



**Analysis of the Draft Constitution of Libya  
Thematic Committees of the Constitution Drafting Assembly  
Status: December 2014**

**International IDEA**

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March 2015



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## Executive Summary

This analysis provides a response to selected draft provisions for a new Libyan constitution published by thematic committees of the Constitution Drafting Assembly (CDA) in December 2014. Progress has been made and there is much in the draft that is commendable. Significant problems remain, however, both with respect to the coherence between the various sections and the substantive approach the drafters take to a number of key issues. It is hoped that the identification of these problems and alternatives suggested in this analysis will inform the work as the drafting progress continues.

**Form of state and fundamental principles.** These provisions raise questions regarding their relationship with the section on fundamental rights and liberties (for example whether they are enforceable by individual citizens; whether the general limitation clause applies to them; and what status they enjoy in case of inconsistencies between the two sections) and the overall coherence of the constitution (for example with respect to budgetary rules found in the sections on local government and the financial system). The most important provisions in this section are, arguably, the two supremacy clauses. Considerable tension between these provisions may arise given that Islamic Shari'a is, on the one hand, seen as the source of all legislation while the constitution itself, on the other, is declared the supreme law of the state which all public authorities, institutions, and natural or legal persons must abide by.

**Legislative branch of government.** The draft provides that candidates for parliament must enjoy civil and political rights – in addition to any other requirements set out by law. The *loss* of these civil and political rights, arguably one of the most severe limitations of fundamental rights and freedoms in any society, is currently not regulated by any provision of the draft constitution. This is a serious oversight should be addressed.

The draft also provides that legislation can only be passed with an absolute majority in the House of Representatives and, in particular areas, a two-thirds majority plus one vote in the Shura Council. This creates a clear possibility of deadlock in the Council.

The draft also suggests that some bills could be passed without *any* involvement of the President. This would be unusual given that the executive branch promulgates laws in most systems and exercises at least some measure of formal review in this process. Drafters should clarify the involvement of the President in the promulgation process.

**The judiciary.** The draft grants military courts very broad jurisdiction to try civilians. Drafters should narrow down such jurisdiction significantly.

The Constitutional Court resembles the French Constitution of 1958 but does not appear to take any of the reforms that were enacted in France into account, particularly in so far as the jurisdiction of the *Conseil constitutionnel* is concerned. The Court's jurisdiction under the draft should be reviewed in favor of a more modern form of jurisdiction.

The judiciary itself is given considerable weight in the appointment of the Constitutional Court's members. Because the Court will have a key role to play in transforming Libya's legal system, drafters should seek to identify ways of introducing a new generation of judges to the Court and also consider increasing the percentage of judges to be elected by the legislature.

Finally, it is not clear why the budget of the Constitutional Court should be stipulated as a single figure. This should be changed as it does not inspire confidence in a system that should aspire to the highest standards of transparency and accountability.

**Independent institutions.** The draft currently provides that *independent* institutions should act under the *oversight* of the *competent authorities*. This remarkable formulation should be changed as it challenges the very existence of independence of these institutions. In addition, the specific functions and powers of the ten independent institutions mentioned in the draft are described in very little detail and will require considerable elaboration by statute. This bears a very real risk that their mandate could be heavily restricted. Drafters should resolve this by describing in much greater detail what each institution will be responsible for.

**Rights and liberties.** The list of rights and liberties itself is much longer than the bills of rights found in other national constitutions or international human rights instruments, which is commendable. There are nevertheless a number of problems that need to be resolved.

Socio-economic rights in the draft are stated as largely unqualified and universal, and will be difficult if not impossible to satisfy even for a country with as much natural wealth as Libya. It would therefore be prudent to avoid unqualified socio-economic obligations on the constitutional level lest the document as a whole be diminished to a list of commendable – but in practice unfulfilled – promises.

In addition, the draft does not clearly indicate whether rights belong only to natural persons or whether they also extend to legal entities. Some legal entities such as educational institutions, private universities, learning institutes and scientific research centers, the press and media, civil society organizations or unions are stated in various parts of the draft as being entitled to specific institutional rights. This suggests that rights and freedoms are not per se limited to natural persons. It is unclear, however, whether any of these entities enjoy rights and freedoms that are not specifically mentioned in the respective articles of the draft but may be relevant for the activity in question.

The draft features an interpretation clause and thus compares favorably with other constitutional texts in the region. It is, however, still brief and could be fleshed out in order to provide more guidance to those applying the bill of rights.

The draft also includes a limitation clause, which is again commendable. There is nevertheless an important problem, which is that the provision requires that any regulation of fundamental rights and liberties be passed with a two-thirds majority in the National Assembly. This will be very difficult to achieve in practice, which means that legislative deadlock would be a real possibility. The drafters should consider lowering this threshold.

In addition, the limitation seeks to *preserve the core of a fundamental right of liberty*, which seems like an attractive concept but is often very difficult to define in practice. In Germany, where the concept was originally established, courts have decided to discard the concept altogether. In South Africa, it was discarded after heavy criticism only three years after its adoption. Drafters should consider modifying their draft with that in mind.

**Transitional issues.** Although the draft raises a number of important transitional issues, most appear to be incomplete, mainly because they leave unresolved which entity is responsible for implementing the specific provisions. As a result, significant work remains to be done on transitional issues. For example, although compensation for the victims of systematic human rights violations and military operations is promised, as well as other very specific forms of help (for example psychological counseling), the mechanisms or public authorities responsible for providing this assistance are not identified.

The draft also provides that Libya's legal system is to be revised in the light of the new constitution but the body responsible for this substantial task is not named. Armed organizations are to be

disarmed and disbanded but it remains unclear who will actually engage with them and how their members will be brought back into the fold of civil society. These are important issues that the drafters must resolve.

**Decentralization.** The draft displays two different visions of local government. Some important differences exist between the two suggested approaches and the drafters clearly must adopt a single approach to these important issues. Regardless of this choice, there are a number of problems that exist under both the approaches set out in the draft. Amongst other things, the legislative powers allocated to the local level by both proposals should thus be reviewed with some degree of caution. Both proposals appear to leave a number of important issues to be decided by the local level, which is very problematic. National solutions might be preferable or even necessary with respect to a number of the policy areas listed in the two proposals – including airports, water resources and environmental protection, tourism, social security, health care, energy, and higher education.

On the distribution of financial resources, both approaches raise questions about the funding of national tasks. National transportation and communication grids, the education system, defense, policing, the entire institutional infrastructure set out in the constitution, the diplomatic service, large-scale industrial development, and the management of natural resources – to name just a few responsibilities – require a large amount of funding, and it is currently unclear under the draft how the national government will be able to afford to implement these tasks.

