ground, so that different bodies of power were put into a hierarchy of power, discussions revealed that most participants sought a strong legislature. Participants, for example, did not want the executive to have the power to dissolve parliament. This demonstrates a preference for a parliamentary system. The lack of concurrence between these two positions, and the divide in opinion, suggests the need for consultation on this issue.
- Participants were clear that elections are a tool of accountability, and must be general (open to all men and women of voting age), direct, free, with all votes given equal weight, and made in secret.
- Participants also sought a strong, independent judiciary, with 95.3% in favour of a judiciary that is capable of striking down legislation deemed incompatible with human rights. To achieve this, participants noted the importance of impartial judicial appointments and oversight independent of the executive or legislature.
- Regarding national, local, and regional government, participants expressed a clear preference for a centralised government with decentralisation of services and administration.
 - On economic policy, 72.3% of participants felt decisions should be made at a national level, although a significant number noted that a proportion of tax income must be spent locally when speaking during discussions.
 - National budgetary control was also deemed preferable regarding education and healthcare. Participants noted that national control would ensure a more even distribution of services and funding. However, participants still sought a degree of local flexibility in order to respond better to the needs of particular communities, for example, the ability to use minority languages in schools.

- 89.2% of participants were in favour of centralised control of natural resources. Participants were in favour of revenues from natural resources being redistributed in order to benefit the whole country most effectively. Participants also expressed the need to make provisions so that future generations may counter the negative effects of over-reliance on natural resources and better share the benefits of the nation's wealth in the long-term.

Sources of Law

- Participants expressed strong support for the recognition of more than one source of law, including international law, *sharia* and customary law in areas where it is applicable.
- Religious bodies were highlighted as necessitating clear government oversight, with clearly defined roles.
 - 97% of participants responded that no institution other than a supreme court should have the power to strike down laws.
 - 70% told us that only bodies that are elected, or have a popular mandate, such as the judiciary, should have powers to create, amend, or overrule legislation.
- Consensus during discussions clarified that religious bodies should be limited to a purely consultative role, where fatwas would not be binding.
- 93% of survey participants responded affirmatively to the question "Do you feel that protecting human rights should be superior to other forms of law?"

Authorities

- The appropriate role of security services, including the police and army, raised much discussion.
 - Participants spoke of the need for clear regulation of these institutions, and the use of emergency powers to be strictly limited and subject to judicial oversight to prevent abuse.
 - The army was acknowledged as ideally being "invisible" to the people in times of peace.
 - The idea that militia groups could one day be legitimised was a key concern for participants, particularly for victims of violations committed by those militias. There was strong agreement as to the need to ensure human rights, the rule of law, and accountability were observed and respected through a vetting process, to be conducted prior to the assimilation of any such groups or individuals into official state bodies.



Bill of Rights

- The right to dignity was highlighted by participants as integral to other human rights, and often seen as a “lens” through which to see the purpose of other rights.
 - Vulnerable groups, with whom we spoke, such as persons with disabilities, chronic illnesses, older people, women and minority communities noted the importance of dignity, which would secure respect of other rights such as health care, housing and the right to use their languages.
- Freedom of expression was also seen as integral to other rights.
 - Participants frequently identified religious and cultural freedoms by reference to the right to freedom of expression.
 - Women often drew attention to the constraints on their ability to express their opinions freely.
 - Participants from minority communities further called for freedom of expression to encompass protection of cultural identity.
- Participants consider freedom from torture to be an important issue, but also demonstrated that awareness raising needs to be undertaken to ensure that the absolute prohibition of torture is fully understood.
- When considering the rights which the public felt were most in need of protection, economic, social and cultural rights were highlighted.
 - In particular, the right to education, healthcare, and the right to work were raised – especially in regions that are geographically marginalised and suffer from poor infrastructure as a result. These were considered vital in order to maintain dignity as well as to ensure enjoyment of civil and political rights.
 - We encountered regional nuances, in regards to economic, social and cultural rights. The protection of language rights was noted as essential in areas with Amazigh or Tebu populations, whereas in particularly remote areas, the lack of provision for and access to basic services was the key issue. In areas with natural resources, environmental concerns were stronger, whereas protection of cultural heritage was raised in locations of cultural significance.

Equality and Non-Discrimination of Vulnerable Groups

- Participants were strongly supportive of the need to protect the rights of all Libyans and not only the majority.
 - With regards to minority communities, it was felt vital that the Constitutional Drafting Assembly must ensure that minorities are not discriminated against, especially on grounds of religion, language, or citizenship eligibility.
 - Members of minority communities drew attention to the need to respect cultural rights, such as language. They were also clear that difficulties experienced in obtaining citizenship were negatively impacting their rights to freedom of movement, private and family life and political participation.
 - Political minorities were clear in reporting total disenfranchisement and the need for national reconciliation. They were often reluctant to participate and refused to be filmed for fear of reprisals. Speaking off camera, they were able to share with us fears of being isolated from the political process including by the, at the time proposed, political isolation law.
- The need for greater protection of women’s rights was also a key theme across the tour.
 - Women noted the need for specific protections on issues that affect them, such as for maternity rights, provisions in marriage and divorce, and equal citizenship.
 - Religious and cultural extremism was highlighted as the most significant challenge facing women in Libya. Participants expressed to us their hope that the constitution could change this due to the symbolic strength of a peoples’ mandate.
 - Most participants strongly supported the need to take measures to prevent discrimination against women and to ensure their equality in actively participating in social and political life.
- Greater protection for persons with disabilities was also clearly expressed.
 - Participants with disabilities spoke of the denial of dignity that they experience by way of poorly implemented health care budgeting, difficulty in accessing education, and societal stigma in general.

Key Recommendations

We set out below the key recommendations derived from our consultations with over 3000 Libyans across 37 communities.

Forms of Government

1. *The role of each institution of government must provide for a system of 'checks and balances' that allows the other institutions to ensure that power is exercised in accordance with the constitution.*
2. *Given the variation in answers to questions relating to the form of government itself, a full consultation must take place on this issue based on actual functions. A survey that only gives participants the choice between "presidential", "parliamentarian" or "hybrid" would not be sufficient, as it is clear from our research that participants are not always certain of the specific functions assigned to each form.*
3. *The judiciary must be independent and impartial, and no person or organ of state may interfere with the functioning of the courts. The appointment of the judiciary should be conducted through transparent processes.*
4. *Health, education, natural resources, economic policy and taxation should be controlled centrally with some administrative powers given to local governments.*
5. *Elections should be general (open to all men and women of voting age), direct, free, with all votes given equal weight, and made in secret.*
6. *The constitution should specify that Libya's natural resources are owned by all of the people of Libya in all regions, and the revenues and benefits must be distributed in a fair manner in proportion to the population in all parts of the country.*
7. *The constitution must provide mechanisms that ensure that resources and means for development are shared across Libya, without overlooking smaller or remote communities.*

Sources of Law

8. *There should be more than one source of law and they should all adhere to human rights principles.*
9. *Provisions should be drafted that protect customary law in areas where it is applicable, particularly with respect to personal status and dispute resolution.*
10. *The role of bodies other than the executive, legislature and the judiciary, including religious bodies such as Dar Al-Iftaa, should be limited to that of a consultative role.*

Authorities

11. *National security should be for protection against internal and external threats to Libya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.*
12. *Clear provisions for the establishment, structure and conduct of security services that establish clear definitions of what the services entail must be included.*
13. *The role of the army should be independent and should protect the people not the government. Provision should be made for holding the armed forces accountable, and ensuring transparency. This might include creating specific courts to deal with military matters, and provision for civilian oversight.*
14. *National security must be pursued in compliance with the law, including international law.*



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Bill of Rights

15. *The constitution must enshrine the inherent dignity of all human persons, and the right to have their dignity respected and protected, and make particular reference to the protection of dignity and respect for vulnerable groups such as persons with disabilities, chronic illnesses, older people, minority groups and women.*
16. *Everyone has the right to freedom of expression, which includes:*
 - a. *Freedom of the press and other media;*
 - b. *Freedom to seek, receive or impart information or ideas of any kind;*
 - c. *Freedom of artistic creativity;*
 - d. *Freedom from censorship; and*
 - e. *Freedom to hold and express one's opinion without interference.*
17. *The constitution must include the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment.*
18. *Non-state actors shall be accountable for acts of torture, cruel, inhuman or degrading treatment or punishment.*
19. *No one may be subjected to slavery; slavery and the slave trade in all their forms, including human trafficking, forced or compulsory labour and child labour, shall be prohibited.*
20. *The definition of slavery should be held to encompass denial of freedom, control, and exploitation.*
21. *The constitution must prohibit direct and indirect discrimination against anyone on one or more grounds, including race, gender, pregnancy, marital status, ethnic or social origin, colour, age, disability, chronic illness, religion, conscience, belief, culture, language and birth for example by:*
 - a. *Recognising other religions, in the case that a state religion is specified;*
 - b. *Specifying the official status of Tamazight and Tebu languages, in addition to Arabic; and*
 - c. *Providing for access to citizenship on the basis of birth to a Libyan parent (irrespective of gender), birth within Libya, or having lived in Libya regularly for 10 years.*
22. *Decisions on issues affecting minority communities as part of the constitutional drafting process should only be made according to consensus (i.e. with the agreement of Libya's minority groups' drafting representatives).*

CHAPTER ONE

BACKGROUND TO REHLAT WATAN

The underlying understanding behind *Destoori* is that the constitution is an important opportunity to offer legal protection to all of Libya's people. In order truly to achieve this, it is vital that its content does not only realise the aspirations of a small group, a specific generation, or those who hold particular beliefs or influence. Likewise, in order for protections to offer reliable and longstanding rights, rather than privileges, an inclusive constitution should not be changeable at the whim of a new government or constructed by detached politicians or academics.

Such a lasting constitution, based on the rule of law, can only be accomplished by an invested citizenry that actively takes part and is willing to defend its constitution. The primary purpose of *Destoori* is therefore to ensure that Libyans have a voice in the constitutional drafting process and to help foster a sentiment of constitutional ownership amongst them. In order to achieve this, LFJL has sought to carry out activities that provide information on the drafting process to members of the Libyan public and promote the importance of an inclusive and representative constitution. By personalising the process through our on-the-ground events, we have hoped to form a connection between the Libyan public and their constitution.

Perhaps the most notable and ambitious of our engagement activities is the *Rehlat Watan* constitutional tour across all three of Libya's regions. *Rehlat Watan* provided a forum for dialogue and an opportunity for LFJL to obtain an understanding of the key issues the Libyan public would like to see addressed in the new constitution. This has allowed us to collect statements and incorporate them into our recommendations for the appointed Constitutional Drafting Assembly (CDA). It is therefore perhaps worth reflecting on how this activity was achieved and the methods deployed to source information:

Destoori Guides –

In order to undertake the activities of the tour, LFJL sought to hire a team of four social activists and lawyers. The selection process primarily made use of our network of over 60 Libyan lawyers and activists to source potential candidates. It was extremely important to LFJL that our team was extremely talented and passionate about ensuring the upcoming constitution is a representative process. We were also keen to ensure that the team was approachable and able to engage with as wide a spectrum of Libyan society as possible. We therefore were mindful of the ultimate gender, ethnic, and regional





makeup of the team during the recruitment process. The diversity of the group proved vital in ensuring the team's access to many groups, including women and ethnic minorities.

It was equally essential that the *Destoori* Guides be an informed source of constitutional information, so that they would be able to respond to questions asked by participants during *Rehlat Watan*. The Bingham Centre for the Rule of Law assisted us with the development of a comprehensive manual to help train the *Destoori* Guides in constitutional law. The manual examined constitutional law and related human rights issues and gave concrete examples of the merits and difficulties of the many different forms implemented by other states. This manual was then used as the basis for a training event held in Tunis headed by Elham Saudi (Director of LFJL) with the assistance of Lutz Oette (Counsel, REDRESS and Lecturer in Law at the School of Oriental and African Studies), Susan Williams (Director, Center for Constitutional Democracy and Lecturer at Indiana University) and Naina Patel (Director of Education and Training, and Bingham Centre for the Rule of Law and barrister at Blackstone Chambers).

It was fundamentally important to the project's success to ensure that our outreach efforts remained informative but did not push a particular agenda. We were instead more interested in developing the capacity of our Guides to draw out the opinions of project participants. An additional training workshop was therefore held in Tripoli, in order to instruct the Guides on neutral methods of engagement. This discussed various ways to carry out conversations without influencing opinions and also considered aspects of discussions such as body language, for example teaching

the Guides that it was sometimes appropriate to crouch or sit on the floor in order to create physical space whereby they were "below" the participant, preventing them from appearing as if they were preaching from above. Instead, creating a humble environment where the Guides were the students, and not the teachers.

Gathering Information –

In order to canvas public opinion and to inform this report's findings, LFJL adopted a qualitative methodology that was designed in order to draw out the true opinions of project participants.

Surveys

This involved carrying out a comprehensive survey that sampled opinions on what LFJL believed to be key upcoming considerations for the CDA. These included questions on the level of inclusion that human rights protections should have in the constitution, centralisation, ethnic and cultural minority rights, the changing spaces for women in Libyan society and the eventual form of the government.

In total, each survey took approximately 30 minutes to complete. The survey was carried out electronically to enable LFJL to analyse the results on a real-time basis. Due to the detailed nature of the questions, they offered an opportunity to the *Destoori* Guides to have in-depth conversations with participants about their opinions regarding the upcoming constitution and the success of the constitutional drafting process thus far. Across the country, the *Destoori* Guides were able successfully to complete over 200 detailed surveys with members of the Libyan public, a



statistically appropriate sample size for the country. These have been used to provide background information on regional, gender, and community preferences and as evidence in support of our findings. We also carried out additional surveys online following the conclusion of *Rehlat Watan*, however, this data was informally sourced therefore has not been included in this report.

Interviews

Destoori Guides also conducted interviews with over 500 persons during the *Rehlat Watan* tour. These discussions allowed participants to share their concerns with LFJL as to the current state of Libya and their thoughts on human rights and constitutional issues. Many of these were recorded by our documentary team and were referred to throughout the writing of this report to provide supporting evidence. They have also been used in the production of media materials and short videos that we shared during *Rehlat Watan* itself.

Activities

The third manner by which we sought better to understand public opinions was through the development of constitutional activities. These “games” proved a useful and impartial engagement strategy that helped create emotional distance from issues that would otherwise provoke knee-jerk responses due to their political sensitivity. In this way, they helped foster discussion between groups, encouraged objective reasoning and also helped reveal true beliefs. We therefore sought to deconstruct several constitutional issues into their most basic elements and turn them into interactive activities.

Such interactive activities proved to be a hugely popular aspect of *Rehlat Watan* due to their simple, yet informative, structure and often surprising ability to draw out opinions. It was a true indication of their success to later hear that the participants were replicating these exercises with their family and friends weeks and months after the tour had moved on.

These activities were also useful as their results could be contrasted against the responses to survey questions. This was useful when they produced consensus responses but also when there was a disjunction between what people expressed as their opinion when asked directly in contrast to what was revealed through the collaborative engagement of the games. This provides further insight as to popular preferences on key issues of potential confusion which we will later refer to in this report.

Examples of Constitutional Games:

- **Ranking Games –**

We designed several games where we asked participants to rank how powerful they believed various sources of law or legal institutions should be in relation to one another. For example, cards with the words “international”, “customary”, “constitutional” and “*sharia*” were placed on the ground and participants were asked to reorder them to reflect the participants’ views on the importance of those sources of law in relation to each other. This would then lead into debate amongst the participants, with *Destoori* Guides available to moderate the discussion or answer questions. They would also comment on how various orders would look in practice,



discuss whether this was desirable to participants and relate the orders to other countries' systems.

- **Position Statements –**

These activities asked participants to take a position on whether they agreed with certain statements relating to human rights or not; participants could also place themselves at any point along the spectrum. This was done physically by one *Destoori* Guide standing on one side holding up a sign reading “Agree” and another a sign reading “Disagree”. Participants could stand at one end or the other or at any point between the two. An example of the statements is: “Freedom is an absolute right”. This was used as a basis to hold a discussion about limitation of rights and the responsibilities that come with certain rights, such as freedom of expression. This would often encourage conversations amongst participants and *Destoori* Guides as to whether issues such as torture should be absolute in all circumstances.

- **Distribution of Functions –**

This activity was designed to facilitate engagement on controversial issue of federalism and centralisation. In this activity, the *Destoori* Guide would set out on the ground three cards reading “National,” “Regional” and “Local.” We would then give participants over 30 functions of a state to place them where they believed, in an ideal world, the decision would be made. Through discussing the desirability of state functions being held at different levels of government we were able better to understand the major frustrations affecting different communities. This also gave better insight into the different understandings of what people believed federalism and centralism to be.

CHAPTER TWO

INTRODUCTION

Almost all states have a constitution, which may or may not be a single written document named a “constitution”. The constitution of a state sets out rights for every single person within that state and other fundamental laws and principles regulating the distribution of power and the administration of justice.

Affording rights to individuals is a key way of ensuring that the principles of human dignity, equality, liberty and justice are protected and encouraged. Many countries have attempted to guarantee this by including commonly accepted civil and political, as well as, economic, social and cultural rights in their constitutions.

A core principle that is ordinarily reflected in a constitution is a *separation of powers* between: (1) the law-making body (or “legislature”); (2) the people with decision making and day to day administrative power (or “executive”); and (3) the system of courts and judges (or “judiciary”).

A further core principle is a commitment to the *rule of law*, which requires that every person, public body, and private institution should be bound by and entitled to the benefit of laws which must be publicly made, take effect in the future and be publicly administered in the courts.

A. HISTORICAL CONTEXT

Libya was ruled under the Gaddafi regime for 42 years, until 2011. Following the revolution, Libya has commenced some much-needed institutional change, which is still in progress. The constitution represents one of the many milestones to come and should be viewed as a wonderful opportunity to proclaim Libya’s aspirations for a safe, just, and inclusive society.

Although we recognise Libya’s Constitution of 1951 and see that it could well be a useful source of reference for the new constitution, we believe that this document will need significant updating. The Constitution of 1951 was created just after the birth of the Universal Declaration of Human Rights (**UDHR**) in 1948. Although the Constitution of 1951 does make some reference and provision for the human rights protections and principles contained within the UDHR, a wealth of other important international documents have since come into existence, such as the International Covenant on Civil and Political Rights (**ICCPR**) in 1966 and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) in 1976. As international standards have grown and modernised, so increases the need for Libya’s new constitution to reflect and surpass those standards. We see the new constitution as an opportunity to create a new framework that reflects Libya’s current aspirations and to look forward to a new era. With that in mind, we do not reference the 1951 Constitution, although we recognise its value and importance to Libya’s history.

B. WHAT ARE THE PURPOSES AND OBJECTIVES OF A CONSTITUTION?

A constitution is a set of fundamental rules or principles that determine how a state is governed. A constitution is normally a written document which sets out the powers of the legislature, executive, judiciary, and other important national institutions. The constitution will also regulate the relationship between these arms of government and the people. This often involves setting out fundamental rights.

A constitution will normally:

- Reflect a country’s history and values and set out a country’s aspirations for the future.
- Set out a detailed architecture for political institutions and processes and the way public officials are chosen by the people.
- Determine the balance of power between the centre of a country and its regions.
- Provide a legal framework for balancing competing sources of power. Four key areas of power are political power, religious power, economic power, and military power.
- Provide protections for fundamental rights for all individuals against the state and others.
- Impose obligations on the state to protect the fundamental rights of individuals.

A constitution commits a society to a form of ordered decision-making with the consent of the people. It also guards every person against the abuse of power.

C. WHAT DISTINGUISHES A CONSTITUTION FROM OTHER SOURCES OF LAW?

The rules of a constitution are generally superior to ordinary laws. This means that if the legislature tries to pass a law that is not compatible with the constitution, then a court, if empowered to do so, can hold that the law has no effect. Alternatively, if not empowered to rule that the law has no effect, a court will declare the law incompatible with the constitution and return it to the legislature to be amended or struck out. This maintains parliamentary sovereignty while still adhering to the practice of accountability. In either case, our chosen law-makers must act within the boundaries set by the constitution.

A constitution will also determine the permissible role for other sources of law such as international law, religious law or customary law. When a state signs an international treaty, incorporation is generally either automatic (monist systems) or through domestic legislation (dualist systems). Regarding the interaction between



religion and legislation, the legislature will consider how best to ensure that legislation reflects the expectations of the population. Therefore the constitution might, for example, require all laws to comply with certain religious principles, or religion might not be noted as a source of law.

Most constitutions contain a special procedure for amending the constitution itself, so as to reflect changing conditions or to improve the way it works. As constitutions are a superior form of law, it is normally more difficult to change the constitution than to change or update an ordinary law. For example, the Kenyan Constitution provides for amendments on fundamental matters of the constitution only where a simple majority has accepted the provisions at referendum (where voters comprise at least 20% of the country from half of the counties). Additionally, a popular initiative with 1,000,000 signatures from registered voters can also lead to constitutional amendments where the initiative is approved by a majority of county assemblies, passes through both houses of parliament, and is accepted at referendum (if relating to a fundamental constitutional matter).

D. WHAT DOES A CONSTITUTION CONTAIN?

All constitutions are different and must be drafted to suit the needs and values of the country for which they are written. There are, however, many common features in constitutions across the world. These include the following:

1. Preamble – setting out the historical background for, and values and objective within, the constitution.
2. The Character of the State – frequently a first chapter that sets out the basic characteristics of the state, such as religion, citizenship eligibility requirements and national languages.
3. Forms of Government – the constitution will set out the form and balance and separation of powers between the institutions of the state, including the executive, legislature, judiciary, central and regional power, and other state bodies.
4. A Bill of Rights – provisions setting out the special status of certain fundamental rights so that governments have a duty to uphold them.

Each of these areas will be covered in this report.

E. WHY IS THE CONSTITUTION IMPORTANT?

A constitution is important because it guarantees certain rights to individuals and sets out a structure for the functioning of government and the administration of justice.

One of the key ways in which a constitution protects individuals on an everyday basis, and secures for them certain freedoms necessary to lead a dignified life, is through a bill of rights. Such rights are normally applicable to every person on the territory of the state (although some rights, such as the right to vote, might be reserved for citizens or long term residents).

A bill of rights will contain provisions for the protection of civil and political rights and economic, social and cultural rights, and their enforcement.

Civil and political rights frequently include the right to life, protection from slavery and torture, the right to a fair trial, freedom of religion, and freedom of expression, amongst others. The CDA will have to give consideration to how these rights should be reflected, and whether to draw on international law as a source or guide for these rights.

Economic and social rights, such as the rights to education, healthcare and housing are important for people to have a good standard of living and make use of their other fundamental rights. The CDA will need to consider how they will realise these rights – for example by providing for a requirement for their gradual implementation through a series of legislative, financial, educational, and economic measures.

The CDA will also need to consider how those rights should be enforced. They should consider providing mechanisms for judicial appraisal of institutional decisions with reference to the human rights obligations contained within the constitution, and judicial mechanisms for ruling on whether legislation itself is incompatible with the constitution and provisions contained within it. The creation of a human rights commission, or other independent body, to review laws in respect of their human rights compatibility is recommended.

F. THIS REPORT

This report will address the aforementioned aspects of Libya's new constitution by considering the legal possibilities for each provision, citing relevant examples from recently developed constitutions, and detailing the views and opinions that we encountered on the ground while conducting our *Rehlat Watan* Constitutional Tour and research. The report will also provide for recommendations to the CDA based on the findings of the *Rehlat Watan* Constitutional Tour and research.

CHAPTER THREE

PREAMBLE, THE CHARACTER OF THE STATE AND SOURCES OF LAW

A. PREAMBLE

Most written constitutions begin with a brief preamble which may explain the historical background for the drafting of the constitution, and set out the fundamental values and objectives that the constitution is intended to promote and achieve. It does not usually contain binding rules, however the aspirations it voices will help to interpret other parts of the constitution.

South Africa is an example of a recent constitution that contains a preamble that explains the circumstances of its creation, and instils the values that not only colour the constitution, but also the aspired character of the state itself. Reference is made to healing the divisions of the past, and establishing an equal society in which every citizen is equally protected by law.

B. THE CHARACTER OF THE STATE

The first chapter of a constitution often sets out essential characteristics of the state, such as the location of the capital city, design of the national flag, citizenship eligibility, and provisions on religion and language.

1. State Religion

Constitutions frequently reference the religious character of their state. Presently, the transitional constitutional declaration adopted by the National Transitional Council on 3 August 2011 (the **Constitutional Declaration**) states that Islam is the state religion. There are many different possibilities as to how Libya's CDA might approach the inclusion of religion in the new constitution. Some constitutions enshrine secularism, such as France, Turkey, and Kosovo. Others are silent on the relationship between religion and the state but enshrine other founding values, such as Zimbabwe. Afghanistan, Jordan and Yemen are examples of states that specify Islam as the state religion. If the CDA do wish to establish Islam as the state religion, they should include protections for persons who do not belong to that religion.

Further, the CDA should have regard for the fact that identifying the state's character and identity is distinct from the practical elements of law-making. That means that the state could identify itself as an Islamic state, for example, but not necessarily also elect *sharia* as a legislating tool. This is the case in the new Tunisian Constitution of 2014.

2. Official Language

It is common in recent constitutions to recognise more than one official language. This can be seen in constitutions such as South Africa and Iraq. Calls for language rights were among the

strongest that we heard, associating language with ethnic and cultural identity.

South Africa recognises eleven official state languages, specifically referencing the historically diminished status of indigenous languages, and calling for positive measures to elevate their status.

The Iraqi Constitution recognises both Arabic and Kurdish as official languages. Further, the Iraqi Constitution provides for dual language schools and for state media publications, official documents, and speeches in the House of Representatives to be published in both official languages. The Iraqi Constitution also guarantees the right of Iraqis to educate their children in other languages such as Turkmen, Assyrian and Armenian in public institutions.

Since the tour LFJL has spoken with Tebu activists who stated that 30-40% of the Tebu population write in Tebu (using a Latin script). They added, that members of the Tebu community are taking steps to preserve the vocabulary and grammar of the, historically oral, language by publishing books on the subject. When speaking with participants from the Tebu population during the tour, the *Destoori* Guides heard participants express their desire for the Tebu language to be recognised as an official language in the constitution, so that its use can be sanctioned at a local level, in Tebu regions. This will legitimise the use of their language for official purposes, such as education in their regions, and greatly strengthen their efforts to maintain their cultural identity.

Members of the Amazigh population with whom the Guides engaged during the tour were also unequivocal in their calls for the recognition of their language as an official language. Again, the participants with whom we spoke to highlighted language as a fundamental part of their identity and heritage.

3. Citizenship Eligibility

Access to citizenship status has been an ongoing means of discrimination in Libya since the Gaddafi regime. Denying citizenship has been used to restrict access to key rights such as education, healthcare and political representation to whole populations. This is an issue felt keenly among Libya's minority communities, most notably the Tebu and Tuareg.

Additionally, women who have married non-Libyans struggle to ensure their children are able to obtain Libyan citizenship. The *Destoori* team had a candid conversation with a young patient's mother in Tubruk Hospital, who expressed how she has been struggling to afford care for her children and that this was having wider financial consequences for their family. She stated that this was a result of her children not being considered Libyan citizens, due to their father's nationality, and that, therefore, there were occasions where she had to pay for their healthcare.



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The Guides discussed this issue across the tour and canvassed opinions on possible provisions that would better promote fair access to citizenship and its related rights. The Guides led discussions on different possibilities for the regulation of citizenship, including the American model whereby birth within national borders of the United States conferred citizenship rights. Other constitutions allow for citizenship to pass in any case where either parent is a citizen of that state, such is the case Kenya. On this issue, the Guides encountered a clear majority in favour of citizenship being passed to a child in cases where *either* parent is Libyan. This was the procedure in Libya's 1951 Constitution, which provided for citizenship where either parent was Libyan, where a child was born in Libya, or where a person had lived in Libya regularly for more than 10 years.

Recommendations:

1. Irrespective of what the CDA chooses to specify as being the character of the Libyan state, there should be provisions within the preamble that ensure that minorities are not discriminated against, especially on grounds of religion, language, or citizenship eligibility. The constitution should:
 - a. Specify the recognition of other religions, in the case that a state religion is specified;
 - b. Specify the official status of Amazigh and Tebu languages, in addition to Arabic. In regions where the majority speaks Tamazight or Tebu, the state must provide for all official interactions and resources to take place in the majority language of the region, in addition to Arabic, particularly regarding education; and
 - c. Providing for access to citizenship on the basis of birth to a Libyan parent (of either gender), birth within Libya, or having lived in Libya regularly for 10 years.
2. Decisions on these issues as part of the constitutional drafting process should only be made according to consensus and not by majority decision (i.e. with the agreement of Libya's minority groups' drafting representatives).

C. SOURCES OF LAW

In addition to stating that the rules contained within a constitution will generally be considered superior to any subsequent conflicting domestic laws, a constitution must also determine the possible space for other sources of law. Such provisions can include recognising international, religious, and customary legal sources.

In some countries (monist systems), international law is deemed to be automatically part of domestic law as soon as the country ratifies the relevant international convention or standard, whereas in other countries (dualist systems), international law is separate to domestic law and must be expressly made part of domestic law by the legislature before the courts will have regard to it.

Similar issues may arise in relation to the interaction between religion and laws passed by the legislature. For example, the constitution could say that all laws passed by the legislature must be compatible with certain religious principles and contain a mechanism for reviewing laws against those principles. On the other hand, the constitution might not specify religion as a source of law, leaving it to the legislature to decide how best to reflect the electorate's religious and ethical beliefs (while respecting the fundamental rights in the constitution). Again, a middle ground may involve the courts having regard to certain religious principles as an aid to interpretation where certain laws are unclear or where there are no existing laws that bear directly on the issue on which the court is required to decide.

Decisions about whether Islam should be the state religion concern the identity and character of the state, as discussed above. The CDA will also need to make a separate decision regarding practical law making provisions and the role that *sharia* might play in this. Article 1 of the Constitutional Declaration states that the principle source of legislation in Libya is "Islamic Jurisprudence (*sharia*)" and that non-Muslims are guaranteed the freedom to practice religious rights as well as respect for their systems of personal status law.

The new constitution needs to consider carefully what the relationship will be between *sharia* and the legislative process, whether there are other values that will also feed into law-making, and how the compatibility of laws with *sharia* and any other constitutional values will be monitored. Islamic countries can recognise *sharia* as a source of law in different ways. These include making it a foundational source of legislation (Iraq), appearing to permit the striking down of laws that may contravene Islam (Afghanistan), or recognising the exclusive jurisdiction of *sharia* over only certain issues (Jordan). Turkey is an example of a constitution that does not stipulate the status of *sharia* as a source of law, and guarantees freedom of conscience and religion. More recently Tunisia, defining itself as an Islamic state, has drafted a constitution without reference to *sharia* and which guarantees freedom of belief and conscience.

Customary law can also be recognised as a source of law, to protect the customary or traditional practices of particular groups of people. Examples of constitutions enshrining customary law include the Constitution of South Sudan, which recognises the “*customs and traditions of the people*”. Additionally, the Kenyan and “South African constitutions permit the use of customary law to be applied by the courts to persons and situations where it is applicable (although not where the customary law is incompatible with the constitution).

In our survey, 91% of participants expressed positive support for protection of human rights being superior to other sources of law. Customary law received some support, according to the survey responses, with 27% answering positively to a question asking whether minority groups should be allowed to develop their own courts and/or customary law.

However, nuances were revealed when discussing these issues as part of our constitutional activities. This may be because sources of law are sometimes controversial to discuss openly in Libya. The accepted discourse centres around a *sharia* based model, and there are not many public voices that contemplate alternatives to this. It was an area where we found a real disjunction between what participants would answer as part of the interviews, when they felt that they were speaking ‘on the record’, compared to when they were speaking informally as part of our activities. To facilitate

open discussions, we devised an activity that asked participants to identify the hierarchy of importance of various sources of law: constitution, international law, customary law and *sharia*.

Discussions on the issue of *sharia* were amongst the most nuanced that we had, reflecting the importance of the issue and the desire amongst the population to be allowed to express their views on it. We heard from people stating that *sharia* should be the “foundational” source for legislation, with a participant in Kufrah explaining that “*sharia* is not only central in the government, but central in the whole *Umma*”. In equal measure, we heard from people stating that *sharia* must be accompanied by other sources of law, with on average one in five stating that it should be one of many sources and that it should not be stated as a foundation or primary source to enable the judiciary and legislature to draft laws taking into account all available sources. One participant explained “stating that a source is the primary source, is like stating it is the only source because it will always overrule the other sources.” We had other participants, including in Baida, Tripoli, Jalu and Cabaw, stating that international law should be rank higher than *sharia*, with one participant in Tripoli stating “we are members of the global world and we should all abide by the same laws.”

In all these options, after discussing ways in which *sharia* has been used and interpreted in different constitutions, one feature was consistently requested for inclusion in the constitution. Participants expressed the importance of clarifying the scope, definition and interpretive power of the term ‘*sharia*’ especially in regards to following aspects of its application:

- Highlighting that richness of *sharia* and that Libya has people adhering to two schools of Islamic jurisprudence (*mathahab*), the Maliki and the Abadi, the constitution should make clear if one takes precedent. Within a school of jurisprudence, it was asked, which *sahih* would be used and within each *sahih*, which *hadith*? The constitution would need to decide on all these matters as well as who would be empowered by the constitution to arbitrate between them where there is conflict.
- The issue of who would adjudicate in the event that a domestic law or international law is in potential conflict with *sharia* law?
- What would result when there has been a conflict between *sharia* and another source of law?





If deciding to reference *sharia* as a source of law, the CDA must seek to remove ambiguity about the term. This was a major concern for many participants with whom we spoke, who raised the fear that leaving the term undefined by taking into account the issues above may leave room for abuse by the legislature in the future. It was highlighted that the concept of *sharia*, when undefined and left to the legislature to utilise, has been used to justify legislation as varied as permitting alcohol sales within certain parameters and prohibiting young girls from attending school. The fear that an undefined inclusion of *sharia* may lead to the politicisation of Islam for specific gains was one that was highlighted to the Guides in every community we visited, often by citing examples such as Iran and Afghanistan for where it has been used to curtail certain freedoms and Dubai for where it has been used to permit certain actions which some participants deemed culturally undesirable.

Discussions on the point of human rights and international law revealed that participants often understood human rights to mean international conventions. Additionally, the position of international law during the hierarchy activity frequently resulted in international law being placed at the top, with *sharia* usually positioned below, or joint top. This indicates that participants see those two sources of law as equally important. During the activity, customary law received greater support than it had as part of the survey and interviews. The *Destoori* Guides discussed the topic of customary law through reference to some of the issues that customary law affects, such as marriage and dispute resolution. When considered in those terms, participants expressed support for these measures. For

example, elders in Nalut and in Sabratah spoke of how they often use customary law to settle disputes. Further, politicians commonly refer to customary law as a means of achieving transitional justice.

What we can tell from our discussions and through our activities, is that there is no common consensus on these issues, although there is consensus on key concerns. The range of views that we encountered shows the need for this question to be thoroughly considered by the CDA, with sufficient time spent engaging openly with people on this issue.

Recommendations:

1. *There should be more than one source of law and they should all adhere to human rights principles.*
2. *Provisions should be drafted that protect customary law in areas where it is applicable, particularly with respect to personal status and dispute resolution.*
3. *The identification of sharia as a source of law should be the subject of public outreach and engagement to decide on whether it should be adopted as a source of law, notwithstanding whether Islam is identified as a state religion. If so, sharia should be clearly defined in the constitution to clarify its scope, definition, who has the power to interpret it for legislative purposes, and what interpretative use it will have in relation to other sources of law. The method by which international law will be given effect under the new constitution is another area that must be the subject of outreach work, given the variance of opinion on this matter, and its importance for human rights obligations.*

CHAPTER FOUR

FORMS OF GOVERNMENT

A. INTRODUCTION

In our research on different forms of government, we discussed both horizontal and vertical divisions. As part of our survey, we asked participants about their preferences for specific elements of government structure. Additionally, we also devised activities that would reveal the participants' views on differences between relative levels of power and the desired checks and balances in an indirect manner. On certain issues, we found that participants would answer differently when taking part in the survey compared to their responses as part of the activities. Where this was the case, we highlight additional nuances in opinion.

Horizontal division of government concerns the divisions between the judiciary, legislature and executive. We conducted a constitutional activity that asked participants to rank physically the executive, judiciary, and legislature by reorganising cards on the ground in order of preference for the relative power between them.

When considering horizontal division of government, the CDA will need to prioritise the clarification of the separation of powers. This principle means that various branches of government should each hold a distinct function in governance of the state, in order to avoid too much power being concentrated in a single body. In defining the role of the legislature, executive, and judiciary, the separation of power is what regulates the relationship between the three. Ordinarily, the function of the legislature is to draft laws. The function of the executive is to run the state in accordance with the law. The function of the judiciary is to interpret and adjudicate on the laws. Constitutions provide for the separation of powers by providing for institutional or personal separation of powers. Institutional separation involves the three arms of government being created as separate bodies. Personal separation means that each should be staffed by different people. Once the constitution has defined the separate institutions, many will go on to detail a system of 'checks and balances' that allows each to hold the others to account in the exercise of their functions in accordance with the law.

Vertical division of government relates to the relationship between the national, regional and local government structure. In almost all countries the central executive power is supplemented by local authorities, which carry out functions that are best performed in towns and cities. Some states devolve extensive powers to local decision makers. As part of our constitutional activities and discussions, we asked participants to comment on which level of government should have responsibility for over 30 issues including education, policing, health care, natural resources, cultural services, law making, taxation and visa and passport issuing. This allowed us to gain indirect insight into views on vertical division while avoiding use of the concept of 'centralisation' itself, which is often an emotional term and contentious issue in Libya. We also used this format as part of our survey section on this topic.

B. HORIZONTAL DIVISION: EXECUTIVE, LEGISLATURE AND JUDICIARY

1. Executive

The executive has responsibility for formulating policies, applying legislation created by the legislature, and adopting rules and regulations that enable the application of legislation. The executive is also responsible for taking decisions on the day-to-day running of the country, such as devising the national budget and overseeing state institutions such as the police, army, civil service and central bank. In many systems, it is also the executive that suggests new laws to the legislature. The CDA must decide:

- Whether to have a presidential system, a parliamentary system, or a combination of the two; and
- What powers to confer on the executive, however constituted.

The head of the executive under a 'parliamentary' system is usually the leading member of the biggest political party in the legislature. He or she therefore belongs to both the legislature and the executive, and will often therefore have been subject to an internal vote within the party to assume the position as head of

This response indicates a preference for a degree of limitation of the powers of the executive and also for a system with significant parliamentary oversight rather than a strong presidential one.

69.9% of survey respondents felt that a 2-term limit would be preferable.

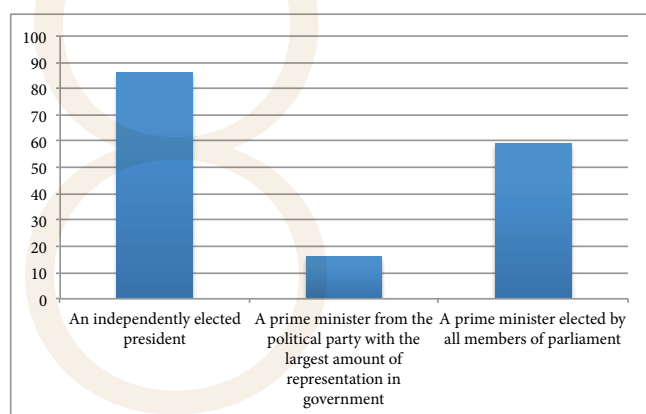
the executive, in addition to the public election to his or her role within the legislature. Parliamentary systems have been adopted in the United Kingdom, Canada, Australia, Morocco, Jordan, and Libya (from 1951 to 1969), which are interestingly all states that retain a monarch as head of state. Parliamentary systems are considered efficient because the executive has the support of a majority in the legislature.

By contrast, the head of government under a presidential system is directly elected and separate from the legislature. Presidential systems observe strict separation of powers, but this can lead to problems of efficiency as the president can experience 'gridlock' if he or she does not have sufficient support in the legislature. Further, a gridlock may also arise where the president has the power to veto acts of the legislature as part of an executive 'check' on the power of the legislature. South Sudan and the United States are examples of states that have a presidential system.

A hybrid system combines both roles, with a prime minister and a president co-existing and fulfilling clearly defined roles as allocated within the constitution. The ease with which either can implement their mandate depends on the degree of support that exists between the two, and also the legislature. France, Lebanon and Russia have hybrid systems.

When surveyed on which head of government would be preferable, 53.4% of those responding selected 'an independently elected president', 36.6% selected 'a prime minister elected by all members of parliament', while 9.9% preferred 'a prime minister from the political party with the largest amount of representation in parliament'. Therefore 46.5% of participants selected a prime minister elected from within parliament in some way. This indicates a narrow preference for a presidential system with a directly elected president who is separate from the legislature, and who has extensive powers of appointment over executive, diplomatic, and civil service positions.

Which is preferable?



However, after conducting the constitutional activity that asked participants to consider the order of preference of relative power in government structures, conclusions appeared to shift. In over 70% of the communities we visited, the power ranking activity revealed a preference for placing the executive below the legislature, where it would be answerable to the legislature and can be removed by the legislature. Further, when discussing the question of whether a president should have the power to dissolve parliament, the predominant response was that this would not be acceptable and that it was important that the powers of the head of government be subject to the oversight of parliament. This response featured even, to a significant degree, amongst those who had opted for a directly elected president, and indicates a preference for a degree of limitation of the powers of the executive and also for a system with significant parliamentary oversight rather than a strong presidential one. The inconsistency also implies that the CDA should consider carrying out a full consultation on this issue, where the functions of each branch, rather than direct questions as to preferences, are discussed to determine the real balance of power that is desirable.

On the question of limiting the duration in power of the head of the government, 69.9% of survey respondents felt that a 2-term limit would be preferable. This indicates a desire to prevent any long-term monopoly of power, and for regular opportunity to renew or withdraw the mandate of authority figures.

2. Legislature

The legislature is the branch of government which is an assembly of elected representatives responsible for making, deliberating on, and amending laws as well as monitoring the performance of the executive. The CDA must consider:

- How the legislature should be made up;
- How representatives should be elected; and
- How the legislature will hold the executive to account.

The legislature might comprise one or more chambers or houses. Libya presently has a unicameral legislature, which is a single chamber that is entirely directly elected, and tends to belong to smaller countries such as Lebanon, Serbia, or Kosovo. A bicameral legislature has two chambers; the lower chamber will be directly elected, and the upper chamber can be selected in different ways. A bicameral system allows legislation to be scrutinised by two different groups of individuals subject to different political pressures. For example, in the United Kingdom the lower chamber is the directly elected House of Commons, with political pressure stemming from the electorate. The upper chamber is the House of Lords. Appointments there were historically made under a hereditary system, but this has largely



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been abolished in favour of recommendations made by political parties, with an appointment commission from the chamber to vet candidates. Libya's 1951 Constitution provided for a directly elected lower chamber, with appointments to the upper chamber made by the king. In contrast, the United States Congress is bicameral with both the Senate and the House of Representatives directly elected.

The need to ensure the legislature's ability to provide a 'check' on the executive branch was a theme repeated regularly in the interactive games. The concept of 'checks and balances' relates to the separation of power because a 'check' or 'balance' on the power of the executive is ensured through the legislature having capabilities that affect and control the actions of the executive, for example through scrutinising and amending proposed executive actions. In over 70% of communities, the legislature was ranked ahead of the executive in the hierarchy of government. This likely reflects calls for separation of power to be protected as part of the new constitution. Nevertheless, views on this topic differed from answers to similar questions in the survey. When asked to place the executive, legislature, and judiciary within a hierarchy of power, there was an almost even divide between those placing the executive at the top of the hierarchy, and those participants who placed the legislature at the top. We consider that the difference in responses between the discussions and the survey reflect the fact that the activities allowed participants to discuss and explore in more detail the notion of a power hierarchy in terms of real powers. During discussions, participants expressed a preference for a stronger legislature, with more oversight over the executive.

In over 70% of communities, the legislature was ranked ahead of the executive in the hierarchy of government. This likely reflects calls for separation of power to be protected as part of the new constitution.

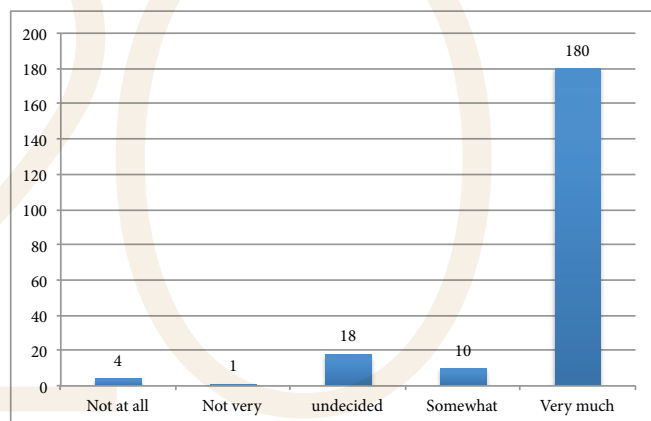
The Guides reported that the activities and discussions indicated that parliamentary transparency and the abuse of power were the predominant and shared concerns of a majority of Libyan citizens who took part.

Many countries, such as South Africa, the USA and Afghanistan, provide for a process of constitutional review in order to ensure that the legislature itself is held accountable, and acts in accordance with the constitution. This can take the form of a judicial review, which is a type of court proceeding in which a judge reviews whether legislation is compliant with the constitution, with the option to strike down legislation that is deemed unconstitutional. Alternatively, a non-judicial constitutional council might be empowered to ensure that laws comply with the principles enshrined in the constitution, such as in Iran and Algeria.

The Guides reported that the activities and discussions indicated that parliamentary transparency and the abuse of power were the predominant and shared concerns of a majority of Libyan citizens who took part. Survey participants considered the duration of governmental terms of office, and 84% of those surveyed considered that 'those in authority should have a specific time in office' with over 71.8% answering that governmental terms of 4 years would be most appropriate. The participants also suggested the following recommendations which they felt would decrease or stop the abuse of power:

- Public to be allowed to attend some of the parliamentary sessions;
- Media coverage of parliamentary sessions be allowed;
- Parliament should provide progress reports and records of parliamentary sessions, especially voting records for each member, should be made public;
- Allow for the legislature to question the executive, to increase legislature's ability to hold them accountable; and
- Apply the law on everyone regardless of someone's position in government.

Should governments be formed for fixed terms?



3. Judiciary

In order to fulfil the key constitutional principle of a commitment to the rule of law, everyone must be subject to the same laws and all individuals must have the right of access to justice before the courts. This requires an independent judiciary, a feature on which participants unanimously agreed. The second key constitutional principle in respect of the judiciary is the separation of powers between the executive, legislature and judiciary. Libya's new constitution must ensure the protection of judicial independence by providing for:

- A hierarchy of courts, where more senior judges can hear appeals from the lower courts about important questions of law; and
- Measures for ensuring politically neutral judicial appointments and the security of judicial tenure.