The drafters should, in addition, consider the concept of *cooperative government* in order to render whatever system that is established more effective. Breaking up a centralized system into a number of different constituent units that enjoy legislative and administrative powers distinct from the center often calls for structures that facilitate communication and cooperation between them. Drafters are thus strongly urged to review the concept of *cooperative government* found, for example, in Germany and South Africa.

**Security issues.** The section dealing with the security sector is conspicuously brief given the tremendous importance of this area and the considerable challenges that the country is facing with respect to the development of national security forces. There are a number of important omissions in the draft that must be resolved. Amongst other things, the draft does not clearly provide that all security forces have an obligation to respect human rights and freedoms. So far, only the police appear to be under this obligation while the army and the intelligence services appear to be exempt. This distinction is very worrisome and should be resolved. In addition, there are serious problems in the chain of command and accountability systems for each of the security branches. Finally, the draft is virtually silent on the role and functioning of the intelligence services, which should be resolved as a matter of priority.

## Introduction

- 1 This analysis provides a response to selected draft provisions of a new Libyan constitution published by thematic committees of the Constitution Drafting Assembly (CDA) in December 2014. The material published by the CDA in al-Bayda covers: (1) the general form of the future Libyan state and its fundamental principles; (2) the system of governance at the central level; (3) the judiciary and, more specifically, the creation and functions of a constitutional court; (4) independent institutions; (5) fundamental rights and liberties; (6) transitional measures; (7) local government; (8) the financial system; (9) natural resources; and (10) the security apparatus (the army, intelligence agencies and police). This analysis discusses a number of key issues in each of these areas while focusing mainly on local government, the *general framework* for the protection of fundamental rights, rather than *specific* guarantees, and the provisions pertaining to internal and external security, in particular civilian control. The response is based on translations provided by International IDEA in December 2014. Readers should note that the article numbers referred to in this text correspond to the numbering (if any) provided by the thematic committees within their respective sections.
- 2 As a general matter, it is quite clear that the various sections of what might become the new constitutional settlement for Libya still require considerable refinement with respect to a more uniform drafting style (language and structure) and better internal coherence between the various sections. Problems of internal coherence become particularly obvious with respect to provisions dealing with fundamental rights and freedoms, which appear, in different guises, throughout the various sections of the draft; the basic structure of local government (based on governorates or regions); the distribution of legislative powers between the central and sub-national levels; and the allocation of financial resources to different tiers of government. The work of some thematic committees is characterized by quite fundamental differences between opposing views (especially in the area of decentralization), while others have stopped short of providing much more than a very rough outline of the future constitutional framework and still have considerable work to do (this is true, for instance, of the committee dealing with independent institutions). These remarks should not be understood as a too critical assessment of the CDA's work. This author acknowledges the very difficult circumstances created by the ongoing political instability in Libya and the highly volatile security environment that currently prevails in most parts of the country. To present a fairly comprehensive draft at this stage is in itself an accomplishment.
- 3 The draft, viewed as a whole, leaves some key issues unresolved. The most important of these is the question of constitutional amendment, which is identified as a power shared by the House of Representatives and the Shura Council (article 20) at the proposal of the President (article 58), but not described in any further detail.

## Form of State and Fundamental Principles

- 4 The chapter on the form of state and fundamental principles contains a number of key provisions that have the potential to control other parts of the constitution. Founding principles are not just ‘colourful’ constitutional language. Courts in other systems often resort to the general notions or values contained in preambles or the introductory sections of a constitution in order to interpret other provisions of a constitutional text or ordinary legislation. Drafters should be aware of this dynamic especially if – as in this case – courts are given powers of judicial review and might in the future invalidate statutes that, in their view, violate the constitution. Important principles that are highlighted in this section include the notions of an inclusive national identity (see article 7, which focuses not only on the Islamic nature of Libya but also emphasizes the social and cultural diversity of the country) and political pluralism (article 14). The latter makes references, inter alia, to the peaceful transition of political power following elections, a separation and balance of power between different branches of government and good governance based on the principles of transparency and accountability, and thus provides a powerful conceptual toolbox for constitutional interpretation. Amendment procedures, although not addressed in this section, could also be different for these more fundamental provisions than for other parts of the constitution.
- 5 The section on the form of state and fundamental principles also contains several important references to fundamental rights and liberties – a number of which are set out in considerable detail here (in relation to citizenship/naturalization, asylum, equality between man and woman, family, children and youth, disabled citizens, martyrs, missing persons, individuals affected by war, education, health care, housing, social welfare and sports). Some of these provisions (such as article 13 which states that ‘male and female citizens are equal before the law’) are phrased in terms of a *bill of rights*. Some establish *socio-economic expectations* (article 36, for instance, declares that ‘the state shall guarantee social welfare for citizens, mothers, children, youth and elderly citizens, and in cases of disability, work-related injury, unemployment, orphanage and widowhood in order to ensure a decent life’). Others suggest *specific levels of funding and hence impact directly on the budget* (article 33, for instance, allocates 1% of national income to scientific research and development). Yet others (such as article 35, which commits the state to ‘developing plans and policies for the provision of appropriate housing’) seem to contain *key policy guidelines* for the emerging new state. These provisions raise questions regarding their relationship with the section on fundamental rights and liberties, such as whether they are enforceable by individual citizens, whether the general limitation clause applies to them and what status they enjoy in case of inconsistencies between the two sections. They also raise questions regarding the overall coherence of the constitution – for example, with respect to the budgetary rules found in the sections on local government and the financial system.
- 6 Three other provisions of particular significance address languages (article 27), the status of international law, which is made subject to Islamic Shari’a and the principle of reciprocity (article 17), and the principle of even development across the country (articles 20, 21 and 24). Drafters should be aware of the financial burden attached to the operation of multiple official languages in one country (involving, for example, the translation of laws, administrative procedures, the training of public employees, and the operation of the court system). The

principle of even development, which includes the fair distribution of resources and economic incentives/benefits, has an impact on national decisions in a wide range of policy areas and may affect both the organization and work of local government structures as well as budgetary questions addressed in other sections of the draft.

- 7 The most important provisions in this section are, arguably, the supremacy clauses contained in articles 8 and 9. Considerable tension may arise between these two provisions given that Islamic Shari'a is seen as the source of all legislation (article 8) while the constitution itself is declared the supreme law of the state by which all public authorities, institutions and natural or legal persons must abide (article 9). Law inconsistent with either Shari'a or the constitution, which includes a very wide bill of fundamental rights and liberties, is regarded as null and void. Drafters might want to consider expressly binding the legislature, the executive and the judiciary at all levels of government to the constitution. This would include, inter alia, all public authorities (national, regional, governorate and municipal), courts at all levels of the system and the security sector (the army, police and intelligence agencies). Binding natural and legal persons to the constitution, finally, raises the difficult question of whether and to what extent fundamental rights and liberties apply to private relationships. This is discussed in some detail below.

#### **System of Governance (Central Level)**

- 8 The system of governance at the central level is semi-presidential (executive branch) and bicameral (legislative branch). Drafters should note that the Shura Council, one of the two legislative chambers, is designed to introduce a strong regional element (24 of the 72 seats are reserved for each of the three geographic regions, see article 15) while the committee on local governance in its majority seems to favour a system based on governorates and limits regional structures (which may be created in the future) to economic matters (see the formation of 'economic regions' by governorates under article 10). Both legislative chambers (the House of Representatives and Shura Council) are required to represent the diverse social, cultural and ethnic fabric of the country (see articles 4 and 15) but without prescribing a particular formula for the involvement of the Amazigh, Tabu or Tuareg minorities.
- 9 The enjoyment of civil and political rights is a condition for membership of either chamber (articles 5 and 16) – in addition to any other requirements set out by law. Drafters should note that the *loss* of these civil and political rights, arguably one of the most severe limitations of fundamental rights and freedoms in any society, is currently not regulated by any provision of the draft constitution. This is a serious oversight. It should, furthermore, not be possible to impose additional *personal* conditions on membership of the legislature by ordinary law. *Technical* requirements resulting from election law should be subject to the principle of political pluralism.
- 10 Legislation can only be passed with an absolute majority in the House of Representatives (article 8) and, in particular areas, a two-thirds majority plus one vote in the Shura Council (article 19). These unusually high thresholds have probably been imposed in order to ensure the enactment



of laws that enjoy wide support, but may compromise the quality of the legislative solution in many cases and not be sustainable in political practice due to the risk of extended political deadlock in either or both chambers. This effect is mitigated by the fact that the Shura Council seems to be the more influential body in areas of *joint* legislative powers. According to article 21, the Council may be able to unilaterally pass such legislation if the two chambers fail to agree on a common solution in a joint committee. The mechanism, however, currently requires the House to have passed a bill in the first place and still leaves open the possibility of deadlock in the Council itself.

- 11 Article 11 gives the President the power to review and possibly block legislative proposals in the House of Representatives if the House is unable to overcome a presidential amendment by a two-thirds majority. Proposals that have been approved by the Shura Council may *not* be returned by the President. This seems to limit the presidential power of substantive review to areas outside the scope of article 20, which defines the legislative powers of the Shura Council by enumerating specific policy areas. The wording of article 20 thereby suggests that bills that fall within such joint legislative power are passed without *any* involvement of the President. This would be unusual given that the executive branch promulgates laws in most systems and exercises at least some measure of formal review in this process. Drafters should thus revisit the interaction between articles 11 and 20 and clarify the involvement of the President in the promulgation process.
- 12 Another important feature of the legislative process is the system of ‘specialized committees’ in the House of Representatives, which clear legislative proposals before they can be considered by the House (article 10). The wording of this provision suggests that *all* proposals are to be reviewed as a matter of course – regardless of their origin (article 9) – and that an unspecified number of Representatives could thus wield exceptional influence over the legislative process by rejecting or substantially amending proposals. Drafters should reconsider this approach.
- 13 Legislation that requires the involvement of the Shura Council is defined in a list of policy areas (article 20). It includes issues of fundamental importance, such as the budget, nationality and immigration, asylum, referendums and elections, political parties, emergencies, political rights and freedoms, natural resources, the organization of the judiciary, and internal/external security, as well as local government. The balance between the two chambers will depend on the interpretation that is given to these various headings. Terms such as ‘financial system of the state’ or ‘local government’ could potentially cover wide areas of legislation, depending on the approaches adopted in these sections of the constitution. In a similar vein, the heading ‘*political rights and freedoms*’ – a term which is not used in the English translation of the section on fundamental rights and liberties – could engage a great number of legislative proposals.
- 14 Other provisions related to the legislature that merit closer analysis include the dismissal of National Assembly members on the basis of bylaws issued by each chamber (article 37), the possibility of holding legislative meetings in secret (article 42) and its relationship with the executive branch (the Prime Minister may be subject to a vote of confidence in the House of Representatives by virtue of articles 12 and 77 while the President can be forced to resign by the

Shura Council on the basis of article 23 or indirectly via a self-dissolution of the Council – with *different requisite majorities* – on the basis of article 22).

- 15 The position of the President resembles in many respects that of the President of the Republic under the French Constitution of 1958. This is true for the President's general role (article 48); the distinction between the President and the government; the power to appoint the Prime Minister (article 74); the President's powers with respect to foreign affairs and defence (articles 60–62, 64); and the President's – more limited – involvement in the dissolution of both the House of Representatives (article 68) and the government (article 69). There are important differences, however, in the detail. The President is elected by the Shura Council and not directly by the people (article 50 – drafters might consider adding this authority of the Shura Council to the list of powers enumerated in article 20); is expressly involved in the development and implementation of public policy (article 55 – drafters should note that this provision could lead to tensions between the President and the government given the difficulty of defining these responsibilities clearly and the fact that President and Prime Minister have distinctly different relationships with the legislature); and has much less power to issue decrees (article 65). The President's emergency powers are confined by the involvement of the government and the legislature (articles 66 and 67). The more limited role of the President envisaged in the draft corresponds with developments in French constitutional law that have also reduced, to some degree, the influence of the President of the Republic. The draft, however, leaves some issues that would merit further clarification. This author thus recommends that thought be given to: a clearer definition of the role played by the Presidential Elections Committee in the election process (article 50); the President's role in proposing constitutional amendments on the basis of article 58, and whether other institutions can propose amendments too; the President's interaction with the government with respect to the development and implementation of public policy under article 55 as opposed to the implementation of the government programme by the government under article 84; and the relationship between the President's authority for defence issues (articles 60 and 62) and the government's responsibility to preserve the security of the homeland (article 84). Finally, the terms of office for the President (5 years), the Prime Minister and the government (4 years), the House of Representatives (4 years) and the Shura Council (6 years, with elections taking place for part of the Council every 3 years) might merit further consideration in the light of the French experience with divided government (*cohabitation*).
- 16 An issue that is discussed in more detail below is the protection given to fundamental rights and liberties in cases of emergency. Article 67 requires that limitations on basic rights and liberties be necessary in such cases to preserve public safety. This author strongly suggests that additional safeguards be introduced for particularly important rights and liberties.