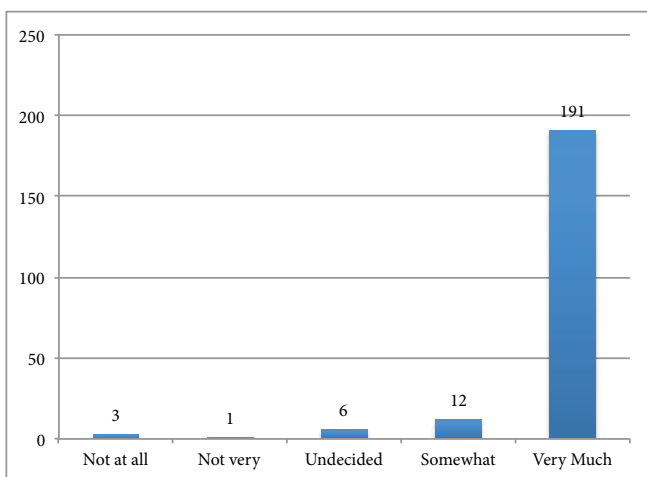
Participants in our survey identified the role of the judiciary as possessing power to hold accountable, and provide a 'check' on the power of, both the executive and the legislature. 95.3% of respondents answered positively to the question of whether the judiciary ought to hold the power to strike-down legislation which it deemed incompatible with the constitution, or legislation that was in violation of human rights. This power does exist in Libya, under Law 6 of 1982 which grants the Supreme Court the power to strike down law that it deems inconsistent with the constitution. This was used by the Supreme Court recently to hold Law 37 of 2012, which criminalised glorification of the dictator, unconstitutional. In the context of this power, many participants supported the creation of a constitutional court that could have the final say on what the constitution means and whether the actions of the executive or legislature are compatible with the constitution, or to ensure that the supreme court is empowered to do so. For example, South Africa's constitution explicitly provides for a constitutional court, which is the highest court and may decide constitutional matters, matters considered by the court to raise unarguable points of law of public importance, and makes the final decision on whether a matter is within its jurisdiction. The court may also decide disputes between organs of state (national or regional), decide on the constitutionality of any amendment to the constitution, and decide whether the legislature or executive has failed to fulfil a constitutional obligation. The provisions in South Africa also allow a person to bring a matter before the constitutional court directly, if doing so is in the interests of justice. The strength of these provisions gives great weight to the rule of law.

When conducting the constitutional activities and discussions




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Should constitutional/supreme courts be able to strike down legislation if it is deemed to be in violation of human rights or other constitutional provisions?



regarding the importance of accountability, participants highlighted very clearly the role of the judiciary as independent. In the activity that required participants to place cards on the ground representing the judiciary, legislature and executive, most participants ranked the judiciary as the highest (or equal to the higher between the legislature and the executive) and separate from them. This

supports our survey findings that participants expressed preference for an independent judiciary with the power to strike down legislation incompatible with the constitution.

Further on the subject of insuring judicial independence, participants with whom we conducted activities or who we interviewed across the tour stated preferences for the judiciary to be monitored to prevent corruption and ensure strong supervision. Participants told us that this should be through either an independent committee formed to appoint and remove judges, or through local judicial elections. Participants specifically referenced the importance of such a commission being independent of the executive or legislature - some even specified that the independent committee should set the level of remuneration of the judiciary, with parliament only ratifying this. Participants also frequently stressed that judges must be chosen on the basis of credentials and must be impartial with no preference being given to judges based on tribal, regional, ethnic, religious, political or other grounds. With that end in mind, a number of participants suggested a transitional process of vetting all existing judges and, looking ahead, empowering the commission to supervise and hold disciplinary hearings if necessary. Such requirements would ensure that Libya complies with the Office of the High Commissioner for Human Rights' Basic Principles on the Independence of the Judiciary¹. In many democracies, the appointment of judges is overseen by a

¹ Office of the High Commissioner for Human Rights, Basic Principles on the Independence of the Judiciary, endorsed by General Assembly Resolutions 40/32 of 1985 and 40/146 of 1985



“judicial services commission”, which is usually an independent body made up of lawyers and lay people, although it can also include members of the legislature or executive. The commission would ordinarily have complete control over appointments although nominations to the higher courts, such as any supreme or national court, might be subject to review by the executive or legislature. This is because those higher courts may make decisions that will be of great importance to the country, which therefore means that a degree of electoral legitimacy is important. Despite the proclamation of the independence of the judiciary contained within the Constitutional Declaration, some concerns related to the independence of the judiciary remain. For example, executive interference, militia interference, deficits in the capacity of the High Institute for the Judiciary training programme, and lastly the presence of judges who were appointed during the Gaddafi era who may not have undergone the traditional training required are still

all valid concerns according to interviews we conducted with judges and prosecutors.

Nevertheless, in order best to maintain adequate separation of power, it might be best for the power of executive or legislature review of judicial appointments to be restricted in order to avoid politicised appointments. During discussions, participants expressed concern at the prospect of executive appointments to the judiciary, which would disrupt their independence. The United States grants its executive the power of appointment to the Supreme Court, and this has resulted in politicised appointments being made.

The second arm of judicial independence involves ensuring security of tenure for judges once they are in office. This enables them to make independent decisions, even if not politically popular. It is common for the constitution to specify a fixed retirement age for judges, or provide for appointments for life, with the option to remove judges only in the event of their becoming unable to carry out their duties, such as

Participants also frequently stressed that judges must be chosen on the basis of credentials and must be impartial with no preference being given to judges based on tribal, regional, ethnic, religious, political or other grounds.

During discussions, participants expressed concern at the prospect of executive appointments to the judiciary, which would disrupt their independence.

due to serious illness, conviction for serious crimes, or bribery. The Constitution of the United States provides for life tenure, whereas the United Kingdom specifies retirement at the age of 70. Moreover, there should be open, detailed rules setting out the standards of conduct that are expected of judges. Participants that we spoke to as part of our discussions about the judiciary expressed support for the creation of an independent commission that has the power to review the actions of the judiciary and which would only have power to discipline members of the judiciary where they break the law.

Update:

Law 14 of 2013 makes certain amendments to the laws governing the judiciary. Article 1 for the new membership of the High Institute for the Judiciary provides for a commission to supervise judicial appointments with the power to hold disciplinary hearings. However, its composition now includes members of the executive in addition to the judiciary, which is inconsistent with the clear request for judicial independence made by participants and judges during discussions.

Recommendations:

1. *The role of the three institutions of government must be clearly defined to identify them as holding distinct functions in the administration of the state.*
2. *The role of each institution must provide for a system of 'checks and balances' that allows the other institutions to ensure that power is exercised in accordance with the constitution.*
3. *Given the variation in answers to questions relating to the form of government itself, a full consultation must take place on this issue based on actual functions. A survey that only gave participants the choice between "presidential", "parliamentarian" or "hybrid" would not be sufficient, as it is clear from our research that participants are not always certain of the specific functions assigned to each form.*
4. *Term in office of government personnel should be limited to a maximum of two terms of 4 years.*
5. *Elections are the main way for the people to hold the government accountable, and should therefore be clearly prescribed to ensure the freedom of citizens to exercise their political rights. This should involve elections being general (open to all men and women of voting age), direct, free, with all votes given equal weight, and made in secret.*
6. *The judiciary must be independent and impartial, and no person or organ of state may interfere with the functioning of the courts. The appointment of the judiciary should be conducted through transparent processes.*
7. *The highest court should have the power to strike down laws that are not consistent with the constitution, as well as holding the other governmental institutions to account.*

C. VERTICAL DIVISION: NATIONAL, LOCAL AND REGIONAL GOVERNMENT

The CDA will need to address the question of who is best equipped to make decisions affecting local people. A balance must be struck between central decision makers, and local decisions makers. Careful thought will need to be given to how the state will be structured in order to address the calls for greater regional and local administration by some citizens.

Nine out of ten participants expressed a preference for some form of local government. This could take the form of a unitary state, which is one that recognises the supreme authority of national government, while devolving a degree of power to sub-national entities on particular, specified, issues. Another form is to create a federal state, in which the constitution recognises sub-national entities as having independent powers, and powers that are to be shared with national government. A confederation is an even deeper form of vertical division, which is a union of political entities, joined together for certain common purposes. Additionally, some states, such as Italy and Japan, do not specify a vertical state structure, but have supreme national institutions with certain devolved sub-national entities with constitutionally protected independence.

We wanted to get to the heart of vertical division without specifically raising the concept of federalism, because this is a controversial topic that is often accompanied by emotional language and may, therefore, obscure the nuance behind participants' feelings. Survey participants were presented with over 30 different government functions and policy tasks and asked which level of government should be responsible for each both in terms of decision making and budget management. Tasks included taxation, law making, economic policy, education policy, health care policy, visa and passport issuing, and control of natural resources. The choice for each task was between national, regional, or local responsibility. The results of our survey indicate a preference for a centralised government with decentralisation of services and administration, but it is important to consider each aspect of vertical division in turn, because responses were not universal.

Fiscal and economic decentralisation was unpopular, with 58.6% stating that taxation and 72.3% stating that economic policy should be decided at the national level. As federalism is often associated with fiscal and law-making power, these results show that when considered in terms of the actual tasks that a federal system might entail, a majority of participants were not in favour of such vertical division. This result was seen across Eastern regions too, despite that region being associated with calls for federalism. Nevertheless, when speaking to participants during the constitutional activities, approximately 30% of participants stated that a proportion of tax income must be spent maintaining local services. When discussing this further, some participants explained that for those purposes a local tax may be acceptable, while others highlighted how a local tax would disadvantage less wealthy areas. Maintaining taxes as a



national task but imposing an obligation to spend a portion on local development was offered by some participants as an alternative.

Our survey results for education revealed a strong preference for national control (89.4%). However, when considered during the activity discussions, education policy was frequently felt to derive from the national level while retaining regional and local flexibility so that the curriculum could be adapted to respect certain language and cultural rights. It was clear that the implementation of the governmental obligation to protect cultural rights in this way would comprise a separate budget provided for at national level. This would ensure that the protection of these education rights would not be at the cost of other necessary functions. It was also held that local governments should have more power in decisions to build schools and in training local teachers and in ensuring that the right to be educated in a person's own language is implemented in areas which are inhabited by minorities with a distinct language and culture. Participants were unequivocal that in regions where a majority of inhabitants belong to a minority with a different culture and language, that the right to protect that culture and language must be protected by a positive obligation on the state to ensure at a local level that implementation would be guaranteed in the budget of the national government.

Similarly, health was seen as another area in which certain issues should be addressed at a local level according to 76% of survey participants. In the context of health care, discussions revealed that participants consider that the national government should devise health policy and budgets but give local government responsibility over day-to-day administrative procedures. Participants also expressed preference for local participation in the national decisions of the health ministry, because of their expectation

that the national budget should provide for the development of facilities in remote areas. Citizens regularly brought up the issue that central government does not take into consideration local needs with regard to specific health sector considerations. Participants from Zwara, Tobruk and Kufra noted that it was especially difficult to receive certain kinds of healthcare such as maternal and antenatal care services. Further, a patient's mother in Tobruk told of how her son was waiting for the only doctor qualified to return from holiday for several weeks. She stated that a genuine national health service would be able to manage staffing better, through reallocating doctors on the basis of arising needs. Participants from smaller locales such as Bayyada, Taknes, Jalu, Shahat, Nalut, Yefren, Sebratha and Regdaleen emphasised the long journeys that they must undertake to reach a central hospital. Indeed, a participant from the Nafusa Mountains recalled that his brother had to have his leg amputated following an infection to a simple cut because by the time they travelled to Tripoli and were seen by a doctor, "it was too late."

Local government independence with regard to administrative decisions was regularly raised also. More generally, having administrative functions conducted at a local level would help to overcome the burden that people in remote areas find when they must travel long distances to the capital to complete paperwork or seek a service because the infrastructure is poorly designed. A common example that was quoted to us, especially in the East of the country is the need to travel to Tripoli for licensing or even passport issuance. Nevertheless, some people voiced concerns about corruption at a local level, citing recent funding allocated to local government for treatment of war injuries. This suggests a desire for local control but with independent national oversight.

A patient's mother in Tobruk told of how her son was waiting for the only doctor qualified to return from holiday for several weeks. She stated that a genuine national health service would be able to manage staffing better, through reallocating doctors on the basis of arising needs.



One of the more controversial aspects of decentralisation concerns natural resources and related revenue. Recently, this topic has become key for groups asserting calls for the federalisation of Libya. During the survey, 89.2% of respondents were in favour of national control of natural resources. During the activity discussions, we asked participants to identify what they considered to be “natural resources”. Participants identified that natural resources are more than simply petrol, but encompass natural gas and water. With this in mind, participants noted that there is significant interdependence between the different regions in relation to resources, and expressed a preference for national oversight. Participants further elaborated that they are in favour of revenues from natural resources being redistributed to allow all communities to benefit. For example, participants in Jalu, an oil producing town, spoke of the poor facilities and infrastructure, but did not express a desire for appropriation of all of the revenues, but sought fair distribution among all regions. Additionally, a student in Jalu talked about the need to ensure that natural resources are used to develop the country and that the state should set up a “fund for the future” so that the next generations are not left with only a damaged country. In Sinown, a town that does not produce oil but is known for its pipes that transport gas externally, locals there felt that gas companies should be taxed for using their land, and for the local government to use this as income to improve infrastructure and build local schools and health centres. Participants from Sinown also expressed dismay that all they had seen from the natural resources is the damage. Sinown is one of the least developed places that the *Destoori* Guides visited. This view was concurrent with more than 70% of communities, including Bayyada, Yefren, Gheryan, Khoms and Nalut, where it was expressed that natural resources should be used for the local benefit as well as the national benefit. Similarly in Sinown, citizens

pointed out that the people of the village do not benefit from their local natural resources. They believed that the state had a positive obligation to ensure that resources benefit local communities as well. They also demanded the right to fair distribution of a share of natural resources, especially if their region had been disenfranchised and marginalised for a long period.

In many states, no provision is made in relation to the use of natural resources: the national legislature simply has the power to regulate the exploitation of resources as it sees appropriate. However, in countries with substantial sources of natural wealth, specific constitutional provisions are sometimes seen, such as in Sudan, Iraq and Iran.

The Iraqi Constitution states that *oil and gas are owned by all the people of Iraq in all regions and governorates*², and goes on to provide for the fair distribution of revenues as a condition of federal and regional control of oil and gas fields. This includes a specific *allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime...* [to ensure] *balanced development in different areas of the country* to be regulated by law³. The federal powers in control of the resources are also placed under a duty to *formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people*⁴.

Only very few functions of government were seen as best decided at a local level. One was business licensing, backed by 66.6% of respondents, especially local craftsmen who voiced concerns over the amount of excessive bureaucracy and waiting time they had to endure. This concurs with our findings from discussions that participants consider that local government is seen as fulfilling

2 Article 111
3 Article 112
4 Article 112

Across the smaller communities that we visited, we frequently encountered the view that national government frequently fails to provide adequately for those communities. Participants in these communities referred to themselves as “forgotten”, and highlighted the size of Libya relative to its population.

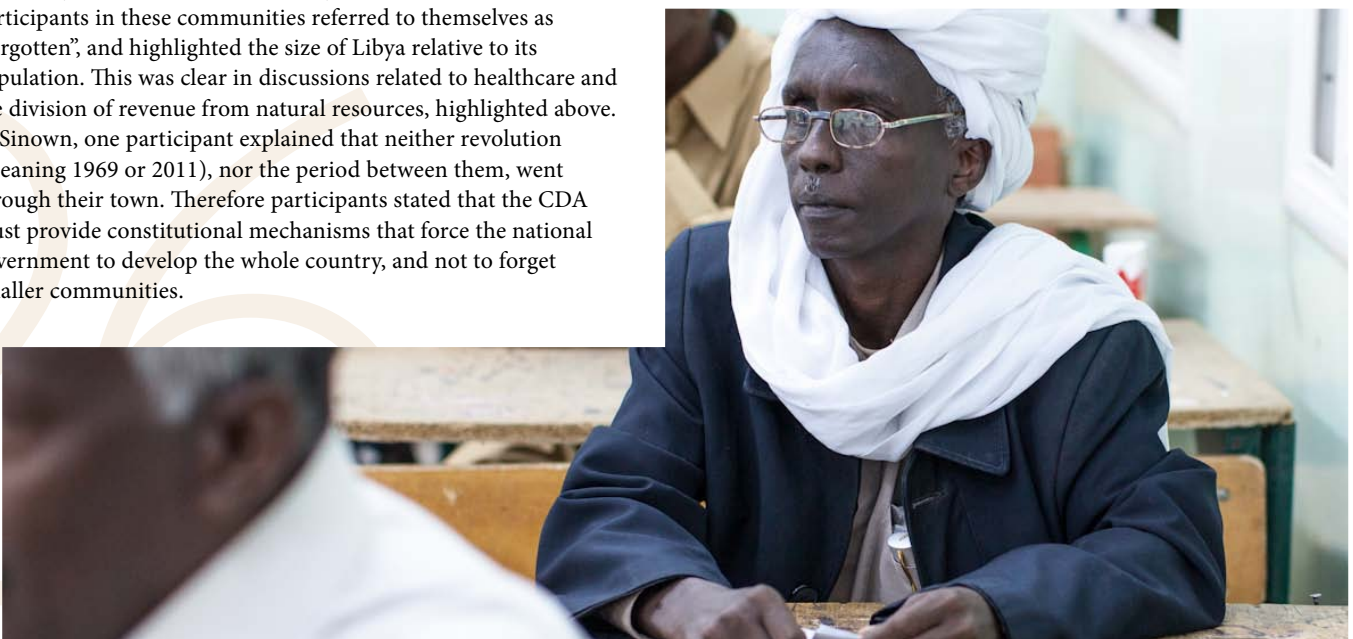
more of an administrative function. Another task that received some support for local administration was related to courts and law making, particularly in the case of areas with significant minority communities, such as Kufra and Ghadames. Participants from these regions noted that a local court could have the power to enforce customary law, for example in relation to marriage or divorce. Further, participants from Zwara highlighted to us that cultural facilities such as youth centres, libraries and elderly homes, should be decided at a local level. These participants also expressed to us that disenfranchisement could be avoided through the housing of different ministries across the country that could ensure communication between the different regions.

Overall, the division of government functions tended to centre more on central and local government and to a lesser degree on a regional level. This is supported by the fact that Eastern regions, who are associated with calls for federalism, were no more likely to specify that services should be administered on a regional or local basis than other regions. Given that survey participants expressed a preference for national control over almost all of the tasks that we questioned them on, this implies support for a unitary state structure, as opposed to a federation or confederation.

Nevertheless, across the smaller communities that we visited, we frequently encountered the view that national government frequently fails to provide adequately for those communities. Participants in these communities referred to themselves as “forgotten”, and highlighted the size of Libya relative to its population. This was clear in discussions related to healthcare and the division of revenue from natural resources, highlighted above. In Sinown, one participant explained that neither revolution (meaning 1969 or 2011), nor the period between them, went through their town. Therefore participants stated that the CDA must provide constitutional mechanisms that force the national government to develop the whole country, and not to forget smaller communities.

Recommendations:

1. *The objectives of local government should be specified as:*
 - a. *To provide democratic and accountable government for local communities;*
 - b. *To ensure the provision of services to communities in a sustainable manner;*
 - c. *To promote social and economic development;*
 - d. *to promote a safe and healthy environment; and*
 - e. *To encourage the involvement of communities and community organisations in the matters of local government.*
2. *The constitution must set out the various powers which the regions are afforded from the national government.*
3. *Health, education, natural resources, economic policy and taxation should be controlled centrally with some administrative powers given to local governments.*
4. *The constitution should specify that Libya’s natural resources are owned by all of the people of Libya in all regions, and the revenues and benefits must be distributed in a fair manner in proportion to the population in all parts of the country.*
5. *The constitution must provide mechanisms that ensure that resources and means for development are shared across Libya, without overlooking smaller or remote communities.*





D. ELECTIONS

Elections are the primary means of the people directly holding the government accountable. The people can select the members of the legislature, and also the president if a presidential system is in use, that best represent their interests, and can decide to replace them at subsequent elections if they do not meet expectations. For a country to benefit from elections as a tool of accountability, elections must be general (open to all men and women of voting age), direct, free, with all votes given equal weight, and made in secret.

The voting system employed will greatly impact the outcome of elections. There are broadly two types of voting system: majoritarian systems (“plural” systems), as used in the United Kingdom, are decided according to which candidate achieves a majority of votes, whilst proportional systems, used in Tunisia and South Africa, allocate membership of the legislature according to the share of the votes received. Hybrid systems combine elements of plural and popular systems. Libya used a hybrid system in its General National Congress elections, with 80 members elected through single member constituencies via party lists (proportional) and 120 as independent candidates to “top up” the legislature to reflect better the spread of the popular vote. Some districts were able to choose from both candidate types, whilst others were limited to one or the other.

Some countries have opted to include provisions to encourage minorities or traditionally disadvantaged groups to participate in government, perhaps through quotas for particular groups to put

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forward candidates, or by providing reserved seats in the legislature. The Constitution of Iran reserves seats for religious minorities, and the Constitution of Kenya reserves almost half of the seats in the legislature for women, with set quotas for representatives of youth, the disabled and workers.

When holding discussions as part of the tour, we encountered the following key issues over which participants expressed concern:

- Security and intimidation that prevent a fair and free elections.
- The prevalence of non-voting. Participants discussed the law in Australia that penalises non-voting.
- Lack of political campaign funding transparency.
- The perception that elected representatives spend much of their time in Tripoli and are therefore unable to represent adequately the interests of their constituency.
- The need for greater procedural inclusiveness, to increase the political participation and representation of women, minorities and youth. The idea of including quotas for these groups was discussed widely, with a discussion in Ghadames suggesting a quota at party level too.
- Lack of provision of information on candidates – participants spoke of their desire for more opportunity to get to know candidates. This could be achieved through longer campaign periods, community meetings, televised debates and online resources, participants suggested in different discussions.
- If Libya adopts a presidential system, the participants would like to ensure a clear majority is required, perhaps by having more than one round of votes.

Recommendations:

1. *At every election, an independent body shall ensure that:*
 - a. *Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
 - b. *The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
 - c. *The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
 - d. *Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*
2. *The constitution should provide mechanisms for inclusiveness and positive discrimination for minority groups and the traditionally disadvantaged, such as ethnic minorities, youth, women and people with disabilities. Provisions should also be made to guarantee the safety of voters.*
3. *Provision should also be made for increasing the accountability of those seeking election. This should include provisions in relation to funding transparency and constituency interaction such as maintaining a constituency office.*

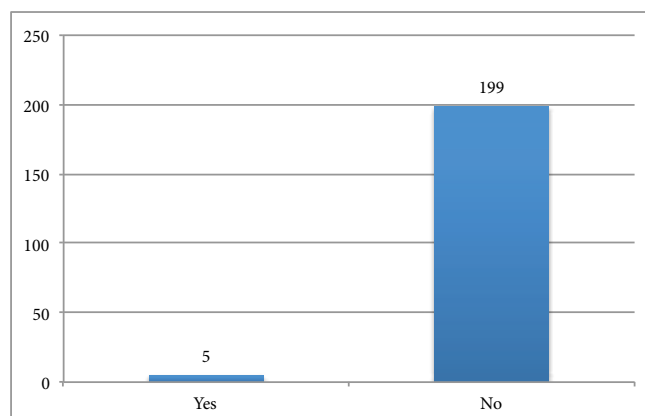
E. OTHER STATE BODIES

1. Dar Al-Iftaa

Following on from our conversations concerning the role of *sharia* as a source of law, we were keen to learn the view of Libyans with regard to the role of Dar Al-Iftaa. This was

addressed in the survey, where we asked participants if any institution other than the Supreme Court should have the power to strike down laws, to which 97% answered “no” with none of the remaining participants attributing that power to Dar Al-Iftaa. In the activities, the participants were given a card with the words “Dar Al-Iftaa” on it and asked to rank it physically in relation to the official state institutions of the executive, legislature and the judiciary. The ensuing discussion highlighted a key point of consensus amongst participants that Dar Al-Iftaa should have a purely consultative role in the state. Its fatwas would not be binding and it would be up to the executive and the legislature to decide whether to act on its advice or not.

Should any other institutions (other than a constitutional or supreme court) have the power to strike down laws?



Over 70% of participants told us that a body that has not been elected, and that does not have a popular mandate, should not be empowered to create, amend or overrule legislation. As one participant in Tripoli stated, “an unelected authority should not have the same powers as an elected body and it certainly should not have veto power on legislation”.