### **Judiciary and Constitutional Court**

- 17 The sections concerning the judiciary and, more specifically, the Constitutional Court contain structural provisions and institutional safeguards for courts and judges as well as judicial

safeguards for citizens. The latter are mainly found in articles 4–6. While the judiciary is accorded substantial institutional safeguards that serve to protect the independence of both the courts in general and individual judges, drafters might consider separating these provisions more clearly from judicial safeguards for the citizen.

- 19 Article 13 authorizes the State Council to review administrative challenges to decisions of the courts of appeal relating to the violation of human rights, disciplinary issues and election disputes. The State Council also has a role to play with respect to draft laws. The author suggests that the latter power be set out in more detail.
- 20 The power of military courts to try civilians is set out in article 18 and characterized by a fairly wide remit to hear ‘crimes which constitute direct aggression on military installations or installations of a similar nature’. The provision is complemented by article 6 in the section dealing with national security (army and police), which delegates to military courts crimes that constitute an attack on ‘military installations, public or private funds, or military factories’, crimes relating to conscription, and crimes that constitute an attack on military personnel ‘because of or during the performance of their duties’. Both provisions are capable of a wide interpretation that might undermine the judicial safeguards otherwise enjoyed by civilians in ordinary criminal courts. This author strongly advises the drafters to review the powers of military courts given the troubling experience with the interpretation and application of similarly phrased provisions in the Egyptian Constitution.
- 21 The Constitutional Court is dealt with in a separate title, which in structure again resembles the French Constitution of 1958. Other systems integrate their constitutional court directly into the judicial system (see Germany’s Basic Law of 1949 article 92; the Constitution of South Africa of 1996 in section 166; or Tunisia’s Constitution of 2014 in Chapter 5). The difference is not just symbolic. The French *Conseil constitutionnel* was (and is still by some) perceived not as a court of law but rather as a forum that merely provides further review of bills, and thus an extension of the legislative process with very limited connections to the ordinary court system. This has changed only recently with the introduction of references to review constitutionally dubious statutes that can now be made to the *Conseil* from the ordinary and administrative courts (article 61-1 of the French Constitution). *This is a significant change that drafters in Libya should take note of.* The German and South African constitutional courts, by contrast, are clearly conceptualized as courts of law – albeit courts with a special remit – and hence procedurally integrated into the rest of the judicial infrastructure.

The judiciary itself is given considerable influence in the appointment of members of the Constitutional Court. Article 22 determines that five of its eleven members are nominated by the Higher Judicial Council, which in turn is dominated by judges (article 8). These members must be counsellors with the rank of a judge in the court of appeal. The President nominates another three members, who require the approval of the Shura Council under article 20, and the legislature also nominates three members (note that the draft does not specify how the House of Representatives and the Shura Council interact in this regard). While this formula potentially provides for a number of politically independent candidates for the Court, selected by the judiciary, it is equally important to infuse the forum with sufficient (albeit indirect) democratic

legitimacy. The Court will have a key role to play in transforming Libya's legal system, especially with respect to developing a culture of fundamental rights protection, which involves the risk of striking down invalid statutes and, in the process, confronting other branches of the government. This might be easier if a larger percentage of judges were in fact elected by the legislature (and in equal numbers by the House of Representatives and the Shura Council). Large majorities could be required there in order to ensure the selection of candidates that enjoy wide support (in Germany, all judges of the Constitutional Court are elected by the legislature, eight by each house, by a two-thirds majority). Judicial expertise (and, in particular, experience with human rights protection) can be required here too (six of the 16 members of the Constitutional Court in Germany, for example, must be chosen by the legislature from the ranks of federal judges).

It is not clear to the author why the budget of the Constitutional Court should be stipulated as a single figure (article 21). The idea seems to stem from the Egyptian Constitution of 2012/2014. Flexibility and judicial independence (in the guise of a separate budget that a court can handle and spend flexibly) should, however, not preclude transparency and accountability. Opaque budgets, whether for the entire judiciary, a particular court, or other institutions, do not inspire confidence in the system nor do they set an example for the vision of good governance that this draft constitution emphasizes so strongly in other sections (see the provisions in the sections on independent institutions, fundamental rights and liberties, and transitional measures).

- 22 The tenure of the members of the Constitutional Court is comparatively short; article 23 specifies a single term of six years. Given the special competence and experience required for the adjudication of constitutional disputes, especially in cases involving fundamental rights and freedoms, it would seem preferable to provide for a longer term. This is the case, for example, in France, where members of the *Conseil constitutionnel* serve for a single term of nine years; Tunisia, where members of the Tunisian Constitutional Court serve for a single term of nine years; Germany, where judges of the Federal Constitutional Court sit for a single term of 12 years subject to retirement at age 68; and South Africa, where judges on the Constitutional Court of South Africa sit for 12 years subject to retirement at age 70.
- 23 Article 23 specifies that the Constitutional Court oversee the constitutionality of legislation, interpret constitutional texts, review international agreements, rule on disputes between its members, determine the constitutionality of political parties, and decide disputes between authorities with respect to the exercise of their constitutional powers. The latter competence seems to be closely related to issues arising from the legislative process but the German experience suggests that such a clause could more generally provide effective protection for *any* institution that enjoys specific powers under the constitution (including, for example, independent bodies such as the High National Electoral Commission or the National Council for Public Liberties and Human Rights and institutions found at lower tiers of government such as governors or governorate councils).
- 24 Article 24 allows the President, the Prime Minister and the Public Prosecutor to request the passage of legislation needed to regulate certain issues, presumably in cases specified by the constitution itself, and thus establishes a fairly unusual safeguard against legislative inactivity.

The same type of action can be brought by natural or legal persons in the context of fundamental rights and freedoms.

- 24 Despite these provisions, which identify the most important types of constitutional disputes, the draft currently leaves unanswered a whole host of key questions that will need to be addressed if the Constitutional Court is to perform its functions in a coherent and predictable way. It thus remains unclear, for example: how the Court will fit into and interact with the ordinary judicial system (i.e. the appeals process) and whether individual applicants will be able to challenge administrative decisions, court judgments or even legislation on constitutional grounds (possibly after exhausting all other available remedies); whether the Court's review powers will be exercised only in concrete cases, only in the abstract, or in both situations; whether lower courts will be able to stay proceedings and refer questions regarding the validity of ordinary legislation to the Court for a preliminary ruling (as is now possible under article 61-1 of the French Constitution of 1958); or who enjoys standing in the cases specified in article 23. The question of standing, which underlies many of these issues, is particularly relevant if the Court is to perform its role as guardian of the constitution. If handled too restrictively, legislators and public administrations will feel too safe – or insulated – from judicial (constitutional) review, rendering the whole idea of a constitutional court ineffective. This would be troubling in a system that is trying to develop a new culture of human rights protection.