Another concern raised by participants is the risk of an institution with religious weight being used to legitimise or justify the politically motivated actions of an executive. As a participant in Jadu explained, “this is a body appointed by the executive and, so, even if theoretically independent, it is possible for an executive to appoint members to Dar Al-Iftaa that will serve its own purposes under the cloak of religious legitimacy.” Another, in Jadu also, stated an example of the Grand Mufti during the Gaddafi era urging participants to “respect the guardian” and to “keep at home”. This, he said, “was not our religion but instead our religion being used by a politician interested in killing freedom of expression.”

A participant in Baida affirmed the point that a constitution exists to “protect us from the worst, and not the good, members in our society,” and so when deciding the role of institutions with moral and religious authority it is important to draft with a perspective as to the “worst case scenario”.

In this context, participants feared that if a binding power was granted to Dar Al-Iftaa, it will interfere with the balance of power between the three branches of government by potentially:

- Forming its own institution that might supersede the executive, legislature and judiciary.
- Disrupting the ability of the judiciary to act independently and in accordance with international human rights principles.



- Enabling a Grand Mufti to interfere with the responsibilities of the executive branch by issuing *fatwas* that conflict and take precedence over the legislative action of the executive.

A participant in Baida, asked the question, “Are we going to follow the system in Iran? So the Mufti is the highest power in the state?” Another participant in Tripoli was also concerned by this trend and highlighted the immunity granted to the Mufti.

A further concern was highlighted by women participants who stated that recent fatwas by Dar Al-Iftaa, including in relation to travel and marriage, were concerning and that as a result its role should be only consultative. This, they said, would guarantee that the legislature would refrain from adopting any fatwas that contradict the rights of women.

Some participants expressed the desire for laws to be approved by Dar Al-Iftaa before they are adopted. A participant in Tripoli stated that “laws must pass by Dar Al-Iftaa.” This was stated to be necessary “because sometimes laws are not compatible with our country and our religion.” In discussing this balance between the traditional branches of government and Dar Al-Iftaa where there was a conflict of view. The opinion of participants was split with some stating that Dar Al-Iftaa should have the final say but significant majority held the view that it should be the elected body whose opinion is binding. In over 70% of discussion, the consensus was that if there was conflict the arbiter should be the judiciary, with a participant in Jalu stating “Who is the arbiter if there is a problem? Who decides if something is constitutional or not? We have a constitution. The judiciary, the judiciary.”

Finally, it was stated that this was not intended to curtail the rights of Dar Al-Iftaa as a public body, for it would still have the ability to call for judicial review if it believes that a law or other public policy matter is unconstitutional. This coincided with the consensus view on the tour that the final word should be to the Supreme Court and the constitution, as expressed by a participant in Jalu: “nothing outside the constitution, nothing.”

Recommendations:

1. The constitution should specify the separation of religious bodies from politics.
2. The role of religious bodies, including Dar Al-Iftaa, should be limited to that of a consultative role.
3. Religious fatwas should not be legally binding.
4. As with all other public bodies, Dar Al-Iftaa must be subject to judicial review.

2. Security

Security remains a concern to many of the people that we spoke to as part of the survey. 41.7% of those surveyed answered “Not at all” or “Not very” to the question “Do you feel that you are safe at the moment?”⁵

⁵ We consider that the security situation has worsened significantly since we undertook the tour, for example Libya recently experienced security threats that led to the widespread disruption of the elections to the Constitutional Drafting Assembly. More recently, armed confrontations have taken place in Tripoli and Benghazi in connection with Operation Dignity.



Many constitutions establish institutions to regulate the coercive forces of the state, namely the police, the armed forces and the security services.

Over the course of our activities we saw some enthusiasm for strengthening the Libyan army for protecting the sovereignty of the state and its borders. However, we did encounter some concern about the potential for a politicised army, and the need for transparency and accountability. Democracies often contain constitutional provisions for defining and regulating the armed forces. This is especially important in relation to countries that have been affected by civil war. In South Sudan, guiding principles were developed for the People's Liberation Army in order to regularise it, as well as subjecting it to civilian control and establishing a code of conduct.

Participants also raised the point that the army should not be seen in the streets aside from in emergencies with the goal

of protecting the people. At the headquarters of a brigade in Tripoli, we asked the question "If we are in a peaceful situation in the country, would we see the army in the streets? As citizens, is it visible to us?" "No," they answered, "they would be in their brigades." Respondents also emphasised that 'state of emergency' should be clearly defined in the constitution. For example, participants in Ragdaleen expressed that the military should not engage or interfere in politics, and its purpose should be to protect Libyan people. A participant in Kufra highlighted this fear by stating "what is my guarantee as a Libya citizen that the army, after 5 or 10 years, will not undertake a coup?"

Emergency powers need to be strictly defined, as they often allow the limiting of fundamental rights for the duration of the emergency. Therefore, the powers should only be available for genuine emergencies, and only for as long as strictly necessary. Participants across many communities, including

At the headquarters of a brigade in Tripoli, we asked the question "If we are in a peaceful situation in the country, would we see the army in the streets? As citizens, is it visible to us?" "No," they answered, "they would be in their brigades."

Participants who we interviewed felt that the police should be the only security force visible in daily life. They also noted that the role of the police is “Implementing the law within the country, it has to be under the control of the executive.”

Kufra, Tripoli and Benghazi, expressed a genuine concern that emergency laws could prove to be a loophole that undermines the entire constitution, as they could not only impact on human rights guarantees but also on democratic processes. One participant in Ghadames highlighted that emergency laws are often used to suspend elections and install dictatorships. This has been historically demonstrated, including in Algeria from 1992 until 2011, and Egypt from 1967 to 2012 (except for an 18 month break in 1980) where fundamental freedoms were significantly curtailed.

Constitutions frequently place strict limits on political interference with the police force. It is common to establish an independent Police Services Commission, which either directly takes decisions concerning the appointment and disciplining of police officers, or provides advice to the executive so that it can make those decisions. Kenya is an example where the power to appoint the most senior police officer lies with the President, but requires this appointment to be based on advice of an independent commission, and scrutinised by Parliament.

Participants who we interviewed felt that the police should be the only security force visible in daily life. They also noted that the role of the police is “Implementing the law within the country, it has to be under the control of the executive.” Indeed, 83.4% of survey respondents were in favour of a police force being controlled at a national level. However, when responding as part of our constitutional activities, participants expressed support for some local police, including local police chiefs, in order to respond better to localised issues. Nevertheless, participants raised concerns about corruption, dismissing the idea of locally elected police chiefs or sheriffs (as seen in the United States) on grounds of potential for corruption.

Institutional reform and incorporation of elements of transitional justice might play a role in the restructuring and reform of Libya’s security bodies. It is common, in states emerging from a period of conflict or oppression, to undertake institutional reform in order to facilitate establishment of the rule of law. Indeed, a particular concern among participants was the potential for the legitimisation of current militia groups, especially in





relation to the impact that this might have on the victims of violations committed by those militias. One participant in Gmeil made the point stating that “with no vetting process, the man who yesterday tortured me as part of an illegal militia can tomorrow have a badge on his shoulder and sit at the police station where I might wish to report that crime.” Institutional reform of state security bodies could help to re-establish respect for human rights, preservation of the rule of law, and accountability. An example is of police reform implemented in Bosnia and Herzegovina by the United Nations mission there. This included the rigorous screening process of police officers.

Recommendations:

1. National security should be for protection against internal and external threats to Libya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.
2. National security should be promoted and guaranteed in accordance with the following principles:
 - a. National security should be subject to the authority of the constitution and parliament;
 - b. National security should be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
 - c. In performing their functions and exercising their powers, national security organs should respect the diverse cultural of the communities within Libya;
 - d. Recruitment by the national security organs should reflect the diversity of the Libyan people in equitable proportions; and
 - e. Require recruits to have a clean record in respect to committing past human rights violations.
3. Clear provisions for the establishment, structure and conduct of security services that establish clear definitions of what the services entail.
4. The role of the army should be independent and should protect the people not the government. Provision should be made for holding the armed forces accountable, and ensuring transparency. This might include creating specific courts to deal with military matters, and provision for civilian oversight.
5. The national police service should be structured to function in national, regional and, local spheres of government.
6. The creation of an effective security service is important for ensuring that citizens can live free from the threat of violence. However, national security must be pursued in compliance with the law, including international law.
7. There should be a special body created to regulate the conduct of the military and another special body to regulate that of the police to ensure compliance with laws and to ensure people aren’t subject to human rights violations. For example a national police service commission and defence council, with both to include mechanisms for complaint.
8. Provisions for a state of emergency must be defined clearly, for use only in true emergencies, such as when the state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to restore peace and order. The state of emergency should only be declared for a maximum of 6 months at a time, requiring renewal where an emergency is ongoing, rights may only be limited to the extent that derogation is strictly required. Any competent court may decide on the validity of the declaration, extension, and legislation arising from, the state of emergency.

CHAPTER FIVE

BILL OF RIGHTS

A. INTRODUCTION

Most modern states set out in writing the fundamental human rights that are accorded to every individual. This is recognition of the fact that it may not always be possible to rely on a government elected by a majority vote to protect the fundamental rights of all individuals, and therefore these rights should be enshrined in law of a special status such that all governments have a duty to uphold them.

The obligations and duties that arise from human rights are often considered to fall into two categories: negative and positive. **Negative duties** follow from rights such as freedom of religion –they require the state to refrain from interference and are therefore duties that require little or no action from that state. **Positive duties** arise from rights that necessitate an action for implementation by the state, which often requires time and resources. An example of a positive duty would be the equal provision of education across Libya, as the application of this right would require positive steps to be taken by the state, for example, to build schools and employ staff.

Civil and political rights, such as the right to freedom of expression and the right to a fair trial, will require the state to refrain from interfering with individuals' lives in certain ways. For example, the right to life requires the state to refrain from arbitrarily taking life without an appropriate legal process or exceptional circumstances. However, many of these rights will also impose positive obligations on the state. The right to life can impose an obligation to repress violations of this right, to investigate allegations that this right has been violated and to provide redress for victims accordingly. Most of these rights were mentioned in the Constitutional Declaration.

Economic, social and cultural rights may also be included in the constitution, and are included in most recent constitutions. These include the right to housing, education, healthcare, food, water and work. Access to these rights is important for peoples' overall standard of living and for ensuring dignity. They are also important facilitators of other fundamental rights.

The CDA will need to consider whether these rights should be reflected in the new constitution. They will need to consider how to incorporate Libya's international law obligations with regard to these rights and to what degree and how to empower the Libyan courts to have regard to international law when interpreting these rights.

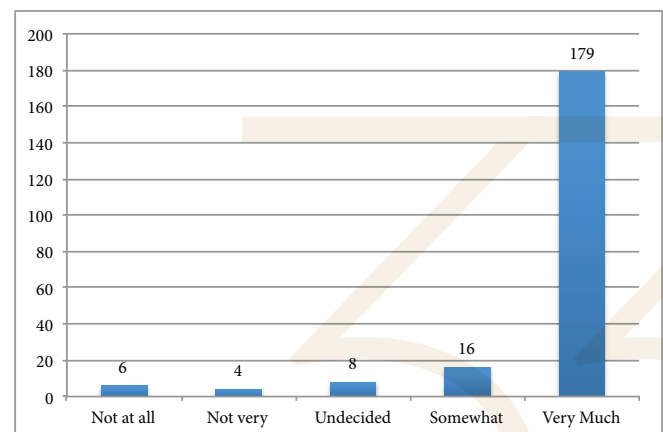
Some rights, such as freedom from torture or freedom from slavery, are recognised as **absolute rights** that cannot be limited in any circumstances. Other rights, such as freedom of expression, might be limited or qualified in certain circumstances. For example, speech that incites violence against minority groups or which promotes public disorder is unlikely to be protected.

If some rights are limited, then the CDA will need to consider how these limitations will work. Some constitutions set out a specific list of circumstances in which a right can be limited. Taking the example of freedom of expression, it could be stated in the bill of rights that racist speech is not protected. Other bills of rights simply say that a right can be limited as long as the limitation is compatible with a democratic society and does not go any further than is necessary. It is then left up to the courts to decide in particular cases whether an interference with a right by the government has gone too far. This places the responsibility on the court to strike the right balance between the protection of individual rights and the legitimate scope of government action.

In addition, some rights may be rights which states can suspend enjoyment of during, for example, a state of emergency. Such rights might include the right to freedom of assembly. They are described as **derogable rights**. In contrast, other rights may be such that they are enshrined in a constitution as rights which a state can never, in any circumstances, resile from. An example is freedom from torture. These rights are described as **non-derogable rights**.

The CDA will therefore also have to consider which rights are to be derogable and which non-derogable, as well as in what situations derogation is to be permissible.

Do you feel that protecting human rights should be superior to other forms of the law?



B. RIGHT TO LIFE

The right to life is traditionally understood to impose upon states the duty to abstain from arbitrarily killing individuals under their jurisdiction. In addition, the right to life can also give rise to

During the tour, participants frequently linked the right to life with the right to live with dignity, through provision for economic and social rights.

positive duties to investigate loss of life and an obligation to take measures to protect against unlawful loss of life.

In interpreting the Indian Constitution, the Supreme Court has construed the right to mean the right to live a dignified life and the right to carry on functions and activities for the bare minimum expression of the human self, such as to include nutrition, health, housing and education⁶. Therefore the right to life effectively gives rise to separate economic, social and cultural rights. During the tour, participants frequently linked the right to life with the right to live with dignity, through provision for economic and social rights. This concurs with the provisions for economic and social rights contained within the Indian Constitution, which states that economic and social goals are directive of state policy and must therefore be regarded in legislation and executive action⁷.

In South Africa and a number of other jurisdictions, the right to life has not been held to extend to unborn children or to require the continued feeding of a terminally ill patient. The right to life does not require the abolition of the death penalty, although its use should be limited to the most serious crimes and must follow proceedings which strictly respect all the procedural safeguards of a fair trial. Nevertheless, there is a strong trend among states to abolish the death penalty or apply a moratorium with a view to abolition and the CDA should consider this global trend in looking at the right to life.

Safety and security were concerns raised frequently by participants. 41.7% of survey participants responded negatively to the question “Do you feel that you are safe at the moment?” Additionally, some participants expressed that they feel safe only in their areas, and one in ten specifically mentioned their safety to the open question, “What is the most important thing for your constitution to protect?” Speaking informally as part of discussions or in interviews with the Guides, participants expressed concerns about the prevalence of non-state armed militia groups, and the threat to the security of their life that they felt as a result.

Recommendations:

1. *The right to life is a non-derogable right.*
2. *The constitution must enshrine the right to life provisions in the ICCPR and optional protocol providing that every human being has the inherent right to life, which shall be protected by law, and no one shall be arbitrarily deprived of his or her life.*
3. *The constitution must guarantee investigation and review mechanisms for incidents resulting in the loss of life.*
4. *Right to life violations carried out by non-state actors (such as militia groups or other private forces) must be subject to the same scrutiny as if the state had acted.*

⁶ Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981) 2 SCR 516

⁷ Constitution of India 1949 (rev. 2012) Part IV Article 37

C. RIGHT TO DIGNITY

The preamble to the United Nations Charter⁸ notes that “the peoples of the United Nations” have “faith in fundamental human rights” that include “the dignity and worth of the human person”. References to protection of dignity are frequently made in other international treaty documents, such as the ICCPR, as well as being a value noted as integral to other human rights in many constitutions. For example, economic and social rights are frequently seen as essential for protecting and promoting human dignity. The preamble to the Constitutional Declaration makes reference to the 2011 Revolution’s aim for Libyans to “live in dignity in the territory of their country”.

The South African Constitution has explicitly enshrined the right to dignity as a non-derogable right in itself, stating that “everyone has inherent dignity and the right to have their dignity respected and promoted”⁹. The South African Constitutions also makes clear that the right to dignity may not be violated when detaining a person¹⁰.

The Kenyan Constitution also enshrines the right to respect and protection of the inherent dignity of all people¹¹, as well as specifically protecting the right of persons with disabilities and older persons to live with dignity and respect.

The South African Constitution and the Kenyan Constitution reflect the attitudes that we encountered while conducting the tour. When completing the phrase “My constitution protects...” using stickers on our sticker wall, participants frequently highlighted the importance of dignity, together with freedom, as a “lens” through which to see other rights. For example, a disabled student that we spoke to told us that having increased protection for her rights would help her to live a more dignified life. By way of example, she expressed how different she feels when able to use a wheelchair compared to when she had to be carried by others.

Participants also spoke about other issues which they felt impacted on their dignity. In Bayyada, when discussing healthcare and housing, participants explained that the lack of adequate healthcare and the lack of regular running water in their homes impacted on their ability to live a dignified life. In Zwara and Cabaw, members of the Amazigh communities linked their ability to use language to the protection of their dignity as a people. Amazigh participants also expressed to us that they consider the Gaddafi regime’s ban of their language and use of their names a crime against their dignity.

⁸ Charter of the United Nations 1945, preamble

⁹ Constitution of South Africa 1996 (rev. 2012) Article 10

¹⁰ Ibid, Article 35(2)(e)

¹¹ Constitution of Kenya 2010 Article 28



Recommendations:

1. *The right to dignity must be a non-derogable right.*
2. *The constitution must enshrine the inherent dignity of all human persons, and the right to have their dignity respected and protected.*
3. *The constitution must make particular reference to the protection of dignity and respect for vulnerable groups such as persons with disabilities, chronic illnesses, older people, minority groups and women.*

D. RIGHT TO PRIVATE LIFE

The UDHR Article 12 states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks”. Further, the ICCPR prohibits the unlawful interference with privacy, family, home, or correspondence¹², and enshrines the family as a natural and fundamental group unit¹³.

The Kenyan Constitution enshrines the right to privacy as including the rights not to be searched or have their home searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; and the privacy of their communications infringed¹⁴. The Kosovan Constitution additionally limits the use of searches to investigate crime, only after court approval unless immediately necessary, and in such case must then be retrospectively approved¹⁵.

12 ICCPR 1966 Article 17

13 Ibid, Article 23

14 Constitution of Kenya 2010 Article 31

15 Constitution of Kosovo 2008 Article 36(2)

Women expressed to us how they feel that their family life is disrupted by the difficulty that they face to pass on their citizenship to their children or foreign spouse.

Participants expressed that everyone should be free to criticise state and non-state actors without fear of prosecution as an essential feature of a democratic society.

Libya's Constitutional Declaration provides for this in its Article 12: "Private life for citizens shall be inviolable and shall be protected by statute. The state shall not intrude into it without a judicial warrant in accordance with the statute." However, the right to private life is not sufficiently safeguarded in practice. Women, for example, expressed to us how they feel that their family life is disrupted by the difficulty that they face to pass on their citizenship to their children or foreign spouse. The exclusion of a person, such as a spouse, from a country where close members of his family are living can amount to interference. Indeed, the interpretation of the term 'family' has been interpreted sufficiently broadly in the past to include the common residence of husband or wife¹⁶. The right to private life is also disrupted in the case of minority communities, we were told, because they face difficulty accessing citizenship, and due to their locations as internally displaced persons. The community of Tawergha are a notable group of displaced persons, who are, to date, forcibly prevented from returning to their home town¹⁷. In Tripoli and Benghazi, young activists with whom we met were concerned about the government accessing their internet accounts without their consent.

Recommendation:

Protection of private life must be inviolable; including the right of a person to have his or her private and family life respected, the inviolability of his or her residence, and the confidentiality of his or her correspondence, telecommunication and other communication.

E. FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION

The ICCPR formulates freedom of expression as including the freedom to seek, receive, and impart information and ideas of all kinds, through any media¹⁸.

Freedom of expression must comprise the creation of a protected space in which ideas can be shared and expressed in public. States can then interpret how to regulate the nature of the ideas that can be

expressed: balancing the importance of freedom of expression against the need to protect against threats to public safety or order. Therefore the right is subject to limitations such as the interests of national security, public safety and for the prevention of disorder and crime.

The scope of this right has been held to encompass different concepts or limitations within different constitutions. In India, the right to freedom of expression has been held by the Supreme Court to include a right to access administrative information. In South Africa, freedom of expression does not extend to propaganda for war, incitement of immigrant violence or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm¹⁹.

We conducted activities with participants that were intended to explore the balance between people's entitlement to express their views and beliefs against their duty to behave responsibly and to respect other people's rights. We asked participants to state whether they agreed or disagreed with the statement "Freedom is unlimited" and then defend their position. As the debate progressed and people realised the impacts of an abuse of freedom of expression, certain issues were highlighted that demonstrated the need for the right to be qualified, including in relation to the potential infringement on private life, incitement to violence, damage to reputation, and spreading of falsehood.

Throughout *Rehlat Watan*, the need to protect freedom of expression was consistently raised as a particular concern by participants, particularly during interviews and informal discussions. However, when reviewing the data and testimonials that we collected, we noted demographic and regional nuances regarding the aspect of freedom of expression being highlighted.

In Cabaw, for example, the team met a group of women in the local Quranic school who advocated for the right of women to express their opinions freely. These participants felt that women's views were not valued and taken into consideration in deciding on key issues. This view was echoed in many other communities, including Tobruk, Bayda, Yefren and Tripoli. The data from the survey confirms this finding, particularly when completing the sentence "My constitution protects..." as female participants specifically referenced the right to freedom of expression and political participation.

In Tripoli and Benghazi, although many forms of media flourished after the uprising, participants highlighted the government's inability

¹⁹ Constitution of South Africa 1996 (rev 2012) 16(2)

¹⁶ El Dernawi v Libya (2007) AHRLR 35 (HRC 2007)

¹⁷ <http://www.libyanjustice.org/news/news/post/84-lawyers-for-justice-in-libya-welcomes-tawergha-decision-to-return-home>

¹⁸ ICCPR 1966 Article 19(2)



to ensure the safety of persons to express their opinions. This is in spite of the provisions contained in Article 14 of the Constitutional Declaration. Participants recalled incidents of journalists being assassinated and media outlets attacked by armed non-state actors. Participants expressed that everyone should be free to criticise state and non-state actors without fear of prosecution as an essential feature of a democratic society.

Participants also raised the issue of illegally armed groups restricting their freedom of expression. 41.7% of participants responded negatively to the question: “Do you feel that you are safe at the moment?”, and many survey participants raised the issues of security and freedom in tandem when asked about the biggest challenges facing Libya and what they want their constitution to protect. This suggests that participants consider that the security situation impacts not only their immediate safety, but also their general freedom. The proliferation of arms has decreased the ability of Libyans to offer up a dissenting voice, we were regularly told. This was particularly highlighted in politically disenfranchised areas such as Gmeil, Sirte and Sebha, perceived to have opposed the February 17 Revolution. In these areas, the Guides were told by citizens that they believed that their opinions are disregarded simply because their towns have an association with the former regime. As a result, those participants revealed that they are afraid to express their views for fear of reprisal. The CDA should therefore consider widening freedom of expression to include protection from the interference not only of the state but also that of non-state actors.

When meeting with members of Libya’s ethnic and cultural minorities, the team encountered calls for freedom of expression to encompass protection of cultural identity. Survey responses from Ghadames, for example, reference the need for the constitution to protect the Tamazight language, civilization and culture, as a part of achieving equality for all Libyans. Language, in particular, is a part of the cultural heritage of minorities for which they seek protection. *Destoori* documentary footage highlights this, with one participant from Zwara noting that preserving the Tamazight language may

seem like a “cultural luxury and a part of history... but what’s more important for us is that it is an identity”. It was repeatedly and clearly stated to us that protecting language rights was fundamental to minorities being able fully and freely to express themselves. This view was also reflected in the interviews conducted by the Guides with members of two Tebu communities in Kufra, members of both stated that recognising language rights is a fundamental element of preserving cultural identity. It was expressed to us as a freedom of expression point. “If we cannot express ourselves in our mother tongues, how can we truly express ourselves?” we were told by a Tebu lady in Kufra. This was also backed articulately by a man in Shahat, of Arab origin, who stated that freedom of expression was at the core of all rights, especially rights of disenfranchised populations. “It all comes back to freedom of expression,” he said.

Freedom to Access Information

Mechanisms for citizens to demand and receive information from public bodies can be a very important tool for holding state institutions to account, by ensuring that the state performs its duties in an honest and transparent way. It can empower ordinary people and interested bodies, like the press and non-governmental organisations (NGOs), in examining the work of the institutions of the state. Many countries around the world have enacted legislation protecting freedom of information. States such as Sweden, Brazil, and South Africa have enshrined constitutional guarantees. The responsibility to provide information can be limited where the information is security sensitive, threatens the reputations of others, or threatens public order, public health, or morals. Limitations may only be applied for those reasons and must only be applied where the restrictions are sufficiently clear and precise, and meet the test of necessity.

Calls for greater transparency of state institutions were amongst the most common throughout *Rehlat Watan*, with clear support for a mechanism for ensuring transparency and accountability being demanded. We heard impassioned participants, especially in Benghazi, Jadu and Tripoli, demand greater transparency with

regard to public spending, government salaries and budgetary decisions. Mechanisms such as freedom of information requests to government institutions and public bodies guaranteed in the constitution would be a strong step towards ensuring transparency and accountability.

Recommendations:

1. *Everyone has the right to freedom of expression, which includes:*
 - a. *Freedom of the press and other media;*
 - b. *Freedom to seek, receive or impart information or ideas of any kind;*
 - c. *Freedom of artistic creativity;*
 - d. *Freedom from censorship; and*
 - e. *Freedom to hold and express one's opinion without interference.*
2. *Limitations to this right should be strictly provided by law, pursue a legitimate aim and be necessary to secure the achievement of this aim. Legitimate aims include the protection of the rights and freedoms of others, national security or public order, or public health or morals. These should be 'proportionate', in the sense that they must be applied in a targeted way and represent the most effective measure available, yet the least restrictive on freedom of expression.*
3. *The right should not extend to propaganda for war; incitement of imminent violence; or, advocacy of hatred that is based on nationality, race, ethnicity, gender or religion, and constitutes incitement to discrimination, hostility and violence. These limitations should be made expressly. The constitution should contain provisions that protect cultural identity as part of freedom of expression. This would create a positive duty on the state to protect cultural heritage.*
4. *The right to freedom of expression should extend to protection of the right to express a politically unpopular view.*
5. *The need to protect freedom of expression from the threat of violence from non-state bodies is also an issue that the CDA should consider.*
6. *Media independence should be protected, including through the prohibition of censorship and ensuring confidentiality of news providers' sources. A media regulatory framework should be in place not to censor information, but to ensure pluralism and equality in the flow of information that reaches the public.*
7. *Everyone has the right of access to any information and records held by the state and public bodies, including electronic records in the possession of any level of government or any organ or agency thereof; and national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state. This right is to be limited only for the reasons listed at 2. and 3.*
8. *There must be recourse to judicial review available where freedom of expression is curtailed or a freedom of information request is denied.*

Update:

Recent legal developments have added to the difficulties faced by freedom of expression practitioners in Libya. Law 5 of 2014 criminalised any action that may harm or prejudice the February 17 Revolution, as well as insulting remarks directed at the executive, judiciary, and the legislature or any of their members. This restricts

the right to express opinions freely, and diminishes the government's accountability by legislating for the suppression of criticism.

Additionally, threat to the media remains an issue. In August 2013, television presenter Azzedine Qusad was killed by three gunmen while in his car. In November 2013, photojournalist Saleh Ayyad Hafyana was killed while documenting anti-militia protests in Tripoli, and Radwan Gharyani of Tripoli FM was killed in December 2013 by unknown perpetrators for unknown reasons.

F. FREEDOM OF ASSEMBLY AND FREEDOM OF ASSOCIATION

Throughout the tour, participants expressed a variety of notable concerns related to freedom of assembly and association. These freedoms are essential to the exercise of freedom of expression. They are also limited because of the association with freedom of expression, primarily in relation to the difficulties that participants expressed were experienced by people when dissenting – whether they be due to legal obstacles, armed groups, government forces, or cultural constraints (particularly in the case of women).

Law 65 of 2012, passed by the General National Congress, regulates the right to peaceful protest in Libya. The law does recognise that peaceful protest is a basic human right under the Constitutional Declaration, and is clear that the right to peaceful assembly and the need to maintain security and order are not contradictory. However, some aspects of the law do not meet international human rights standards on this issue, and as a result limit the ability of citizens to express themselves. In particular, the law contains limitations through provisions:

- Preventing any temporary disruption to public utilities and highways, where assemblies are not recognised as a legitimate use of public space;
- Requiring that the assembly organisers bear responsibility for maintaining order, which conflicts with the report of the UN Special Rapporteur²⁰ stating that neither organisers nor participants should be held responsible for the actions of others or for maintenance of public order during demonstrations;
- Requiring 48 hours' notice in advance of a demonstration;
- Specifying limitations through vague references to "security reasons";
- Permitting the complete dispersal of the protest for any violation; and
- Applying criminal sanctions against gatherings in violation of the law.

In Tobruk, the *Destoori* Guides came across citizens actively exercising their right to freedom of assembly. Participants here voiced their concerns about their social and economic rights. After the Revolution, it was a regular sight to see demonstrations being held across the country. However, participants noted that the exercise of this right presently carries with it a risk, and that they feel disenfranchised as a result.

When the team engaged on the issue of freedom of assembly with women across the country, a number of different factors were drawn out. 54% of women answered "not very" or "not at all" to the question "Do you feel safe at the moment?" compared to 38% of men. This difference in perceptions of personal safety may have an impact on the willingness of women to protest. Particularly highlighted was the risk of harassment or sexual violence. Some female participants stated that they are prohibited from protesting because of societal

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constraints, such as restrictions on freedom of movement, for instance those set out in fatwa number 1587 released by Dar Al-iftaa calling for a ban on Libyan women travelling without a male chaperone. Societal restrictions such as these limit female freedom of assembly directly, as well as having a consequential impact on women's participation in political life more generally.

Freedom of assembly is made more difficult by the existence of armed groups. Presently, a violent minority is able to curtail the right of the majority to assemble and demonstrate peacefully. This was particularly highlighted in politically marginalised cities, such as Bani Walid, Sebha, and Sirte, where participants do not feel safe to exercise free assembly. For example, participants from Sebha answered negatively to the question "Do you feel that you are safe at the moment?" in a higher proportion to other areas at 66.6% compared to 41.7% nationally.

Additionally, participants spoke of intimidation and use of excessive force by militia and security forces when protesting peacefully about the destruction of Sufi shrines that had taken place in August 2012. This included the alleged driving of a bulldozer at protestors, and ill treatment of detained protestors, we were told by participants in Tripoli. Nationally, only 17.8% of survey respondents answered 'very much' to the question, "Do you feel that you are safe at the moment?". In Sirte, participants taking part in discussions expressed that they felt insecure because of their town's perceived association with the former regime, which they feel places them at greater risk of attacks from armed groups.

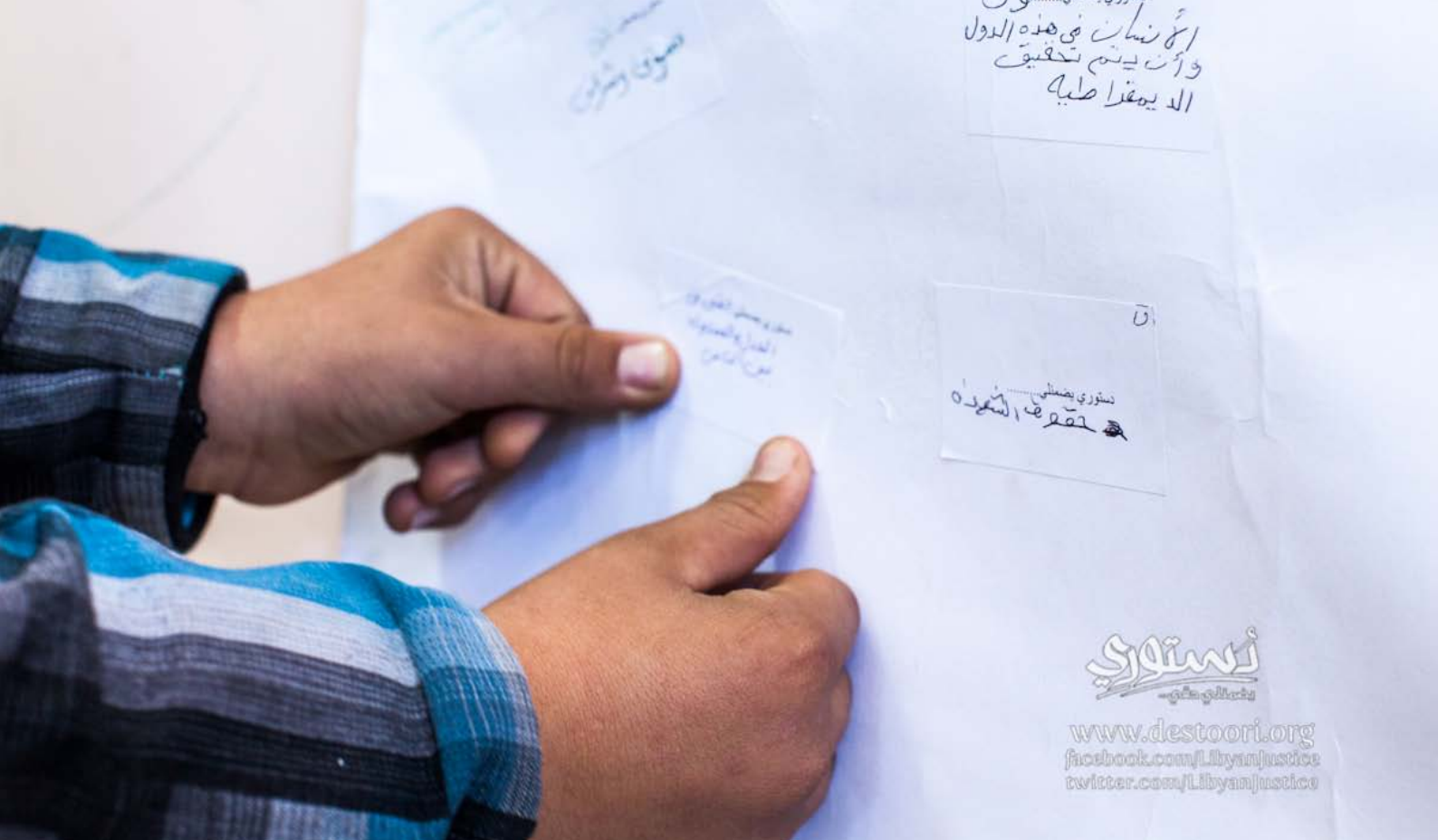
Citizens in Gmeil highlighted that freedom of assembly should be exercised with limits. They used the example of a demonstration

that took place which forced the shutting down of an oil refinery in Zawya. This has led to disruptions to petrol heading to western Libya. They suggested that rights should be balanced, noting that the right is both a right to exercise freedom of assembly but also an obligation on citizens to exercise it responsibly.

Political parties, trade unions, and NGOs

Political parties, trade unions and NGOs are important for ensuring that specific interests are protected. It is common for the right of freedom of association in political parties, trade unions and other civil society organisations to be protected in constitutions. The ability to form political parties is a key step to the establishment of permanent and accountable democracy. Trade unions are also important because they allow the ability to stand together and collectively bargain to strengthen calls for adherence to, and protection of, certain rights. NGOs are an important agent to promote certain civil society concerns, such as human rights. The existence and survival of such groups is protected through the promotion and protection of the right to freedom of association.

Participants expressed different viewpoints regarding the existence of political parties when undertaking the constitutional activities. For example, participants in Tobruk argued that political parties should be banned as they only serve their own interests rather than the interest of Libya. On the other hand, in Tripoli for example, some participants noted that allowing the formation of political parties is important to encouraging political dialogue which is needed to help establish democratic values. International human rights standards, and the Constitutional Declaration, would



not permit for the outright ban of establishment or membership of political parties. Further, no constitutions include such an outright ban as far as LFJL is aware.

Participants also highlighted the need for the professionalization of certain sectors and the importance of securing certain protections for workers and expressly raised the need for trade unions. South Africa's constitution sets out specific protections for labour relations in Article 23. These permit every worker to form and join a trade union and to participate in their activities and strikes, and every employer to form and join an employers' organisation and to participate in their activities. Both trade unions and employers' organisations have the right to collective bargaining, to determine their own administration, and to organise and form a federation.

Further, members of civil society organisations that we met with in several communities, including Bayda, Kufra and Benghazi, highlighted the lack of any active protections or guarantees for NGOs in the current legal framework and the exposure of those working in civil society, and especially in the field of human rights, to arbitrary legislation intended to curtail their efforts. With that in mind, the civil society organisations that we met with overwhelmingly called for the express protection of the right to freedom of association for civil society organisations in the new constitution.

Recommendations:

1. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.
2. Limitations on the right to peaceful assembly may only be applied through clear procedural steps, in compliance with human rights standards.
3. The state should bear responsibility for the maintenance of order during public protests, including providing stewards

for informing and orienteering participants and ensuring alternative arrangements for public services and traffic where a public protest may otherwise cause disruption.

4. Decisions on whether to prohibit a gathering require a judicial review, with reference to requirements that such action be necessary and proportionate, and as a matter of last resort where there is a serious threat of unlawful acts or crimes.
5. Authorities must only permit the use of force to the minimum extent necessary, should it be necessary to do so, and ensure accountability where excessive force is used.
6. Criminal sanctions, or dispersal tactics, may only be applied in respect of individuals who engage in criminal acts in the context of any gathering.
7. Everyone has the right to freedom of association regardless of their political, social, religious, ethnic, linguistic or tribal affiliations.
8. Positive implementation of freedom of assembly through ensuring the protection of protestors and creating a safe environment for protests.
9. Protection of freedom of association through guaranteeing the right to join and form political parties, trade unions, and other civil society organisations, participate in the activities of those bodies, and campaign or bargain collectively.

Update:

Intimidation of protestors remains a key issue. In November 2013, peaceful protests in the Gharghour district of Tripoli were violently stopped by armed non-state actors. More than 40 people were killed and around 500 injured. Eyewitnesses reported that militiamen opened fire on unarmed protestors, who were holding white flags as a symbol of peaceful intent. More recently, a demonstration in Benghazi calling for the end to armed brigades and a stronger police and army was disrupted by gunmen.

Some participants stated the primacy of religion in all aspects of life, others considered religion a personal issue that need not necessarily be prescribed by law. This suggests the need for this issue to be included in the public discussions of the CDA.

G. FREEDOM OF RELIGION

The protection of freedom of religion is an important guarantor of the rights of religious minorities, particularly if the preamble to the constitution specifies that Libya has a state religion, and/or includes *sharia* as a source of law.

Views on the role of religion and the protection of freedom of religion were varied. While some participants stated the primacy of religion in all aspects of life, others considered religion a personal issue that need not necessarily be prescribed by law. This suggests the need for this issue to be included in the public discussions of the CDA.

Freedom of religion was discussed strongly in places where religious sites have been destroyed- an on-going phenomenon since 2011. Students at Alasmaria University in Zliten were concerned about cultural sites of religious minorities such as the Sufis being targeted. These participants recalled the demolition of the mausoleum of Sheikh Abdessalem al-Asmar al-Fituri in Zliten, one of Libya's most important Sufi shrines and part of the Asmariya Islamic University complex. Such acts continue to violate the rights of religious minorities, and participants considered that the government has made no effort to protect their religious sites. When asked 'should religious authority belong to a political party or a madhab?' these participants responded primarily with a 'no'; they stated that some political groups abuse religion to serve their own interests and some, more dangerously, incite hatred and violence.

Women had particular concerns related to freedom of religion. The data collected as part of our survey shows that women identify religious and cultural extremism as a key constraint: 22.9% of women highlighted this as their primary concern out of a possible 17 options in response to the question "What do you think is the most significant challenge facing women in Libya?" For example, women in Cabaw and Bayda expressed that religion should not be abused and used as justification to curtail their freedoms, citing the example of not being allowed to drive because they are told it is against *sharia*. This call for a ban on female driving was seen as exemplifying the manner in which the use of religion by political or legislative entities can negatively impact freedoms. Over 60% of female participants strongly disagreed with these restrictions and want a constitution which recognises their fundamental human rights unfettered. Women also shared stories of girls being abducted

or murdered because they were perceived to act outside expected norms. This was also reported to us in Tobruk and Zwara, where female medical staff felt vulnerable and restricted when working late shifts.

We also spoke with a small number of Christian, Jewish and Agnostic Libyans who felt they were unable to declare, or practice, their beliefs for fear of reprisal. None of these participants were willing to speak on film or to take part in official surveys, such was their fear.

Recommendations:

1. *Everyone has the right to freedom of conscience, religion, thought, belief and opinion that should include freedom 'not to have a religion'.*
2. *No one may use religion to incite hate speech.*
3. *No one may be discriminated against due to their conscience, religion, thought, belief and opinion.*
4. *All places of worship and religious sites of all religions must be protected.*

H. RIGHT TO FAIR TRIAL

The ICCPR specifies the right to a fair trial as including the right to be brought before a judge or other officer of judicial power within a reasonable time.

This right must establish, as a minimum, a set of procedural guarantees in civil and criminal trials. In criminal trials, this should include the right to be informed of the charge, to have the opportunity to prepare a defence, to have access to counsel, and to cross-examine witnesses. The right should also include procedural guarantees for both civil and criminal processes. Further, the constitution should provide for a process of review of administrative action by a court or independent or impartial tribunal.

Throughout the tour, participants called for an impartial and independent judiciary to allow for real and effective access to justice. Participants complained about arbitrary arrests, assassinations and abductions of judges, lawyers and other members of the legal community by non-state actors. When holding discussions with members of the judiciary while conducting the tour, they expressed to us that the

Key procedural guarantees identified in discussions by participants were the right to be heard before an impartial court, having access to a lawyer, the length of an arrest without charge being minimal, and that the detainee should be brought before a court of law as soon as possible.

judiciary is currently inactive because of the threats that its members face to their lives due to the proliferation of arms and prevalence of non-state armed actors. The judges also noted that they see this as a significant risk to access to a fair trial, as well as to the implementation of a successful constitution in general. These concerns were echoed by participants, such as those in Tripoli, for example, who spoke of their doubts for the fairness of trials taking place if the legal community cannot protect itself from attacks. They considered that threats to the legal community allowed for many perpetrators to roam free and not be held accountable.

Key procedural guarantees identified in discussions by participants were the right to be heard before an impartial court, having access to a lawyer, the length of an arrest without charge being minimal, and that the detainee should be brought before a court of law as soon as possible. Participants raised concern that the right to a fair trial has been frequently violated during, and after, the conflict in Libya. Participants explained this concern with reference to the prevalence of unlawfully held conflict-related detainees. It is estimated that up to 8,000 such detainees are held in conditions that do not meet international human rights standards and have not been tried or given a court hearing date. The fact that a substantial number of prisons are run by non-state actors was identified as a cause of the delays, as well as the fact that prosecutors are reluctant to bring cases against those detainees with strong links to militia groups due to fear or reprisals.

Participants also discussed the necessity of judicial independence and impartiality for ensuring a fair trial. Methods of judicial appointments are central to this, and participants engaged on the merits of different processes of judicial appointment. For example, in Tarhuna, several participants preferred an independent committee to appoint and vet judges, as a means to ensure their credibility and impartiality in order to allow an unbiased hearing to take place. The specification of an independent committee reflects concerns about the potential for political appointments if the committee were to contain members of the executive or legislature.

In Ragdaleen, for example, some participants suggested that there could be improved accountability and transparency if judges were to be elected locally.

Judicial Review

An integral part of the right to a fair trial is access to a mechanism to appeal and review a decision. Judicial review is a process by which a judge may assess the lawfulness of a decision or action made by the state or a public body in accordance with a higher authority, such as the constitution. This is an essential check on the power of the executive and legislature in accordance with the right to a fair trial.

Access to judicial review is enshrined in many constitutions, for example, the South African Constitution specifically provides for review of administrative action by a court or independent and impartial tribunal²¹. In the Kenyan Constitution, the right to review a decision in accordance with the Bill of Rights is protected in Article 23(3). In the Czech Republic, the constitution states that “judicial review of decisions affecting the fundamental rights and basic freedoms listed in this Charter may not be removed from the jurisdiction of courts”²².

Across Libya, participants expressed desire for greater transparency and accountability of government, not only in relation to large-scale public policy decisions, but also in relation to smaller transactions. Participants spoke of their frustration at present corruption levels when interacting with bureaucracy generally, particularly in terms of bribery and nepotism. The most commonly cited corrupt institutions were the civil service, police and education sectors, with participants questioning the motives for decisions related to funding and grants for healthcare abroad and education. For example, a women’s college in Gmeil was being closed and moved to Zawiya, significantly impacting many local people. Participants there noted the absence of a mechanism to review or challenge such decisions.

21 Constitution of South Africa Article 33(3)

22 Constitution of the Czech Republic 1993 (rev. 2002) Article 36(2)



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Recommendations:

Every accused person has the right to a fair trial, which includes the right-

1. *To be presumed innocent until the contrary is proved;*
2. *To be informed of the charge, with sufficient detail to answer it;*
3. *To have adequate time and facilities to prepare a defence;*
4. *To a public trial before a court established under the constitution;*
5. *To have the trial begin and conclude without unreasonable delay;*
6. *To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
7. *To choose, and be represented by, an advocate, and to be informed of this right promptly;*
8. *To have an advocate assigned to the accused person by the state and at state expense, and to be informed of this right promptly;*
9. *To remain silent, and not to testify during the proceedings;*
10. *To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
11. *To adduce and challenge evidence;*
12. *To refuse to give self-incriminating evidence;*
13. *To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
14. *Not to be convicted for an act or omission that at the time it was committed or omitted was not-*
 - a. *an offence in Libya; or*

b. a crime under international law;

15. *Not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*
16. *To the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;*
17. *If convicted, to appeal to, or apply for review by, a higher court as prescribed by law; and*
18. *To review of administrative action, either by a court or independent, impartial tribunal.*

Update:

In December 2013, the General National Congress adopted the Transitional Justice Law (Law 29 of 2013), which included provision for a fact-finding commission and measures to address the unlawful holding of conflict-related detainees kept under militia control. The self-imposed deadline of 2 March 2014 for the implementation of measures for the transfer of all detainees into state custody and release of those who will not be charged has now passed, without any significant improvements in the situation.

I. FREEDOM FROM TORTURE

Throughout *Rehlat Watan*, the Guides identified a consistent lack of understanding and awareness about acts that constitute torture.

During discussions, participants discussed whether the prohibition of torture is an absolute or a limited prohibition. Participants frequently sought to justify the use of torture in exceptional cases to serve the common good. The severity of the act is often defined by reference to the identity of perpetrators and subjects. For example in Benghazi, participants commented that “some people deserve to be tortured” and even that “some people make you angry, so you torture them.” Across the communities we visited, over 40% of those with whom we spoke felt that there were instances where torture was justified and over 65% were of the view that the ban on torture should not be applied universally. This pervasive attitude illustrates the relatively widespread tolerance among many Libyans towards acts of torture, conflating it with the concept of punishment. This is in contradiction to the absolute and non-derogable nature of torture in international law.

During our interactions, we sought to discuss with participants why freedom from torture is, in fact, an absolute right. We highlighted that it remains absolute regardless of what may be deemed as exceptional cases such as war, political instabilities, other public emergencies or the targeting of particular groups. The lack of awareness of freedom from torture was even more pronounced when some participants confessed that they had exercised torture on others, but explained it partly by referencing their limited understanding of what torture encompasses.

Recommendations:

1. *Freedom from torture must be a non-derogable right.*
2. *The absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment.*
3. *“Torture” should be defined as any act by which severe pain*

or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.