### **Independent Institutions**

- 25 The section on independent institutions sets out some basic principles that serve to ensure the functioning and independence of the ten institutions mentioned in the draft. These include, in broad terms, a reference to their legal personality; the necessary technical, administrative and financial independence; a call to exercise their respective tasks objectively and without fear or favouritism; as well as the authority to report their findings in public (articles 1 and 3). It is remarkable, however, that *independent* institutions should act 'under the *oversight* of the *competent authorities*' (article 3, emphasis added).
- 26 The specific functions and powers of the ten independent institutions mentioned in the draft are described in very little detail and will require further elaboration by statute. This bears a very real risk that they could end up with too limited or – in the absence of detailed legislation – too wide powers. It is, furthermore, unclear whether independent institutions will enjoy standing in the Constitutional Court in order to protect their prerogatives. A purposive reading of article 23 in the section dealing with the Constitutional Court, it is suggested, might include this possibility.
- 27 A detailed review of the provisions dealing with particular independent institutions is beyond the scope of this analysis. It should be noted, however, that the *National Council for Civil Liberties and Human Rights* is given standing, inter alia, to challenge legislation and decisions by public and private bodies with respect to the possible violation of fundamental rights and liberties (article 16). This National Council is also called on to monitor and follow up on human rights violations by public authorities, support citizens in the protection of their rights and

recommend the ratification of, or accession to, international systems of human rights protection (article 14). While this represents a commendable portfolio of tasks, what specific tools the Council will have at its disposal remains unclear. The *National Council on Education* seems to enjoy extensive powers with respect to elementary and secondary education. These include, in particular, the development of school curricula and the training of teachers (article 17). It is not clear what the relationship between this Council and the relevant ministry will be either at the central level or the regional/governorate level, given that it shall coordinate ‘the implementation of its plans and programs’ with the relevant executive authority (article 17). This language suggests that the National Council on Education – rather than the executive – might shape the details of education policy. Similar concerns arise with respect to the powers of the *National Council on Media* (article 19) and the *Libyan Broadcasting Authority* (article 23). Both institutions seem to enjoy widely drafted regulatory powers with respect to the freedom of the press and media. The authority of the National Council on Media to develop a ‘media code of ethics that takes into consideration the unity of the country, Islamic values, ethics of the profession as well as a pluralistic and honest media’ and ‘impose [this code] on public and private media institutions’ – probably in the context of its licensing powers – is a cause for concern and could give rise to considerable tensions with regard to freedom of expression and thought, as well as the freedom, pluralism and independence of the press and media envisaged in the section on fundamental rights and liberties.

## **Rights and Liberties**

28 Rights and liberties permeate many sections of this draft. As explained above, they appear in the guise of *fundamental values and principles* that underlie the entire constitutional framework and provide guidance for both the legislative and executive branches of government with respect to key policy areas such as social welfare, health, housing and education. Rights and liberties are an important area of *joint legislative authority* that requires the involvement of and coordination between the House of Representatives and the Shura Council. *Judicial safeguards* such as access to justice, the rights of detained individuals, the transparency of court proceedings and due process rules are enshrined in the context of the judiciary. The *Constitutional Court* has a special mandate to require the enactment of the statutes required to provide an effective level of human rights protection should the legislator fail to act appropriately. In addition, the *National Council for Civil Liberties and Human Rights* is given a mandate to monitor the activities of public authorities, report publicly on human rights violations, and challenge both legislation and decisions by public and private bodies if these fail to meet constitutional standards. The list of rights and liberties itself, finally, is much longer than the bills of rights found in other national constitutions or international human rights instruments. These features of the various sections of the draft combine to form a commendable basis for what may be the most important precondition for a successful human rights regime, which this author would describe as a ‘culture of human rights protection’.

- 29 Nonetheless, considerable challenges remain. The main aim of this part of the analysis is to highlight the key shortcomings in the draft and to identify some difficulties that any emerging system of human rights protection will face in one form or another.
- 30 While rights and liberties are acknowledged as an important basis of good governance, and values such as democracy, human dignity, equality and freedom serve as guideposts for government action, tensions may arise between these notions and the principles of Islamic Shari'a, which act – depending on religious interpretation – as an overarching qualifier on both national legislation and international law. Bicameral legislatures such as the envisaged National Assembly in Libya are not necessarily better equipped to avoid human rights violations than unicameral legislatures, and it may take the establishment of special committees, charged with the scrutiny of legislative proposals in the light of potential human rights violations, to improve the quality of legislation over time. Courts, including specialized constitutional courts or councils, and public authorities have to develop a culture of human rights protection – especially if they emerge from a past characterized by substantial human rights violations. The experience of societies such as Germany or South Africa suggests that this will take time, and that judges and public employees need to learn and embrace the skills and techniques of human rights protection in a continuous process of trial and error. Charged with the implementation and interpretation of legislation, both ordinary ('non-constitutional') courts and public authorities have a key role to play in the protection of rights and liberties. Individual access to the Constitutional Court and a system of procedures that allows for early scrutiny of legislation in that forum – *neither* of which are convincingly established by this draft – play a vital role in the development of a robust system of judicial review. Independent institutions similar to the National Council for Civil Liberties and Human Rights have played an important role in the creation of a human rights culture in many systems – but have only been able to perform their function when equipped with the necessary legal tools and financial resources. The powers of the Council, described only in bare outline in the draft, may not be sufficient. The legal system, finally, inherited from the past regime and very likely to be contaminated by numerous statutes, regulations, bylaws, administrative ordinances and procedures that do not meet the high standards of human rights protection envisaged by this draft, will need to be reviewed in a more systematic way than courts are able to do in what is typically an ad hoc review of specific (challenged) laws and practices that are subject to litigation. Drafters should therefore consider seriously the creation of a *law commission* that could perform this task in a more organized and sustained way. The idea of evaluating periodically all legislation and public policies actually appears in the section on fundamental rights and liberties (general rules) and could be developed in greater detail on the basis of the independent law commissions found in England and Wales, South Africa or India. Note should also be made of the fact that an extensive bill of rights, while certainly an indication of the seriousness with which a system approaches human rights protection, is not enough to change the reality of human rights abuse in practice. Egypt, for example, enacted an extensive catalogue of rights and freedoms in 2014 but has yet to meet the standards of human rights protection found in many other parts of the globe.
- 31 With this background in mind, the following sections of this analysis focus on four key issues connected to human rights protection: socio-economic promises and the application,

interpretation and limitation of rights and freedoms. The analysis closes with a few recommendations concerning the effective implementation of human rights in practice and some observations about specific provisions in the draft.