4. *Non-state actors shall be accountable for acts of torture, cruel, inhuman or degrading treatment or punishment.*
5. *The state shall not expel, return or extradite a person to another state where there are substantial grounds for believing that they would be subject to torture.*
6. *The state shall take measures necessary to establish its jurisdiction over offences in cases where the offender is present in any territory under its jurisdiction.*

Update:

The General National Congress adopted the Law Criminalising Torture, Enforced Disappearances and Discrimination on 9 April 2013. This law intends to provide a legislative framework for the prohibition and criminalisation of certain human rights violations including torture and enforced disappearances. Nevertheless, concerns are raised in relation to the definition of torture in the law. Article 2 of the new law is not aligned with the definition provided in Article 1 of the United Nations Convention Against Torture 1984 (UNCAT). The new law results in narrowing the scope of its application, for example, by restricting torture to acts committed against detainees. Secondly, the law does not enshrine the prohibition of deporting, extraditing or transferring a person to a state where they could be subject to torture. Such shortcomings fail to provide a comprehensive anti-torture framework for Libya. Therefore, the CDA must deal with these shortcomings.

Across the communities we visited, over 40% of those with whom we spoke felt that there were instances where torture was justified and over 65% were of the view that the ban on torture should not be applied universally. This pervasive attitude illustrates the relatively widespread tolerance among many Libyans towards acts of torture, conflating it with the concept of punishment. This is in contradiction to the absolute and non-derogable nature of torture in international law.

Participants frequently understood slavery only in a narrow or “traditional” sense. Through rights focused discussions, participants were able to identify forms of “modern day” slavery

J. FREEDOM FROM SLAVERY²³

In international law, freedom from slavery is considered an absolute right. That is that, like torture, it cannot be violated under any circumstances.

During the tour, participants and Guides discussed the concept of absolute rights, and over one-third of participants correctly identified that freedom from slavery is an example of an absolute right. However, participants frequently understood slavery only in a narrow or “traditional” sense. Through rights focused discussions, participants were able to identify forms of “modern day” slavery. These were identified to include a denial of freedom, control, and exploitation. By understanding modern slavery, participants expressed that several forms of these exist in Libya today. Participants in Sabratha raised the ill treatment of many ‘African’ workers and other ethnic groups, particularly South East Asian workers. We were told that they are often dehumanized by being physically constrained, by having restrictions placed on their freedom of movement and being mentally or physically threatened. We were further told that the workers are frequently paid either less than the minimum wage or not paid at all. Participants in Tripoli raised their concerns about the phenomenon of young children selling ‘tissue boxes’ near traffic lights. They said that these children work under harsh weather conditions for long hours in dangerous routes. They called for the gangs responsible for forcing these children to work to be charged with child slavery. Also mentioned, although to a lesser degree, is early and enforced marriage. When we met with a group of women in Zliten, they described several cases where young girls were forced to marry and suffered physical violence by their husbands. There is a

²³ http://www.antislavery.org/english/slavery_today/what_is_modern_slavery.aspx

need to engage with Libyans about the right to freedom from slavery and what that is understood as encompassing today.

The Egyptian Constitution specifies that “Slavery and all forms of oppression and forced exploitation against humans are forbidden, as is sex trafficking and other forms of human trafficking, all of which are punishable by law”²⁴. A number of constitutions specify that freedom from slavery is a right that cannot be suspended, such as the Constitution of the Dominican Republic, and the Constitution of Liechtenstein.

Recommendations:

1. Freedom from slavery must be a non-derogable right.
2. No one may be subjected to slavery.
3. Slavery and the slave trade in all their forms shall be prohibited.
4. The prohibition should include the prohibition of forced or compulsory labour and human trafficking.
5. The definition of slavery should be held to encompass denial of freedom, control, and exploitation.
6. Freedom from slavery should also include the prohibition of the employment of children.

K. EQUALITY, NON-DISCRIMINATION AND PROTECTION OF VULNERABLE GROUPS

Many constitutions recognise a right to equal treatment. This right may entail both a negative duty, requiring states to refrain from discriminatory conduct, and a positive duty, requiring states to provide benefits equally to its people. The right to equality may also

²⁴ Constitution of Egypt 2014, Article 89





be relied on in order to protect diversity, as may rights to freedom of expression and to cultural participation.

Discrimination can occur directly or indirectly. Direct discrimination results from different treatment that is explicitly justified as a result of personal characteristics, such as making it illegal for women to apply for jobs in certain sectors due to their gender. Indirect discrimination is when a provision imposes an unreasonable requirement that, although applies equally to everyone, may prove more difficult to achieve by a certain group. An example of indirect discrimination includes requiring people to show an expensive form of identification prior to receiving health care which may prevent poorer people from accessing resources.

General Recommendations for Equality:

1. Equality must be a non-derogable right with respect to unfair discrimination on the grounds of race, colour, ethnic or social origin, gender, religion or language.
2. Everyone is equal before the law and has the right to equal protection and benefit of the law, which includes the full and equal enjoyment of all rights and freedoms.
3. The constitution must prohibit direct and indirect discrimination against anyone on one or more grounds, including race, gender, pregnancy, marital status, ethnic or social origin, colour, age, disability, chronic illness, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate, directly or indirectly, against another person on one or more grounds set out in 3 above. National legislation must be enacted to prevent or prohibit unfair discrimination.
5. The constitution shall promote the achievement of equality through legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

1. Ethnic Minorities

A general principle of the rule of law is that the law of the land should apply equally to all and there should be no unjustified or arbitrary discrimination between individuals. The CDA will need to

balance the promotion of a single national identity with the rights of minority groups. There are many different minority groupings that might require special protection under the new constitution. Libya is home to people of different ethnic, cultural, religious, or linguistic minorities which the CDA should acknowledge and protect. A constitution may contain explicit provisions guaranteeing rights to such things as cultural participation, enjoyment of the arts, conservation, development of culture, and freedom for creative activity. It may also protect the rights of persons by explicitly adopting the principle of non-discrimination.

In Libya, there are at least three major ethnic or cultural minorities whose position might require special consideration: The Amazigh (population estimated to be between 236,000 and 590,000²⁵, Tuareg (estimated between 17,000²⁶ and 60,000²⁷) and Tebu (no reliable statistics available). Each of these ethnic minority groups has suffered discrimination, particularly under the Gaddafi regime. For example, the Amazigh were prevented from using their language in public institutions, and registering their newborns with Berber names²⁸. The Amazigh community members with whom we spoke while conducting the tour told us that the discrimination that they face is ongoing, as demonstrated, they stated, by the failure to establish a constituency for Jebel Nafusa, which might better enable their interests to be represented in national politics. The Tuareg suffered similar discrimination to the Amazigh. The Tuareg, along

25 Minority Rights Group International, World Directory of Minorities and Indigenous Peoples - Libya : Overview, August 2011, available at: <http://www.refworld.org/docid/4954ce3523.html> [accessed 20 May 2014]

26 Minority Rights Group International, World Directory of Minorities and Indigenous Peoples - Libya : Overview, August 2011, available at: <http://www.refworld.org/docid/4954ce3523.html> [accessed 20 May 2014]

27 http://www.achpr.org/files/sessions/40th/mission-reports/libya/misrep_specmec_indpop_libya_2005_eng.pdf

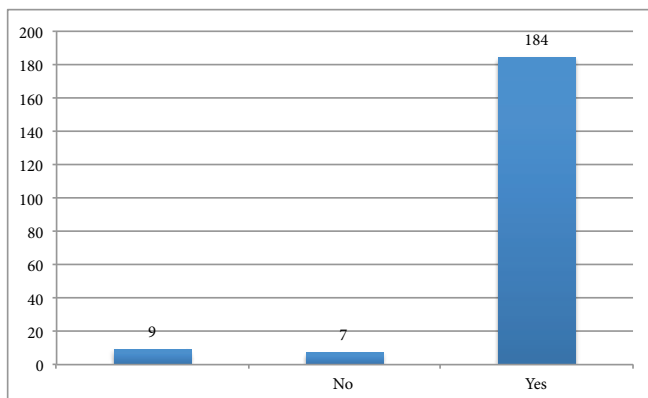
28 In May 2005, this led to a group of Libyan Amazigh filing a complaint with the Working Group on Minorities of the UN Commission on Human Rights. The Working Group demanded that the Libyan government take immediate action to put an end to legal and administrative practices that prohibit use of Amazigh names and restrict the use of the Tamazight language freely in public. (http://www.ohchr.org/Documents/Issues/Minorities/WG/11/Libyan%20WG_3a.doc)

In our interviews, surveys and informal discussions, we found that the key ethnic minorities seek the special protection of three particular rights – language, citizenship and freedom of movement - as well as the promotion of national reconciliation.

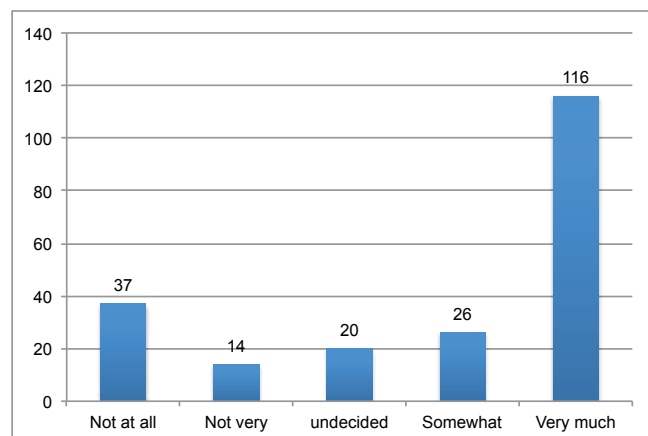
with the Tebu, have historically been denied Libyan citizenship. Further, the Tuareg and Tebu have faced violent reprisals since some were recruited into the Gaddafi regime’s armed forces during the uprising in 2011.

Across the country, 86.3% of survey respondents agreed that Libya has ethnic, religious and cultural minorities. 66.6% of survey participants answered positively to the question “Should special measures be used to ensure the representation of minorities in government?” Additionally, 27.6% of survey respondents considered that communities identifying themselves as minorities should be allowed to develop their own courts or customary law. Providing a role for customary law was said to help aid reconciliation in post conflict situations.

Do you believe that Libya has ethnic/religious/cultural minority groups?



Should special measures be used to ensure the representation of minorities in government?



In areas encompassing ethnic and cultural minorities, such as Kufra, Zwara, and Ghdames, participants recounted stories of unequal treatment and discrimination, especially when dealing with public bodies both at the local and national level. Moreover, participants in these regions reported that the government had neglected their cultural rights such as preserving their language and traditions. In our interviews, surveys and informal discussions, we found that the key ethnic minorities seek the special protection of three particular rights – language, citizenship and freedom of movement - as well as the promotion of national reconciliation.

a) **Language** can be a fundamental part of state, group, or cultural identity. The South African Constitution recognises this, and provides extensive protections for the language rights of minority communities. Aside from the positive obligations on the state to protect and promote minority languages²⁹, the South African Constitution also includes language as part of its equality provisions, for which discrimination may not be permitted³⁰ - thereby acknowledging the link between language and identity.

When the *Destoori* Guides visited towns and cities where minorities were located, participants expressed the importance of having positively implemented minority rights as part of the question “What is the most important thing for your constitution to protect?” The CDA must grant official language status to indigenous languages. Where the majority of a region speaks a minority language, provision should be made for its use in all official interactions. For example, the Iraqi Constitution recognises the right to educate children and conduct business in minority languages. The Afghan Constitution provides for multiple languages to be used in state media.

When the Guides held discussions in Cabaw, participants expressed that the state has not taken sincere steps to recognise the Tamazight language. Students from the Institute of General Professions in Yefren asserted the importance of including the Tamazight language in the curriculum. They felt that it was the role of the state to assure that this was a priority and serious steps should be taken to fulfil this, as language is experienced as a fundamental part of one’s identity, the protection of which is vital to dignity. Citizens in Zwara did not only want the Tamazight language to be taught in schools but also be an official language in Libya, in fact language rights were ranked as the most important issue by over 75% of those with whom we spoke in Zwara. They also requested that the government build centres to protect the culture and traditions of minorities and promote them as a part of Libyan identity.

The *Destoori* Guides met with two Tebu communities in Kufra who also emphasised the importance of language rights and requested that their language be officially recognised

²⁹ South African Constitution, Article 6

³⁰ South African Constitution, Article 9(3)

Language is experienced as a fundamental part of one's identity, the protection of which is vital to dignity.

for use by them at a local level. The Tebu representatives also spoke of their desire to preserve their language; they described that they had published a book that teaches the rules of Tebu grammar, and are in the process of creating a Tebu-Arabic dictionary. The Tebu expressed a desire for the state to implement positive action for the use and preservation of their language – along the line of the measures included in the Iraqi and Afghan constitutions.

b) **Citizenship** was frequently cited as an issue for the members of minority groups such as the Tebu and Tuareg, because of their struggles to gain access to it. Participants from those communities spoke of how they are prevented from acquiring a family booklet, which is the primary means to acquiring citizen rights needed to enjoy fundamental human rights such as health care, education and political participation.

During the tour, Tebu participants highlighted to us how this problem has been exacerbated following the Chadian-Libyan conflict. Many of the population of Aouzou, which was at the centre of the conflict, are Tebu. Although the population of Aouzou had historically possessed Libyan citizenship, this citizenship had been revoked by the Gaddafi regime following the International Court of Justice³¹ finding that the town belonged to Chad in 1994. As a result, many of the Tebu have been left without any citizenship from either Libya or Chad³².

In the Character of the State section, we discussed the options for the basis of citizenship, and recommended that birth to a Libyan parent (of either gender), birth within Libya or residence in Libya regularly for over 10 years.

c) **Freedom of movement** according to the UDHR is the right to freedom of movement and residence within the borders of each state, as well as the right to leave and return to any country³³.

Constitutions such as Canada's protect the rights of their citizens to enter, leave, remain in, take up residence in, and pursue a livelihood in, any province³⁴. India's Constitution simply protects the right of its citizens to move freely throughout the territory of India³⁵.

Libya's Constitutional Declaration guarantees movement generally in its Article 14. However, in practice the enjoyment of this right has been limited. Freedom of movement has not been protected for minority communities who face difficulty in gaining access to citizenship and key official documentation. This concern was highlighted to us especially when speaking with Tebu and Tuareg community members.

Additionally, the right to freedom of movement is presently restricted for groups of internally displaced persons, notably the

31 <http://www.icj-cij.org/docket/files/83/6897.pdf>

32 United Nations General Assembly Human Rights Council Working Group on the Universal Periodic Review Ninth Session, A/HRC/WG.6/9/LBY/3, pg 7

33 Universal Declaration of Human Rights 1948 Article 13

34 Constitution of Canada 1982 (rev. 2011) Article D(6)

35 Constitution of India Article 19(1)(d)

community of Tawergha who now reside in camps for internally displaced persons and have been, to date, repeatedly prevented from returning to their town³⁶.

Update:

Following a recent decree not to update or issue passports outside of Libya, many Libyans currently living outside of Libya have found themselves unable to return to the country, meaning their right to the freedom of movement is restricted.

2. Religious Minorities

Libya has a Sunni Muslim majority of approximately 97%³⁷. However, the country is home to a number of religious minorities. These include Sufi and Ibadi Muslims, Hindus, Christians, Agnostics, Roman Catholics, and Anglicans³⁸. Under the Gaddafi regime, these groups were nominally permitted to practice but some rights were limited³⁹. Since the revolution, the position regarding religious minorities has become more precarious. Notably, places of religious minority importance have been attacked, including one of Libya's most important Sufi shrines, the mausoleum of Sheikh Abdessalem al-Asmar al-Fituri in Zliten, which was entirely demolished. Other sites that have been attacked include a historic library, as well as historic graves because of the declared belief that shrines and saints are un-Islamic.

During the tour, participants expressed dismay at the attacks on sites of religious heritage that had taken place across the country, and highlighted the importance of guaranteeing religious freedom and expression, including freedom not to have a religion. This was also emphasised to us by Christian, Jewish and Agnostic Libyans who felt that the protection of their religious rights was non-existent and that, as a result, they were unable to express their faith or practice it for fear of reprisal.

Protection of religious freedom should include protection of religious minorities in a positive way – by undertaking steps to ensure all can exercise the right to religious freedom.

3. Political Minorities and Reconciliation

Participants from areas considered political minorities, such as those in Sirte, Sebha and Bani Walid, were reluctant to be filmed for fear of reprisals. The *Destoori* Guides explained the importance of participants from these marginalised communities sharing their opinions of what they want to see protected in the constitution. Speaking largely off camera, they were able to share with us their fears of being left out of the political process and their fear of the, at the time proposed, political isolation law. These participants also echoed the view that *Destoori* Guides had widely heard: that

36 <http://www.libyanjustice.org/news/news/post/84-lawyers-for-justice-in-libya-welcomes-tawergha-decision-to-return-home>

37 <http://www.refworld.org/docid/519dd4b118.html>

38 Ibid

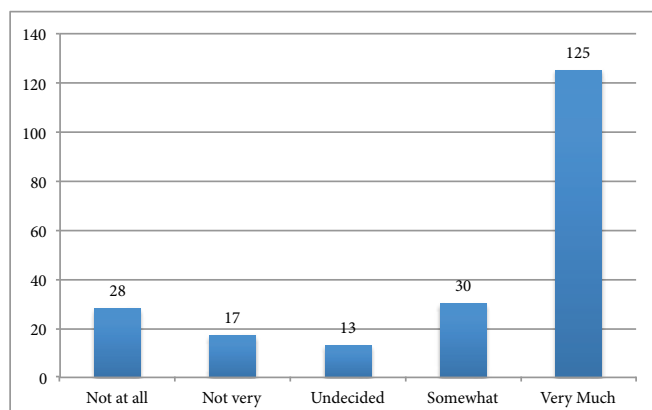
39 <http://berkeleycenter.georgetown.edu/essays/religious-freedom-in-libya>

the new constitution should end this discrimination by promoting national reconciliation between Libya's political minority communities and the majority with the view of assimilating such communities back into society.

Reconciliation was also raised as especially important when the team visited the city of Kufra. The *Destoori* Guides were received by two members of the International Committee of the Red Cross in charge of reconciliation between the Tebu and Alzwaiya tribe. When the team met members of the Tebu community they stated that, although they form the majority in the village of Ribyana (which is located 150km west of Kufra), they were not allowed to form a local council. According to them, the Arabs in Kufra justified this on the basis of Ribyana's small population (up to 50 houses). However, the Tebu questioned why Tazerbo, (200km away from Kufra) has a similar population size and does not have a Tebu majority, has a local council.

The Tebu population in Kufra requested that the new constitution protect their right to live with dignity by not dividing Kufra into Tebu and Arab territories. These divisions, they expressed, have led to armed conflict between the two groups. They also complained that the Arab majority, especially senior positions, controls the workplace. They asked for better living conditions which, to date, have been made difficult to achieve because some members of the Tebu community have been denied the right to citizenship.

Should transitional justice measures, such as courts or the institutions specifically tasked with investigating allegations of human rights violations from the past, be part of the constitution?



Another group who would benefit from reconciliation initiatives include the former inhabitants of the town of Tawergha, which previously had a population of around 30,000⁴⁰. Prior to liberation, the Tawerghans mainly lived in the small coastal town approximately 250km east of Tripoli. That town was used by Muammar Gaddafi's armed forces during the siege of Misrata. As a result, the town was perceived as being 'pro-Gaddafi', and in August 2011, militias forcibly displaced the entire population of the town. The Tawergha are now scattered across Libya, and many live in refugee camps in Tripoli and Benghazi. While conducting the tour, we were unable to gain access to the camps where the displaced Tawergha community now reside. However we have since spoken to members of the community who told us of their disenfranchisement following

40 <http://www.aljazeera.com/programmes/aljazeeraworld/2013/10/road-tawergha-201310191859343221.html>

political discrimination based on their perceived loyalty to the previous regime. The Tawerghan community members emphasised the limited efforts made by the state to facilitate reconciliation and a return to their homes. We were repeatedly told that the state actively discouraged their return to the town. This can be seen as a violation of the right to liberty of movement and freedom to choose his residence, enshrined within the ICCPR⁴¹. The members of the Tawergha community that we spoke to expressed that more was needed to hold actual perpetrators accountable (on both sides) and to facilitate reconciliation with the population as a whole.

Recommendations:

1. All minorities must have their rights protected like every Libyan citizen and should have access to Libyan citizenship on the basis of birth to a Libyan parent (of either gender), birth within Libya, or having lived in Libya regularly for 10 years. Special consideration must be given to those who have no citizenship at all, or where neither parent has any citizenship, but who has lived in Libya for a significant period of time.
2. Language of minorities, including the Tamazight and Tebu languages, must be recognised as official languages in the preamble to the constitution so that where the majority speaks Tamazight or Tebu, the state must provide for all official interactions and resources to take place in the majority language of the region, particularly regarding education.
3. Minorities have the right freely to enjoy and develop their particular cultures, observe their own religions, and to practice their beliefs freely. This should include an obligation on behalf of the state to protect and preserve the cultures of all the people.
4. All provisions on issues concerning the rights of minorities within the constitution should be adopted on the basis of consensus during the drafting process, and not by majority basis. This is to reflect the fact that these issues have overriding impact on the minorities themselves.

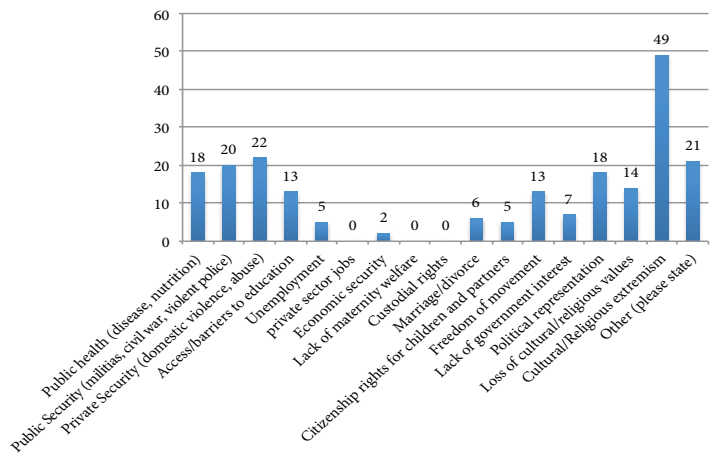
Update:

Law 1 of 2014 provides for certain benefits and reparations to the families of martyrs and the missing. In it, the definition of 'martyr' has been limited to those who were on the side of the February 17 revolution, including those killed fighting against the Gaddafi regime or who were civilians and killed by Gaddafi fire. Therefore those killed fighting for the regime at the time are not included. Although the definition of 'missing' did not make reference to those missing on the Revolutionary side expressly, clause 2(2) states that the benefits do not apply to anyone who has been found to oppose and was hostile to the Revolution at any time in any way. This creates a serious obstacle to transitional justice and reconciliation between groups, and has resulted in families of the missing and killed of Gaddafi fighters being disenfranchised, and was anticipated as a concern by participants across the tour. For example in Sirte, Sebha, Tripoli, Bani Walid and Regdalen, participants spoke of the trend towards punishing the "losers" and disenfranchising them from political processes as well as transitional processes.

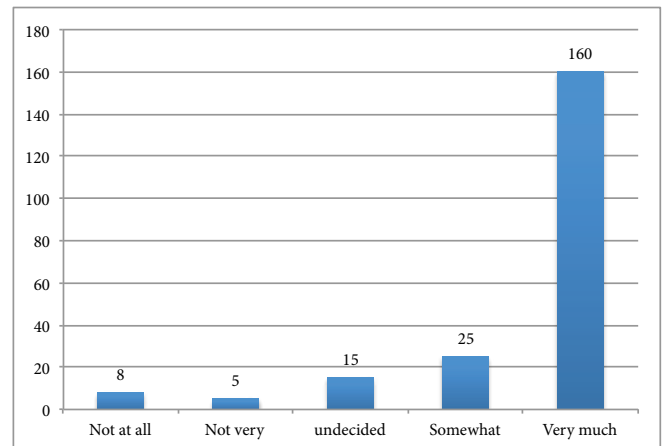
41 International Covenant on Civil and Political Rights 1966 Article 12



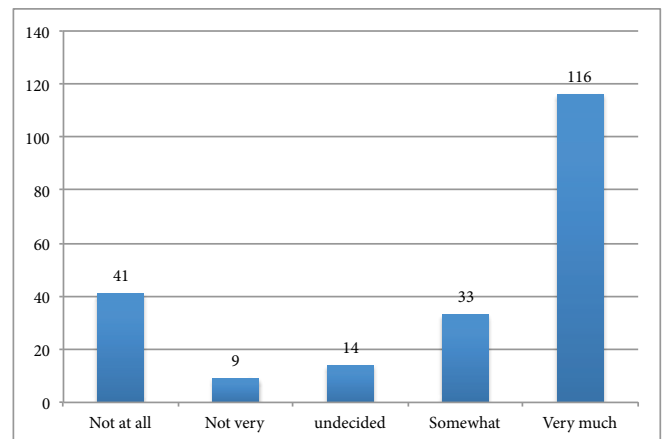
What do you think is the most significant challenge facing women in Libya?



Should specific protections for women, such as those that recognise the importance of maternity rights, equal provisions in marriage and divorce, and equal citizenship, be included as part of the constitution?



Should special measures be used to ensure the representation of women in government?



4. Women's Rights

In some societies, women may traditionally have had inferior rights to men, or had less access to economic or political opportunities. Where this is the case, a constitution can aim to promote equality between men and women by supplementing the general principle of equality before the law with an express prohibition of discrimination against women.

The Constitution of Afghanistan makes express guarantees for substantive equality in Article 22. The South African Constitution makes express prohibitions of discrimination between men and women in Article 9. Provisions for positive discrimination through reserving seats for women in the legislature are also made in the Afghan Constitution under Article 84, and under Articles 97 and 98 of the Kenyan Constitution.

One key benefit of including provision for positive discrimination in the new constitution is that this prevents the laws that will implement the provision from later being found inconsistent with the constitution. If the provision for positive discrimination is included in the constitution, this guarantees the implementation of that provision; a court would be bound to interpret all subsequent law in light of the provision of positive discrimination contained within the constitution. The opportunity for including such provision in the constitution means that the measure can be drafted as a matter of permanent democratic legitimacy and not as a temporary measure. The language used may be gender specific or gender neutral.

Although Libya has ratified its commitment to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 and optional protocol, our survey responses and informal discussions show that women feel that they have not achieved equality in practice. When surveying female participants, 85.4% felt that the new constitution should include specific protections for women. Among male and female survey respondents, 69.9% agreed

‘very much’ or ‘somewhat’ that special measures should be used to ensure the representation of women in government. Furthermore, the role of women in political life was seen as marginal. This was attributed not only to cultural norms, but also to the lack of economic independence for women. Interestingly, these concerns did not translate, statistically, to significant numbers identifying ‘economic security’ (less than 1% surveyed) or ‘accessibility/barriers to education’ (6%). When probed, participants stated that they saw these not as standalone challenges but as by-products of cultural restrictions.

In answer to ‘What do you think is the most significant challenge facing women in Libya?’ the most popular response was ‘cultural/religious extremism’. This answer represented 23% of the answers received from a choice of 17 challenges. This was also reflected in our activities and interviews where women highlighted the lack of equality within Libyan society as a key challenge. University students across the country, from Bayda to Yefren, also expressed their feeling of lost opportunity in education and employment as a result of gender, attributing this more to cultural norms than to legal obstacles. The constitution, we were told, ‘could change this’ because of the people’s mandate it would hold. Participants in women circles we held in Cabaw and with whom we conducted interviews in Bayda and Tobruk raised their distress over the increasingly influential role of the Mufti, with specific examples of a potential ban on travel without a male chaperone or women driving, as well as his attempt to prohibit Libyan women marrying non-Libyan men being key issues raised. The freedom to marry and citizenship rights for children of women who were not married to Libyans were also set out as concerns, particularly in the border towns of Jalu and Tobruk as well as in Kufra, where proximity to neighbouring countries means increased likelihood of marrying non-Libyans. Their concern stemmed from a legal system which they perceived as being swayed by cultural and religious extremism.

Recommendations:

1. In addition to the general provisions for equality, the constitution must include specific non-discrimination measures for the protection of women, particularly with regards to employment, political participation, health-care, nationality and education.
2. General social policies should be made in order to specifically guarantee the civil, political, economic, social and cultural rights of women, designed to ensure they are able to live a life of dignity and enjoyment of human rights and fundamental freedoms on the basis of equality with men.
3. The constitution must provide for special measures that ensure the promotion of women in political, economic, social, cultural, civil, and other fields. These measures, such as reserving a significant proportion of legislature seats for women, are necessary until the achievement of substantive equality with men has been reached.
4. The constitution must make provision for a commission for gender equality that can monitor the implementation of positive action for political and electoral systems.
5. The constitution must guarantee women equal rights with men to acquire, change or retain their nationality. It should ensure in particular that neither marriage to an alien nor change of nationality by the spouse during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality her partner. Citizenship rights should be granted whenever a child is born to a parent of Libyan nationality, irrespective of gender.

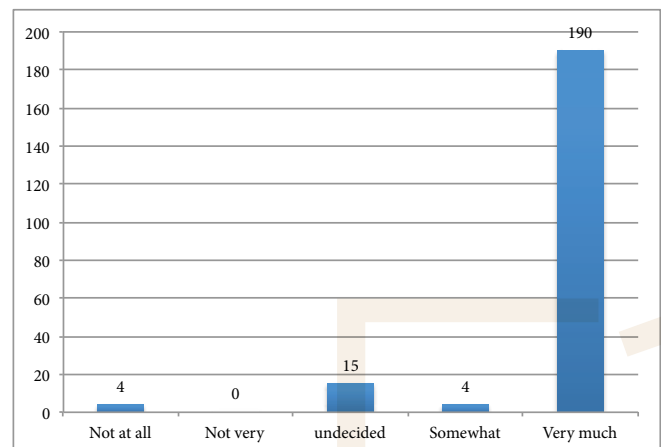
5. Rights for the Protection of Persons with Disabilities

The Constitutional Declaration provides that all Libyans shall be equal before the law (Article 6), and declares in Article 8 that the state shall “guarantee for every citizen equal opportunities and shall provide an appropriate standard of living. The state shall also guarantee the right of work, education, medical care, and social security...” This echoes the provision for persons with disabilities in the constitutions of a number of other countries, for example, Afghanistan, Colombia and the Democratic Republic of the Congo. Additionally, the Constitution of South Africa contains strong provisions for equality and non-discrimination in general, which expressly include provisions for persons with disabilities.

The CDA will need to address the needs of people with disabilities. A disability is often understood to be a condition that interferes with a person’s ability to do normal tasks in everyday life. Disabilities may be physical or mental and can range in severity. Some people with disabilities may be able to work in a job and live mostly ordinary lives whereas an individual with a severe disability may require constant care.

There is a significant number of people in Libya who have disabilities as a result of the fighting that took place during the uprising. These will include both people who took part in the fighting and civilians who were caught in bombing or shooting. As is normal in all countries, there will also be people who are born with a disability or who become disabled as a result of accident, disease or old age. In many countries, there is special legislation dealing with the position of people with disabilities. This may deal, in particular, with the workplace, with spaces or services open to the general public, and with financial support for disabled persons.

Do you think it is important that the constitution enshrine provisions for those with disabilities?



It is essential that provision of public services for persons with disabilities (such as healthcare, living allowances, and education) are not offered in a discriminatory fashion, as this may result in non-equitable distribution of services that will disproportionately affect those living with disabilities, especially in relation to health care. A consensus among the participants with whom we spoke during the tour emphasised the belief that equal provision of healthcare is fundamental for the protection of human dignity. Further, provision of all fundamental services in a manner that facilitates equal access to people with disabilities is essential, participants argued. This includes access to education, election

Provision of all fundamental services in a manner that facilitates equal access to people with disabilities is essential, participants argued.

participation, in addition to suitable care. A participant with a disability also spoke of his desire to include discussion of people with disabilities as part of the curriculum in schools, in order to change the attitudes that able-bodied people sometimes have to people with disabilities. One school child in Tripoli highlighted the challenges of accessing facilities in her school because it had no ramp or stair-free access. Because of this issue, she was forced to attend a special facility for children with disabilities where, she said, the standard of education was significantly lower. Another school child talked of his bullying by students and teaching staff at his school for his mental disability, highlighting what he called the “hurt” to his dignity.

When visiting a facility for the care of children with disabilities, the *Destoori* Guides were shocked to see how poor the standard of provision was. There was insufficient specialist equipment for each child, noting that the children had to share a wheelchair. Some children were tied to beds so that they would not move. Additionally, the staff spoke of being paid minimum wages and of having to work 2-3 shifts in a row, as well as not receiving pay or treatment costs when injured at work.

The new constitution should permanently enshrine the rights of persons with disabilities. It should include positive obligations on the state to promote the core principle of non-discrimination for persons with disabilities including taking measures to: (a) promote physical accessibility in day to day life; (b) consider the need for community support services and assistance with mobility; and (c) secure access to education, employment, political life, and culture, recreation, and sport.

Recommendations:

1. *The new constitution must recognise that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the person.*
2. *Public authorities or businesses providing services to the public must also be placed under a duty to take account of the position of disabled people.*
3. *In the workplace, employers must be placed under a positive duty to assist a person with a disability to carry out a job, if some adjustments could be made that would help them to do this, then it is reasonable to expect the employer to make these adjustments.*

L. Protection of Children and Youth

The *Destoori* team visited 10 secondary schools in different towns and cities, interacting with over 300 students. The children were too young to complete the constitutional survey, but the *Destoori* Guides held highly interactive and lively discussions to engage with the children on the issues of the constitution and how the provisions will affect them. The Guides began the interaction by asking the children how many rights they thought that they, as children, should have in relation to adults. Almost all of the children answered that they thought that adults should have more rights than they do. The Guides then prompted consideration of all of the different rights that children thought that they would specifically need. The first thoughts were always about education, which the Guides





attributed to the fact that the discussions were taking place in schools, and because of the age of the children. However, by asking the children to think right back to when they were first born, and what they would need immediately, the children soon arrived at the need, and right, to have a name, a nationality, and to know who their parents were. The Guides continued on this track until the children had identified almost all of the needs and rights that should be met, and the children recognised that they should actually have more rights than adults. The students in each school correctly identified over 70% of the rights in the United Nations Convention on the Rights of the Child 1989. These included special rights relating to standard of living, and the right to play and recreation. One student in the school in Regdaleen expressed it eloquently by saying, “well, it is just the right to have a childhood! That is what we need protected.”

By the end of the interactive games and activities on constitutional issues, students recognised the need for special protection for children. More than 80% of students expressed that there should be special rights for children, particularly with regard to the right to education. Educational concerns were a clear focus for the children, and they also raised demands that included:

- Learning should not be limited to the classroom

- Facilities such as libraries, computers and provisions for sports and arts should be improved to reflect the right to foster the development of a child’s personality and talents.
- Build libraries in every school with different types of books. Schools should also allocate reading time for children.
- Provision of computers and internet access for students to be able to visit educational sites to reflect the fact that they have a right to access to information for their own learning and research aside from the school curriculum. In this context, pupils discussed how their curriculum had changed since the revolution, and that they had the right to carry out their own research to decide what their personal views were on the relevant issues.
- Protection for non-discrimination and equal education between children. In remote areas such as Bayyada, students felt marginalised as they only have three classes per day in comparison to six classes per day in schools in Tripoli and Benghazi. Also, parents from the Tebu tribe in Kufra said that their children have been suffering from racial harassment by denying the registration of their children.
- Provision of good transportation to prevent many children being denied access to education and not completing their

It is just the right to have a childhood!
That is what we need protected.

Economic and social rights are often considered to be essential for the enjoyment of civil and political rights, because without measures securing aspects such as adequate food, and housing, civil and political rights would be rendered meaningless.

education. This problem is especially important for female students who are not allowed to travel alone. If their guardians have work or cannot afford to take them, these girls cannot go to school and are forced to stay home. These challenges were raised in rural areas such as Sinown, Taknis and Bayda where there is poor infrastructure, making movement difficult. This demand reflects the duty of the state to take measures to encourage regular attendance and reduce drop-out rates.

- Consideration of and provision for the needs of children with disabilities when building schools. The *Destoori* Guides visited a rehabilitation centre in Sidi Almasry. It was not equipped to care for those with physical disabilities. In the centre, many children complained that they cannot go to school because they are not built to their needs. Such needs include classrooms on the ground floor and qualified staff in schools to care for students with disabilities or training for teachers on how to accommodate students with disabilities. As a result, this has denied many disabled children access to education.⁴²

Child healthcare was a key concern raised by parents in towns with oil refineries and cement factories. In Khoms and Jalu, children had health problems from the widespread environmental pollution. In rural towns such as in Bayyada, Cabaw, Sinown, Regdaleen and Zwara participants stated that paediatricians were hard to find. In addition, there was a lack of hospitals or clinics with specialist medical equipment. This has led, we were told, to the deaths of many new-born babies, due to lack of incubators. Such a problem forces citizens to travel with their children to nearby towns to get medical care. This is made difficult due to poor transport services, the lack of a basic ambulance system and lack of infrastructure more generally.

Violence against children and discriminatory acts brought heated discussions. In an all-girls secondary school in Sousa, a girl we spoke with suffered from a mental illness because of physical and verbal abuse from members of her family. Nothing was done to hold the family member accountable. This shows the need for strengthened protective measures for children.

Recommendations:

Every child has the right:

1. *To have a name and nationality from birth;*
2. *To family care or parental care, or to appropriate alternative care when removed from the family environment;*
3. *To have their best interests as the paramount consideration*

⁴² Since the *Destoori* tour, Libya has ratified the United Nation Convention on the Rights of Persons with Disabilities.

4. *To basic nutrition, shelter, health care services and social services;*
5. *To freedom from unlawful interference with their family life and privacy;*
6. *To an adequate standard of living, to include basic nutrition, shelter, basic health care services and social services;*
7. *To access appropriate treatment if seeking refugee status;*
8. *To be protected from maltreatment, neglect, abuse or degradation - this right shall be non-derogable;*
9. *To be protected from exploitative labour practices - this right shall be non-derogable;*
10. *Not to be required or permitted to perform work or provide services that are inappropriate for the child's age, or place at risk the child's well-being, education, physical or mental health, or spiritual, moral, or social development;*
11. *To protection from armed conflict, and not to be used directly in armed conflict - this right shall be non-derogable for children under 15;*
12. *Not to be detained except as a measure of last resort, in which case, in addition to general protection from penal law guarantees of process, the child has the right to be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years, and treated in a manner, and kept in conditions, that take account of the child's age - this right shall be non-derogable; and*
13. *To have a legal practitioner assigned to the child by the state, and at the state expense, in civil proceedings affecting the child.*

M. Economic, Social and Cultural Rights

A constitution may contain provisions for economic, social and cultural rights, which can include rights to property, housing, education, healthcare, food, water and work. Economic and social rights are a well-accepted part of the human rights canon and essential components of development and human dignity. In fact, the ICESCR notes in its preamble that these rights derive from the inherent dignity of the human person⁴³. Further, economic and social rights are often considered to be essential for the enjoyment of civil and political rights, because without measures securing aspects such as adequate food, and housing, civil and political rights would be rendered meaningless.

Not all economic, social and cultural rights require the state to take positive action to provide its citizens with goods or resources. For instance, the right not to be unlawfully evicted (associated

⁴³ International Covenant on Economic, Social and Cultural Rights 1966, preamble

with the right to housing) merely requires the state to refrain from certain action.

The following subsections deal with the key issues that were raised to us while conducting our research.

1. Property Rights

The UDHR protects the right to property in Article 17, stating that “everyone has the right to own property alone as well as in association with others” and that “no one shall be deprived of his property”⁴⁴. The African Charter also contains provision for the protection of property, noting that “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”⁴⁵. Further, the African Charter acknowledges the need for equality of access to public property and services⁴⁶, and the right of all people to dispose freely of their wealth and natural resources in their interests⁴⁷, and the right to lawful recovery of property and compensation in the case of spoliation⁴⁸.

Constitutions frequently contain provisions that protect the right to property, and stipulate protections for circumstances where that right might be limited. For example, the Constitution of India states that “No person shall be deprived of his property save by authority of law”⁴⁹ and provides that where land is acquired by the state, compensation must be paid at market value⁵⁰. The South African Constitution also limits the expropriation of property to situations of public purpose or interest, and subject to compensation agreed by those affected or approved by a court. Further, the level of compensation must be “just and equitable, reflecting an equitable balance between the public interest and the interests of those affected”.

Under the Gaddafi regime, property was frequently appropriated from the people through the application of Law 4 of 1978, which effectively allowed for the seizing and nationalisation of properties, agricultural lands, and businesses. The tenants then paid rent directly to the government. Consequently, the redistribution and return of nationalised land and property was frequently mentioned as a key concern by participants during the tour. Indeed, Libya is rated one of the worst places in the world for property rights⁵¹. Participants frequently equated restitution schemes with transitional justice and expressed their desire for clear constitutional protections of the right to property as well as for adequate safeguards for a scheme for the return of property. In its Article 25(7), the South African Constitution itself provides for

44 Universal Declaration of Human Rights 1948, Article 17

45 African Charter on Human and Peoples’ Rights 1998 Article 14

46 Ibid, Article 13

47 Ibid Article 21

48 Ibid

49 Constitution of India 1949 (rev. 2012) Article 300A

50 Ibid Article 31A(1)

51 2012 Report of the International Property Rights Index

an Act of Parliament towards either restitution or equitable redress in the event of any person still dispossessed as a result of previous discriminatory practices.

2. Natural Resources

It is common to make specific reference to natural resources in countries that derive much of their national income from them, such as Libya.

In South Sudan’s Constitution, detailed provisions are made for the management by the state of petroleum and gas resources on behalf of the Sudanese people. The provisions require the organisation of oil production and revenues to be managed for the benefit of the whole country, and aim to balance the interests of the oil-producing regions, the Sudanese people as a whole, and the interests of future generations. Special provision is made to divide the payment of oil revenue between the oil producing regions and a general Oil Revenue Stabilisation Account (which is aimed at providing a buffer against volatile oil prices), with any surplus being invested in a Future Generation Fund.

The Constitution of Iraq also makes broad provisions in relation to oil revenues. In particular, it provides for a percentage of revenue to be allocated to regions damaged by the regime of Saddam Hussein.

Natural resources and their revenues were a big issue on the tour, in part because they are a key cause of calls for greater regional control by some regions, particularly in the East of the country. Across the nation, 89% of survey participants stated that oil and natural resources should be administered at a national level. This suggests a preference for national control in order best to accrue the maximum revenues from the resources for later redistribution across the nation. The constitution should consider enshrining the public ownership of oil and gas, and the requirement that revenues be managed for the maximum public benefit, including for equitable redistribution.

3. Housing

The ICESCR stipulates the right to housing as part of an adequate standard of living, and enshrines a positive duty on states to ensure that this right is realised.⁵² The state must therefore take measures to ensure that everyone has access to affordable and acceptable housing policy and legislative measures, which may include provision of state housing. Further, the right not to be subjected to unlawful interference with one’s privacy, family, home or correspondence is another key defining aspect of the right to adequate housing⁵³.

The right to housing has been recognised as a separate right in South Africa. This differs from India, where it is construed as being implicit in the right to life. In the African Charter on Humans and Peoples’ Rights, the right to housing has been held as protected by Article 14 (the right to property) and provisions for mental and

52 ICSECR 1966 Article 11

53 Ibid, Article 17

The redistribution and return of nationalised land and property was frequently mentioned as a key concern by participants during the tour.

Participants we spoke to while conducting the *Destoori* tour were clear in their calls for the state to adopt a positive obligation to provide housing. Young people were especially strong in their calls for this – citing the need for access to housing as a foundation for marriage and starting a family.

physical health (Article 16), as well as the right to family (Article 18(1)) in respect of forced eviction⁵⁴.

The content of the positive obligations imposed on the state may again be understood by reference to a “minimum core”, here constituting, for instance, the provision of adequate living space, a safe and decent habitable structure, civic amenities such as roads, and access to land. Participants that we spoke to while conducting the *Destoori* tour were clear in their calls for the state to adopt a positive obligation to provide housing. Young people were especially strong in their calls for this – citing the need for access to housing as a foundation for marriage and starting a family.

4. Education

The right to education may be recognised in a number of different ways. In India, the right to education has been construed as implicit in the right to life, and in South Africa it is recognised as a separate right.

⁵⁴ Social and Economic Right Action Centre and the Center for Economic and Social Rights v Nigeria (Communication No. 155/96)

States are commonly required under national and international law to provide education up to primary level, with provision past that level being made subject to resources. International human rights law has outlined a “minimum core” for the right to primary education, according to which states are required to make infrastructure and teachers available, to ensure non-discriminatory access for all, including cultural, linguistic and religious acceptability, and to be adaptable to changing circumstances. Some states understand the right to education to require the provision of free and compulsory education up to a certain age.

The right to education was frequently noted in response to the qualitative, open-ended question “What is the most important thing for your constitution to protect?” with 21% of answers referring to education.

Children that we engaged with in the schools spoke of their desire for more creative lessons such as art or music. They also expressed concern at the lack of teaching staff, and the level of nepotism involved in the appointment of teachers.



Children that we engaged with in schools spoke of their desire for more creative lessons such as art or music.

Additionally, participants who belong to minority communities spoke of the barrier to education that their children face because of the obstacles currently in place to provide for education in minority languages. The importance of ensuring that such a right is made a positive obligation was highlighted both by members of the Amazigh and Tebu minorities who stipulated that a negative obligation not to interfere with the teaching of languages was not sufficient. The state should be under a duty to provide for a curriculum and teachers to the relevant communities to ensure positive implementation of this right. It should not be left to the communities themselves to raise the funding for such teaching, as we were told in Zwara and Yefren is currently the case in several communities.

5. Health

In Canada, health related entitlements are guaranteed by means of a right to equal treatment with others. In South Africa, it has been recognised to constitute a separate right. In India, the Supreme Court has construed it as an implicit component of the right to life, and has thus been taken to constitute part of an individual's civil and political rights.

A constitution may distinguish between the provision of treatment in the context of health emergency, and the provision of non-emergency treatment. It is common to provide that a state is required to ensure emergency treatment, but that an entitlement to non-emergency treatment is subject to available resources. South Africa is an example of a constitution that makes this distinction. Alternatively, constitutional provisions may take a broader approach, requiring the state to ensure and sustain the conditions necessary for good health. Thus, the Constitution of India has been interpreted by its Supreme Court to oblige the state to provide basic curative and preventative health services and to assure healthy living and working conditions. The ICESCR also notes the importance of environment to health, and requires improvements in environmental and industrial hygiene⁵⁵.

During the tour, participants across Libya highlighted the inadequate provision of health services, particularly in smaller or more remote locations such as Bayyada, Jalu and Nalut. Participants spoke to us of the long journeys that they must make to receive certain kinds of health care, or in some cases, any kind of health care, and the impact that this has on their health and well being. Without access to expedient treatment, otherwise minor ailments can become life-changing conditions. Additionally, the violence in Libya has left many people injured. It is estimated that some 50,000 people are currently receiving treatment outside of Libya for their injuries. Many will be left with permanent disabilities, and will require ongoing care and support. The constitution will need to address these issues.

55 ICESCR 1966 Article 12(2)(b)

6. Environmental Rights

The ICESCR notes the importance of environment to health, and requires improvements in environmental and industrial hygiene⁵⁶. The French Constitution contains a Charter for the Environment, which sets out a right to live in a balanced environment, and a set of duties for protecting the environment from damage, such as sustainable public policies⁵⁷ and research and innovation for environmental preservation⁵⁸.

In the Indian Constitution, provisions confer a duty on the state to “protect and improve the environment and to safeguard the forests and wild life of the country”⁵⁹. Additionally, citizens are noted as being under a duty to protect and improve the environment⁶⁰.