- 32 *Socio-economic promises* are a common feature of the constitutions that have recently been enacted in the Arab world. The draft follows this laudable trend and identifies a large number of socio-economic obligations of the state and corresponding rights of citizens. Constitutions cannot, however, *in and of themselves* change the social and economic situation of a nation. Socio-economic entitlements should therefore be carefully considered lest a constitution degenerate into a collection of unfulfilled promises and ambitions that loses its credibility with the people as the state fails to deliver in subsequent years, for lack of either resources or administrative capabilities. What constitutions *should* do is provide incentives and establish enforceable mechanisms that can realistically generate change over time. They should provide a basis for principled government action with respect to core human needs such as food, housing, water, health care, electricity and education. Modern constitutions should also require governments to guarantee a minimum level of support for the most vulnerable members of society. Even the most ambitious drafters, however, must remain mindful of the economic realities of their country.
- 33 The draft contains socio-economic entitlements and other specific obligations of the state that, if invoked or provided, will put considerable financial pressure on Libya's public budgets and pose immense organizational challenges for the country's administrative systems. A list of at times overlapping obligations that may require direct or indirect public expenditure includes:
- Commitments to providing employment opportunities and protection in case of unemployment;
  - commitments to provide safe working conditions;
  - commitments to ensure comprehensive, sustainable and balanced development;
  - commitments to fairly distribute resources in order to fulfil the basic needs of citizens and sustain social welfare;
  - commitments to child and youth welfare, which include creating the necessary conditions for the development of their educational, psychological and innovative capacities;
  - provision of medical, social, educational and economic support for disabled citizens;
  - provision of support for martyrs, families of missing citizens, and citizens who have suffered injury through war;
  - commitments to the wider notion of social justice;
  - the development of an education system and a corresponding right to education;
  - commitments to health care, which include the level of health services, improving the situation of health care workers and emergency health care;
  - the creation of housing programmes, including the provision of subsidies for citizens affected by hardship;
  - the provision of social welfare for mothers, children, youth and elderly citizens in cases of disability, work-related injuries, orphanage or widowhood;
  - financial guarantees for pensioners;



- the promotion of sports activities (development and maintenance of sports facilities, the promotion of talented athletes and the support of national teams);
  - compensation for the victims of crime, terrorism and natural disasters;
  - measures to ensure a decent level of life and welfare;
  - commitments to a balanced and clean environment.
- 34 The above list of provisions could lead to very different kinds of financial obligations. Not all would be characterized as *socio-economic* rights or entitlements, but all will have financial implications – if provided in a meaningful way – and should be taken very seriously given the human rights context in which many have been placed by the drafters. Citizens might thus misinterpret policy considerations for directly enforceable rights. Some obligations will not require immediate expenditure but can only be realized if certain administrative resources are dedicated to the task. To take the right to information as an example – some public official in the relevant administration will have to react to the requests of citizens, compile the relevant data – often from different and possibly non-electronic sources, redact parts of the documents in order to protect the legitimate interests of the state (state secrets) or other citizens (details of private life), send the response to the applicant or provide time and space for the applicant to access the information in a secure location and deal with any legal challenges that might arise from allegedly unfulfilled or openly denied requests. Comparative experience from other systems that grant citizens access to information held by the public sector suggests that this entitlement can create considerable administrative and financial burdens for the state, and that not every cost can be passed on in the form of fees if the right is to be meaningful for the vast majority of citizens. Other entitlements contained in the draft are clearly socio-economic in character and will absorb substantial resources if really provided at an adequate level. This is true, for example, with respect to the support promised in the area of social security, health care and education. The cost will increase quite substantially as citizens in traditionally neglected parts of the country invoke the commendable obligation of the state to provide services and promote development *in all* (even very remote) *parts* of Libya, which is a principle expressed in numerous provisions across the draft.
- 35 Key to the success of these provisions, however, is their enforcement in practice. While Libya is rich in natural resources, competing demands made on the basis of these very generous – constitutional – rights might lead to political tensions and discontent among citizens anxious to receive certain benefits. Distributive justice is likely to be a key challenge in the future and raises the question of whether any of the provisions that provide citizens with particular socio-economic rights or other entitlements are justiciable. While there should be a sufficient basis to invoke more specific entitlements, such as the right of an accused person to a defence lawyer in cases of hardship (judicial aid), it is more than doubtful that the right to employment or the right to a balanced and clean environment will ever reach the courts even if the state fails to provide citizens with work or preserve the biodiversity of Libya.
- 36 Few of these provisions are openly conditional on the availability of the resources necessary to provide the entitlement in question or the progressive realization of a right by the state. Given the limited socio-economic potential of most countries, including fairly rich societies like Germany or the United States, it would seem prudent to avoid unqualified socio-economic

obligations at the constitutional level lest the document as a whole be diminished to a list of commendable but in practice unfulfilled promises. Obligations clearly couched in terms of a *commitment* by the state to gradually improve the situation in a certain policy area seem far preferable. This again begs the question of enforcement. Case law from countries such as South Africa suggests that – short of enforcing the specific socio-economic claims of single plaintiffs, such as a right to housing or medical treatment – courts *can* be involved in monitoring a government’s efforts to improve service delivery in specific policy areas. Standing could be limited to civil society organizations with a proven interest in a given policy area. This approach, which requires the state to show that reasonable steps are being taken to address shortcomings in the provision of crucial services, seems to strike an appropriate balance between the legitimate expectations of citizens that the state will work to improve their lives and the sheer impossibility of meeting all societal needs at once – especially in a geographically large country with a fairly weak administrative/service infrastructure. This approach could foster a culture of good governance and improve, over time, the socio-economic situation of many citizens. The South African experience also shows that giving courts the authority to review government plans with respect to socio-economic needs must not jeopardize executive and legislative discretion. Judicial respect for reasonable political decisions of a democratically elected government can leave sufficient space for governments and legislators to prioritize their efforts and pursue certain socio-economic strategies for a given period of time without undue intervention by courts. Ineffective and arbitrary governments, however, will be held to account on the basis of a legal process and without the need for renewed revolutionary intervention or civil unrest. This author strongly suggests that drafters review the mechanisms described in this paragraph with respect to the experience of countries such as South Africa and India.