Participants in Jalu spoke of their concerns over pollution levels, and expressed the need for increased environmental protections. This was commonly highlighted in areas affected by natural resource production, with participants stating that damage to the environment was a key concern, and that revenues from oil production should be used to counter the damage caused. People in Bayyada as well as Ghadames and Tripoli highlighted the cost of lack of environmental protection on their towns, with Ghadames concerned with regards to the protection of its historic and touristic importance if pollution from nearby areas is not addressed.

7. Work

The UDHR protects the right to work, stating that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”⁶¹. Further, the ICESCR enshrines the right to work, as well as the duty of the state party to take steps towards realisation of this right – through training and guidance, and creating favourable conditions by guaranteeing a fair wage, healthy working conditions, and equal pay⁶².

The Indian Constitution makes strong provision for protecting its people in this regard, stating that: “The State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.”⁶³ This echoes provisions for assistance in the UK, which encompass an allowance for those actively seeking work, a disability allowance, and a housing allowance.

56 ICESCR 1966 Article 12(2)(b)

57 Constitution of France 1958 (rev. 2008), Environmental Charter Article 6

58 Ibid, Article 9

59 Constitution of India 1949 (rev. 2012) Article 48A

60 Ibid, Article 51A

61 Universal Declaration of Human Rights 1948 Article 23(1)

62 ICESCR 1966 Article 6, 7

63 Constitution of India 1949 (rev. 2012), Article 41



The recent Tunisian Constitution too, offers specific protections – in this case for women, by specifying that “work is a right for every citizen, male and female alike” and then, “all citizens, male and female alike, shall have the rights to adequate working conditions and to a fair wage”⁶⁴.

Work was another aspect of economic rights that was frequently drawn to our attention by participants. Many sought assistance with finding work, and raised the issue of state support for those who are unemployed. Participants speaking in Tobruk, for example, told us of how the government had cut social security benefits despite of the challenging economic and social situation.

8. Cultural Heritage

Items of cultural heritage are artefacts, monuments, archaeological sites, or nature that have cultural significance. Because they are important and irreplaceable, they are often protected in a country’s constitution, particularly where the country has a rich cultural heritage, as Libya does. The Colombian Constitution states that the country’s cultural heritage shaped the nation’s identity and therefore belongs to the nation⁶⁵. It also stipulates an obligation of the state and of individuals to protect the cultural assets of the nation⁶⁶. The Romanian Constitution and the South Sudanese Constitution also provide for a duty on the state to protect cultural heritage, with South Sudan’s specifically referencing the need to protect sites such as “monuments and places of national, historic or religious importance from destruction, desecrations, unlawful removal or illegal export”⁶⁷.

Throughout the tour, reference was made by participants to the need to protect Libya’s historical heritage at a constitutional level. Participants from areas of historical significance were notable for the strength of their calls for such provisions, such as in Shahat, Khoms, Sabratah and Ghadames, fearing that if armed conflict

continues these shrines might be at risk of attack. Participants noted the destruction of the ancient shrine of Sidi Abdul-Salam Al-Asmar Al-Fituri and library in Zliten, and feared due to the instability around them. Participants in Tobruk also noted the attacks on World War II burial sites as a cause for concern.

Recommendations:

1. *There must be no discrimination among the various regions with regard to the exploitation of natural resources, utilisation of public revenues, and distribution of economic activities among the various regions of the country, thereby ensuring that every region has access to the necessary capital and facilities in accordance with its needs and capacity for growth.*
2. *The constitution must provide for protection of the right to access to adequate housing. This should include protection against evictions or demolishing of homes without an order of court that considers all the relevant circumstances.*
3. *The constitution must provide for the right of everyone to basic education, including adult basic education; and for the state to take reasonable measures to make further education available. Provision should also be made for the right to receive education in the official language (including the languages of minority groups in regions where that language is spoken by the majority) in public educational institutions.*
4. *The constitution must provide for protection of the right to access to health care services, including reproductive health care; sufficient food and water; and social security and appropriate assistance to support any dependents.*
5. *The constitution must protect the right to property save by an act of legislature. Fair and equitable compensation must be guaranteed in the event of expropriation. The constitution should provide for a mechanism for restitution of historical property dispossession.*

64 Constitution of Tunisia 2014, Article 40

65 Constitution of Colombia 1991 (rev. 2005) Article 72

66 Ibid, Article 8

67 Constitution of South Sudan 2011 Article 38(1)

The United Nations Human Rights Committee has emphasised that it is the responsibility of all branches of government (judicial, executive, and legislative), as well as other governmental authorities, to implement and observe human rights at the national level.

6. *The constitution must make effective provision for ensuring the right to work, and to public assistance in the case of unemployment, sickness and old age. The right to work must be an equal right, for men and women alike.*

7. *The constitution must contain environmental protections that ensure that public policy, state institutions and private bodies act to protect and preserve the environment for the wellbeing of the population and future generations. This must include provision for legislative measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable use of natural resources while promoting justifiable economic and social development.*

8. *The constitution must protect sites of cultural heritage such as monuments and places of national, historic or religious importance throughout Libya from destruction, desecrations, unlawful removal or illegal export.*

N. Implementation, Access and Enforcement

Human rights can be implemented through a bill of rights, inclusion in a constitution, and/or, specific domestic legislation. Human rights can be accessed and enforced by means of legislative scrutiny, and both judicial and non-judicial mechanisms.

The United Nations Human Rights Committee has emphasised that it is the responsibility of all branches of government (judicial, executive, and legislative), as well as other governmental authorities, to implement and observe human rights at the national level.

Human rights have traditionally been implemented at a national level in three main ways: by means of an independent Bill of Rights, by inclusion of such provision in a constitution, and/or by means of specific domestic legislation designed to protect rights.

There are also three main methods for enforcing rights protections: scrutiny by the legislature, judicial enforcement, and non-judicial enforcement.

1. Legislative Scrutiny

In certain countries, an organ of state has the power to screen legislation to determine compatibility with human rights before it is made law. Examples include the French Conseil Constitutionnel, or, for example, the UK's Joint Committee on Human Rights. In addition, the executive may provide its own scrutiny of legislation to ensure compliance with human rights.

2. Judicial Enforcement

Courts globally use a number of different remedies as means of rights enforcement. In some jurisdictions, courts have power to strike down as null and void any legislation violating constitutional rights. In others, courts may make a 'declaration of incompatibility' where legislation is found to be inconsistent with human rights, and may call on parliament to pass new legislation. Others, such as South Africa, have created special remedies for rights infringement, such as the 'structural or supervisory interdict', which requires the state to provide a timetable for remedying rights infringement, and to report on implementation.

Many individuals whose rights may have been infringed cannot afford to bring cases against the state. In order to ensure that human rights are effectively protected, some jurisdictions permit organisations to bring cases on individuals' behalves. In addition, some states have introduced special "standing" rules (rules as to who may bring cases to court) to provide wider access to the courts to those who cannot afford to bring cases.

For example, India has introduced a mechanism of 'Public Interest Litigation' encompassing wide standing rules, court-initiated fact finding, and mandatory order remedies which give the Court on-going supervisory powers. Cases may be commenced by letters, postcards or even newspaper articles, and any member of the public may approach the High Court or Supreme Court for relief on behalf of any person or determinate class of persons who by reason of poverty, helplessness or disability or social or economical disadvantage, are unable to approach the Court for relief.



3. Non-Judicial Enforcement

Judicial enforcement of human rights may be regarded as a last resort. Non-judicial methods, designed to avoid the need to go to court, may include provision of appropriate training and information in applicable rights and obligations, scrutiny of schemes, and use of specialist agencies such as independent human rights commissions or ombudsmen who may take up individual complaints or investigate of their own motion. Examples of such commissions include the South African Human Rights Commission (set up under s. 184 of the Constitution), the Afghan Independent Human Rights Commission (Art. 58 of the Constitution) and the Kenyan National Human Rights and Equality Commission (Art. 59 of the Constitution). Examples of human rights ombudsmen include Argentina (Art. 86) and Guatemala (Art. 274). In addition to investigative powers, many human rights commissions have a mandate to promote and protect human rights, which could include awareness raising initiatives as well as advocacy to secure reform in law and in state institutions. Libya has its own Human Rights Commission, but it does not currently have a constitutional mandate. In considering how to empower Libya's Human Rights Commission, the CDA should have regard to the UN OHCHR Principles Relating to the Status of National Institutions (Paris Principles) which set out necessary powers and principles to which such a body must adhere in order to offer effective non-judicial enforcement of human rights.

Recommendations:

1. *The constitution should empower the legislature to adopt its own mechanism for reviewing and amending laws to ensure human rights compatibility, such as a cross party working group to provide legislative scrutiny.*
2. *A constitutional or supreme court must be empowered to strike down provisions that are not compatible with the human rights provisions contained within the constitution.*
3. *The constitution must provide for a constitutional mandate for Libya's national human rights institution, the National Council for Civil Liberties and Human Rights (NCCLHR), to include promoting respect for, and protection and enforcement of, human rights in Libya. The NCCLHR must also have monitoring, reporting, researching and educational powers. The NCCLHR must also be empowered to require state institutions to provide the NCCLHR with information on the measures that they have taken towards the realisation of the rights contained in the constitution.*

ANNEXES

LIBYA'S CURRENT INTERNATIONAL LAW OBLIGATIONS

International Bill of Human Rights

International Covenant on Civil and Political Rights (1966), entered into force 1976, accession by Libya in 1970

- *First optional Protocol to the International Covenant on Civil and Political Rights concerning communications from individuals claiming to be victims of violations*, ratified 1989

International Covenant on Economic, Social and Cultural Rights (1966), entered into force 1976, accession by Libya in 1970

Rights of the Child

Convention on the Rights of the Child (1989), entered into force in 1990, accession by Libya in 1993

- *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)*, accession by Libya in 2004.
- *Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography*, (2000), accession by Libya in 2004

Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), entered into force in 2000, ratified by Libya in 2000

Freedom of Association

Right to Organise and Collective Bargaining Convention (1949), entered into force in 1951, ratified by Libya in 1962.

Freedom of Association and Protection of the

Right to Organise Convention (1948), entered into force in 1950, ratified by Libya in 2000.

Equality and Non-Discrimination

Slavery Convention (1926), entered into force 1927.

- *Protocol Amending the Slavery Convention (1953)*, entered into force 1955. Convention ratified by Libya in 1957 following the amendments to the Convention.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), entered into force, 1957, accession by Libya in 1989

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), entered into force, 1951, accession by Libya in 1956

International Convention on the Elimination of All Forms of Racial Discrimination (1965), entered into force 1969, accession by Libya in 1968.

International Convention on the Suppression and Punishment of the Crime of Apartheid (1974), entered into force 1976. Libya ratified the convention in 1976.

Women's Human Rights

Convention on the Elimination of All Forms of Discrimination Against Women (1979), entered into force 1981. Libya ratified this convention in 1989.

- *Optional Protocol to the Convention on the Elimination of Discrimination against Women (1999)*, entered into force 2000. Accession by Libya in 2004.

United Nations Convention against Transnational Organized Crime (2000), entered into force 2003, ratified by Libya in 2004.

- *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000)* entered into force 2003, ratified Libya in 2004
- *Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)*, entered into force 2004, ratified by Libya in 2004
- *Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (2001)*, entered into force 2005, ratified by Libya in 2004.

Protection from Torture, Ill-Treatment and Disappearance

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), entered into force, 1987, ratified by Libya in 1989.

Employment and Forced Labour

Convention concerning Forced or Compulsory Labour (1930), entered into force 1932, ratified by Libya in 1961

Abolition of Forced Labour Convention (1957), entered into force 1959, ratified by Libya in 1961

Equal Remuneration Convention (1951), entered into force 1953, ratified by Libya in 1962

Discrimination (Employment and Occupation) Convention (1958), entered into force 1960, ratified by Libya in 1961

Employment Policy Convention (1964), entered into force in 1966, ratified by Libya in 1971

International Convention on the Protection of Migrant Workers and Members of their Families (1990), entered into force 2003, accession by Libya in 2004

Nationality, Statelessness, and the Rights of Aliens

Convention on the Reduction of Statelessness (1961), entered into force 1975, accession by Libya in 1989.

Convention relating to the Status of Stateless Persons (1954), entered into force 1960, accession by Libya in 1989.

Law of Armed Conflict

Geneva Conventions I, II, III, IV 1949 (Protection of victims of armed conflict), entered into force 1950. Ratified by Libya in 1956

- *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949.
- *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949.
- *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949.
- *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949

Additional Protocols

- *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (1977), entered into force 1978. Ratified by Libya in 1978
- *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (1977), entered into force 1978. Ratified by Libya in 1978

War Crimes and Crimes Against Humanity, Genocide

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), entered into force 1970, accession by Libya in 1989

Convention on the Prevention and Punishment of the crime of Genocide (1948), entered into force 1951, accession by Libya in 1989

International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), entered into force 2001, ratified by Libya in 2000

Methods and Means of Warfare

Geneva Protocol for the Prohibition of the Use of Asphyxiating or Poisonous or Other Gases, and of Bacteriological Methods (1925), entered into force 1928, ratified by Libya in 1971

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972), entered into force 1975, ratified by Libya in 1982

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1992), entered into force 1997, ratified by Libya in 2004

Protection of Cultural Property in the Event of Armed Conflict

Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (The Hague Convention), entered into force 1956, ratified by Libya in 1957

- *First Protocol to the Protection of Cultural Property (1954)*, entered into force 1956, ratified by Libya in 1957
- *Second Protocol to the Protection of Cultural Property (1999)*, entered into force 2004, ratified by Libya in 2001

Terrorism and Human Rights

International Convention Against the Taking of Hostages (1979), entered into force 1983, accession by Libya in 2000

International Convention for the Suppression of Terrorist Bombing (1998), entered into force 2001, ratified by Libya in 2002

International Convention for the Suppression of the Financing of Terrorism (1999), entered into force 2002, ratified by Libya in 2002

International Convention for the Suppression of Unlawful Seizure of Aircraft (1970), entered into force in 1971, accession by Libya in 1978

U.N. Activities and Employees

Convention on the Privileges and Immunities of the United Nations (1946), accession by Libya in 1958.

Convention on the Safety of United Nations and Associated Personnel (1994), entered into force 1999, accession by Libya 2000

Regional Charters and Conventions

African Charter on Human and Peoples' Rights (1981), entered into force 1986, ratified by Libya in 1986.

- *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000)*, entered into force 2005, ratified by Libya in 2004
- *Protocol on establishing the African Court for Human and Peoples' Rights (1998)*, ratified by Libya in 2003

Convention governing the Specific Aspects of Refugee Problems in Africa (1969), entered into force 1974, accession by Libya in 1981.

Cairo Declaration on Human Rights in Islam (1990); the declaration is a guiding document that does not require ratification.

Arab Charter of Human Rights (1994). The Charter was updated by the Arab Summit in Tunisia in 2004. Libya ratified the amended Charter in 2004.

African Charter on the Rights and Welfare of The Child (1990), entry into force 1999, ratified by Libya in 2000

OUA Convention for the Elimination of Mercenarism in Africa (1977), entered into force 1985, ratified by Libya in 2005

Conventions which Libya has signed but not ratified

Convention on the Rights of Persons with Disabilities (2006), entered into force 2008, signed by Libya in 2008 but not ratified.

Arms Trade Treaty (2013), adopted in 2013, signed by Libya in 2013, treaty will enter into force once 50 countries have ratified the treaty.

Key conventions which Libya Has Not Signed

The Rights of Migrants, Asylum Seekers and Refugees

Convention relating to the Status of Refugees (1951), entered into force 1954

- *Protocol relating to the Status of Refugees (1967)*

International Convention for the Protection of All Persons from Enforced Disappearance (2006), entered into force 2010

International Criminal Court

Rome Statute of the International Criminal Court (1998), entered into force 2002

Protection from Torture, Ill-Treatment and Disappearance

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), entered into force 1987

- *Optional Protocol of the Convention against Torture (2002)*, not signed by Libya

International Covenant on Civil and Political Rights (1966), entered into force 1976.

- *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (1989)*

International Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973), entered into force 1977

Equality and Discrimination

Convention against Discrimination in Education (1960), entered into force 1962

International Convention on the Elimination of All Forms of Racial Discrimination (1965), entered into force 1969

- *Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (1992)*

Employment and Forced Labour

Convention concerning Occupational Safety and Health and the Working Environment (1981), entered into force 1983

Environment

Convention on the prohibition of military or any other hostile use of environmental modification techniques (1976), entered into force 1978

Methods and Means of Warfare

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980)(CCW), entered into force 1983

Additional Protocols to the 1980 Convention

- *Protocol I on non-detectable fragments (1980)*
- *Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1980)*
- *Protocol III on prohibitions or restrictions on the use of incendiary weapons (1980)*
- *Protocol IV on Blinding Laser Weapons (1995)*
- *Protocol IIa on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996*
- *Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), (2001).*
- *Protocol V on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (2003)*

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997), entered into force 1999

Convention on Cluster Munitions (2008), entered into force 2010

Law of Armed Conflict

Geneva Conventions I, II, III, IV 1949 (Protection of victims of armed conflict)

- *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (2005).*

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GLOSSARY

- **Absolute rights:** A class of human rights that cannot be infringed upon in any circumstances. As a result, there are no lawful grounds upon which the state can attempt to justify violations of these rights.
- **Central government:** A national government is the political organisation that maintains control over the nation. The structure of central governments varies but they are most often formed of representatives from political entities. Usual responsibilities of this level of government which are not granted to lower levels are maintaining national security and exercising international diplomacy, including the right to sign binding treaties.
- **Children's rights:** These rights are based on what a child needs to survive, grow, participate and fulfil their potential. They apply equally to every child, regardless of who they are, or where they are from.
- **Citizenship rights:** Every person has the right to a nationality and shall not be arbitrarily deprived of his nationality or denied the right to change nationality. Certain rights and privileges may be attached to citizenship, such as the right to work and live in the state.
- **Civil and Political Rights:** A category of human rights, particularly those which guarantee freedom from unlawful interference by governments and include assurances that enable individuals to participate in civil and political matters of the state with equality. These rights include freedom of religion, expression, as well as the ability to take part in political processes.
- **Dar Al-Iftaa:** An institute founded to provide guidance on Islamic jurisprudence. Its role includes clarifying and interpreting certain religious principles and religious laws.
- **Derogable rights:** These are rights of which the state can suspend the enjoyment in particular circumstances, i.e. during a state of emergency. An example of a typically derogable right is freedom of assembly.
- **Economic, Social and Cultural rights:** A class of rights that embody fundamental entitlements to which all people must be able to access to ensure their inherent human dignity. The state often has a responsibility to provide such rights or to establish institutions that facilitate their enjoyment. These rights cover the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education.
- **Education rights:** Everyone has the right to primary, secondary and higher education. The right of education also includes the freedom of parents and, where applicable, legal guardians to choose their children's schools other than those established by the public authorities.
- **Equality and non-discrimination:** The right to equal treatment imposes state obligations to ensure that human rights are secured without discrimination on any grounds. This may also impose an obligation on states to make tangible efforts in order to promote equality.
- **Executive:** The branch of government that has responsibility for the day to day administration of the state. The executive branch executes or enforces the law which is passed by the Legislature. The Executive is often headed by a president or prime minister.
- **Freedom and security of persons:** Protects the individual from being arbitrarily arrested or detained by the state. Provides safeguards for those who are deprived of their liberty, such as the right to be informed as to the reasons of the arrest, to be promptly brought before the judiciary, and entitlement to bring proceedings to the court.⁶⁸
- **Freedom from slavery:** An absolute right to be free from 'forced or compulsory labour'. Slavery includes debt bondage, serfdom, exploitation of children and servile forms of marriage.
- **Freedom from torture:** Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining information or a confession, punishing them for an act committed or suspected to have been committed, intimidating or coercing, or for any reason based on discrimination, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Freedom from torture is considered an absolute and non-derogable right in several international law documents.⁶⁹
- **Freedom of assembly and association:** The right to hold meetings and demonstrations with people, to be able to form and be part of a trade union, political party or another association or voluntary group. This also entails the freedom from being forced to join an association⁷⁰.
- **Freedom of expression:** This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.
- **Freedom of trade and occupation:** The right freely to choose a trade, occupation, or profession, and place of work or training. This also encompasses the right to form and join trade unions, equal pay for equal work, and to work in favourable conditions.⁷¹
- **Health care, food, water rights:** The right to health and associated rights include various individual protections and state obligations that seek to ensure a minimum standard of universal health.⁷²

68 ICCPR, Art 9

69 UDHR, Art 5; ICCPR, Art 7; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Art 2(2)

70 <http://www.equalityhumanrights.com/human-rights/what-are-human-rights/the-human-rights-act/freedom-of-assembly-and-association/>

71 UDHR, Art 23

72 UDHR, Art 25

- **Horizontal division of government:** A model for the governance of the state, in which the state is divided into branches. Each branch has separate and independent powers and areas of responsibility. Ideally the power of the branches should be balanced, so that each individual branch's functions do not come into conflict with each other's. The typical division of branches is into an executive, a legislature, and a judiciary.
- **Judiciary:** The system of courts and judges concerned with the administration of justice as prescribed by law. The judiciary plays an important role in ensuring that the legislature and executive branches of government act in accordance with their functions as established by law.
- **Legislature:** An assembly of elected representatives that deliberates on, passes, amends, and repeals the laws of a country.
- **Limited rights:** These are rights which can be justifiably limited in specific situations, as specified by human rights treaties. These limitations are often in place to ensure that the enjoyment of an individual's human rights does not violate the human rights of others or cause significant damage to society.
- **Linguistic rights:** These rights safeguard an individual's or groups right, in private and public, to choose one's language or languages.
- **Local government:** An administrative body for a small geographic area. Generally only has control over a specific area and cannot pass or enforce laws that will have national effects.
- **Negative obligations/duties:** In order to protect certain rights, the state needs to refrain from taking action that would otherwise inhibit their enjoyment. Such rights therefore place a negative obligation not to act on behalf of the state. For example, the state's negative obligation prevents it from taking unlawful action that would interfere with individuals' free expression.
- **Non-derogable rights:** These are rights that are considered so important that they cannot be limited or suspended under any circumstance.
- **Parliamentary sovereignty:** A principle which holds that the legislative body (i.e. the parliament) has absolute authority, and is therefore supreme over all other government institutions, including the executive and the judiciary. This means that the legislative body may change and repeal any previous legislation, even the constitution.
- **Positive obligations/duties:** Certain rights require that the state takes action to ensure their enjoyment; as a result, they therefore impose a positive obligation upon it. An example is the right to education, which requires that the state takes measures to provide free primary education to all.
- **Regional government:** Pertaining to a small geographical area. Regional government is used to describe the governance of a particular area of a country or the world, which may bestow its jurisdiction over the activities of several smaller local areas.
- **Right to fair trial:** Every person is entitled to challenge the legality of a charge through a fair and public hearing by an independent and impartial tribunal established by law. This right encompasses procedural guarantees in civil and criminal trials. Guarantees in criminal trials include the right to be informed of the charge, to have time for the preparation of a defence, to have access to counsel and to cross-examine witnesses.
- **Vertical division of government:** A model for the governance of the state (or a number of states), in which power is divided, to different extents, into national or sub-national entities with specific areas of responsibility. Within a sovereign state, this division of government generally implies the existence of regional and local administrative entities.
- **Women's rights:** States are under obligation to ensure that women are able to enjoy equal access to their human rights, regardless of any social, political, economic or cultural objection. Discrimination against women, on the basis of their gender, violates the principle of equality and respect for human dignity.





3rd Floor
6-7 Hatton Garden
London EC1N 8AD
+44 (0) 20 7242 5071

Hay Andalus (by Al Razi Hospital)
Tripoli
Libya

info@libyanjustice.org
www.libyanjustice.org
www.destoori.org



Registered charity number 1152068. A company limited by guarantee registered in England and Wales at 8 Blackstock Mews, N4 2BT. Company number 07741132.