- 37 Finally, note should be made of the interaction between socio-economic responsibilities of the state and corresponding constitutional entitlements of citizens, on the one hand, and the organization of public administration, on the other. As indicated above, duties to deliver services on the basis of fundamental rights may have to be fulfilled by lower tiers of government. These lower levels of the system – regardless of specific design issues (administration based on governorates or regions) – will need the financial and administrative capabilities required to meet the expectations of their citizens raised in other parts of the draft.
- 38 A well-designed *application clause* will try to define who has to respect human rights provisions and who is protected by them. In most cases, obligations arising from rights and liberties will apply to all legislative, executive and judicial authorities at all levels of government. The beneficiaries are usually natural persons.
- 39 Many systems today expand this traditional scope of protection to juristic persons (legal entities) such as companies, associations, churches, trade unions or political parties. Their ability to meaningfully invoke rights and freedoms generally depends on the nature of the juristic person and the nature of the right in question. It is easy to see that commercial enterprises might enjoy constitutional protection of their property but not the rights to dignity, to hold a passport, to education or health care, or to vote and be elected. Churches usually enjoy a right to religious freedom that is distinct from that of their (natural) followers but do not need a right to housing. Trade unions or political parties in many systems enjoy rights in the context of

employment relationships or elections that are again distinct from that of their (natural) members, but will hardly invoke the right to be free from slavery. Grey areas exist, however, and will require decisions by the courts in the light of, inter alia, the values and legal traditions of the society in question. Should companies, for example, enjoy freedom of speech, the right to contribute money to election campaigns or access to information held by the state? Or should NGOs have a right to the confidentiality of their postal, telegraphic or electronic correspondence, or enjoy particular protection of their business premises? Comparative experience suggests that most societies will at some point be confronted with legal issues of this nature.

- 40 Most modern constitutions that expand the protective umbrella of human rights to legal entities will do so either in the form of specific entitlements or through a general clause, such as article 19(3) of the German Basic Law. This provision declares that *basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits*. Similar provisions are included in the constitutions of South Africa and Namibia.
- 41 A related issue concerns the question of whether human rights apply *between* private parties. Can landlords openly discriminate against certain applicants who wish to lease their property even if the reason for such discrimination clearly violates the principle of equality? Can entrepreneurs reject job applicants for similar reasons regardless of their professional qualifications? Can individuals or NGOs call for a boycott of certain products or services that are sold or offered by private companies? Must privately owned banks provide accounts (if not financial credit) for indigent citizens? Do customers have a claim to access to personal information that is held by private companies such as Internet service providers? Some constitutions, as in South Africa, declare human rights *directly applicable* in these and similar relationships while most others only call for the *interpretation and development of private law in the light of constitutional values*, which include human rights and liberties, on a case-by-case basis. German constitutional theory calls this the ‘radiating effect’ of human rights.
- 42 The draft does not provide a formula to address these issues in a structured way. Some legal entities, such as educational institutions, private universities, learning institutes and scientific research centres, the press and media, civil society organizations or unions, are entitled to specific institutional rights. This suggests that rights and freedoms are not per se limited to natural persons. It is unclear, however, whether any of these entities enjoy rights and freedoms that are not specifically mentioned in the respective articles of the draft but may be relevant to the activity in question.
- 43 Women are given protection from arbitrary discrimination in the workplace, which can affect private employers, and children are granted the right to family care – presumably against their parents or other family members. These provisions again indicate that rights and freedoms are not per se limited to the relationship between state and citizen, but the draft does not address the question of whether private parties are *generally* bound by constitutional rights and freedoms.
- 44 Given the practical relevance of both issues and the availability of different solutions in other systems it is unfortunate that the draft fails to address these questions clearly in its operational

- provisions. The principle that all public authority is bound by fundamental rights and freedoms, mentioned above, should also be clearly expressed in the text. This would include, for example, courts exercising public authority through their various rulings, as well as independent institutions, armed forces and police authorities.
- 45 Constitutional rights and liberties are not easily applied in day-to-day administrative and judicial practice. Many modern constitutions therefore provide some guidance in the form of *interpretation clauses*. Courts, in particular, are called on to promote the values that underlie an open and democratic society; to foster core principles such as human dignity, equality and freedom; to promote the spirit, purport and objectives of a bill of rights; to adopt, if possible, an interpretation of the law or an administrative decision that favours the enforcement of a right or freedom rather than a more restrictive one; or to consider international law and comparative foreign law or court decisions when deciding national human rights cases. Some observers might argue that such provisions are merely symbolic, that courts and administrative authorities abide by these principles anyway or that provisions of this kind are themselves difficult to understand and apply in practice. Comparative experience suggests, however, that the provisions of a bill of rights require a broader conceptual framework in order to be translated into meaningful legal practice, and that many public officials and judges who are called on to respect constitutional rights and freedoms in their daily work in fact struggle with the task. Interpretation clauses can support the understanding of a bill of rights and help foster a new approach to the enforcement of rights and liberties in administrative and judicial practice.
- 46 The draft features an interpretation clause and thus compares favourably with other constitutional texts in the region. It is a fairly brief provision, however, and could be fleshed out in order to provide more guidance to those applying the bill of rights – be they public officials, judges, lawyers or the citizens themselves. A second observation concerns the tensions that may arise between the vision of ‘a democratic society under the intentions and principles of the Islamic Shari’a’ in the first clause of the text and values such as human dignity, freedom and equality between all citizens mentioned in the second clause. A third element that could have potentially wide implications is the rule that fundamental rights and freedoms should not be interpreted in a way that allows activities or acts to undermine or threaten the very rights and freedoms that the constitution is trying to protect. Freedom to speak, to assemble, to publish or to associate should not be used to destroy the freedom to speak, to assemble, to publish or to associate. This idea is reminiscent of the German concept of a ‘militant democracy’, which does not allow rights and freedoms to be abused with the aim of undermining the core principles of the Basic Law. It is a potent technique and should be used very sparingly, given the considerable risks that it, itself, poses to democracy and human rights. This author suggests that the idea should be utilized in *specific* provisions of the section rather than in a clause of *general* application.
- 47 Two of the most important provisions of the draft concern the *limitation* of fundamental rights and liberties. The effort invested into both clauses, which cover ‘general rules’ and ‘restrictions to rights and liberties’, is commendable. The drafters opted for the model of a *generally* applicable limitation clause that will apply to all potential limitations of fundamental rights and liberties by public authorities, instead of injecting legislative or administrative caveats into

particular guarantees and thereby opening up the right or freedom to substantial and potentially unqualified regulation. This is a very welcome approach. This author strongly recommends, however, the express inclusion of *courts and tribunals* on the list of authorities that are bound by these clauses (the Constitution of Tunisia, for example, places on all courts a responsibility to protect citizens from human rights violations in article 49, while the German Basic Law declares prominently in article 1 that fundamental rights ‘shall bind the legislature, the executive and the judiciary as directly applicable law’). Note should also be made of the fact that some rights and liberties are heavily circumscribed by the *description* of the right or liberty *itself*. A striking example is the right to form political parties. While the text of the provision allows everyone to freely choose political affiliations (which includes the right to establish, join or withdraw from political parties), it also sets out a number of important constraints with respect to international collaboration, national unity, funding, commercial activities and references to tribes or regions, in addition to the less controversial constraints on violence, terrorism, hatred, discrimination or armed movements/activities. Much will thus depend not only on the *limitation clause*, but also on the way in which the protective scope of such rights is *interpreted* in the first place. What, for example, qualifies as activity that threatens national unity? It is here that fundamental principles set out at the beginning of the draft, as discussed at the outset of this analysis, are likely to come into play.

- 48 Legislators must, in principle, be able to limit the exercise of many rights and freedoms. Every modern society requires a substantial amount of laws in all areas of human life, from simple traffic rules to complex tax codes, in order to avoid chaos and serious risks to the safety and wellbeing of the citizen. This process might also involve balancing *competing* rights and liberties. The freedom of assembly exercised by some citizens must, for example, be harmonized with the equally important freedoms of movement or economic activity enjoyed by others. No right should be exercised to the full exclusion of another if conflicts arise. Once this principle is accepted, effective human rights protection becomes a question of how to properly *limit* the indispensable authority of the state to regulate the rights and freedoms of its citizens. The most generous bill of rights in a constitution is meaningless if the state is given unlimited power to define and reduce these rights and freedoms through ordinary laws and regulations. The language of the draft seeks to achieve this balance by utilizing the principle of *proportionality*. The most common components of a proportionality test, which courts usually apply to both legislation *and* administrative decisions, are: (1) that the state is pursuing a *legitimate public aim*; (2) that it chooses an approach that is *capable* of achieving this aim; (3) that it only uses means that *impair the right in question as little as possible*; and (4) that the positive effects of the measure for society outweigh its negative impact on the right or freedom of the affected citizen(s). The last element will depend on the nature and importance of the right or freedom in question and sometimes require the state to show that the public aim in question is *compelling* or of an *overriding importance for the public interest*.
- 49 Many constitutions establish additional conditions with respect to legislation. These include a requirement that the law in question be of *general application* rather than one that is designed to regulate an individual case, and that the constitutional right or freedom that the legislator

wants to limit is *expressly identified in the law*. These rules are an expression of the principle of equality and foster transparency with respect to the limitation of rights and liberties.

- 50 A proportionality analysis is, in sum, a balancing exercise according to which the public interest in a law or the consideration behind an administrative decision must be of sufficient importance, is pursued by effective means and must affect the right or freedom in question as little as possible. As such, the test is very much a process of *justifying* limitations and provides a step-by-step checklist for the legislator or public official when considering laws or administrative decisions that might impact negatively on rights and freedoms guaranteed by a constitution. Judges, called on to determine the validity of laws or administrative decisions, are in turn provided with a constitutional framework that offers coherent guidelines for their decisions and opens up space for nuanced solutions in the light of the specific circumstances of a case. The draft adopts this approach by demanding that fundamental rights be limited only through general and abstract rules, and that such limitations should be necessary, balanced against the public interest and proportionate. Specific applications of these principles are identified for criminal sanctions.
- 51 Additional safeguards that bolster the protection of fundamental rights and liberties include the imposition of state liability (compensation) for the violation of fundamental rights and freedoms, which includes judicial error, and a higher threshold for limitations enacted under states of emergency. These must be absolutely necessary and in line with Libya's obligations under international law. Note should be made of the fact that some systems provide a more detailed approach to states of emergency by identifying particular rights and liberties that may not be limited under any circumstances. The reference to international human rights instruments, which follow the same approach, will hopefully perform this function.
- 52 Two elements of the limitation clause merit criticism despite this highly positive overall assessment.
- 53 The provision requires, first, that any regulation of fundamental rights and liberties be passed with a two-thirds majority in the National Assembly. This represents a strong procedural safeguard and is, as such, commendable. There is, however, a real risk that differences of opinion with respect to the technical details of a particular law *and* questions related to the protection of rights and liberties will make it difficult to achieve the necessary majority in practice. The wide scope of fundamental rights and liberties set out in the draft, again commendable, will thereby increase the number of areas in which broad consensus must be found before laws can be enacted.
- 54 This could have a profound impact on the political dynamics of Libya's emerging democracy. Legislative deadlock is a real possibility – as is the risk that bills suggested by the executive branch might simply be rubber-stamped by the legislature. Neither scenario is desirable. More importantly, rights and liberties have to be regulated in many areas of human life, and different *constitutionally valid* alternatives may exist to do this. The right to peaceful assembly, for example, can be regulated in a great number of ways. All of these may be *constitutional* but *different* with respect to the methods and tools used to achieve the dual public aims of giving citizens an opportunity to publicly voice opinions, on the one hand, and protecting the rights of

others and maintaining public order, on the other. Legitimate differences with respect to these various options should be discussed and put to the vote in the legislature without the need to achieve a two-thirds majority. Political parties and single representatives with different philosophies and approaches to specific policy areas and regulatory issues should have an opportunity to influence the course of the country as long as they respect the rules of democracy and the substantive limitations of an effective human rights regime. Political pluralism, as envisaged in the draft, will only develop if these differences of opinion can thrive and exist without the pressure to find broad consensus on every detail. The position of a minority that still opposes a particular solution for constitutional reasons might also be weakened if courts – when engaged in a subsequent review of the bill or law – defer to the legislator due to the fact that the text was passed with a two-thirds majority. The majority, even if so large, might still be wrong.

- 55 A second comment concerns the rule that limitations *preserve the core of a fundamental right of liberty*, which seems an attractive concept but is often very difficult to define in practice. What exactly is the ‘core’ of human dignity, of privacy or of free speech? It probably lies at the centre or heart of the right or freedom, or represents something of overwhelming importance – but courts across the globe have yet to come up with a clear approach to the application of the rule in concrete cases (in its ruling on the constitutionality of the death penalty, the Constitutional Court of South Africa even had difficulty identifying the ‘core’ of the right to life). Whatever the definition given to the ‘core’ of a particular right or liberty by a particular court in a particular jurisdiction, however, it is likely to be a very limited area, while most aspects of the right or liberty will be regarded as ‘non-essential’ or ‘of lesser importance’. This suggests that the rule could even potentially be used to legitimize lesser, but nevertheless disproportionate, limitations.
- 56 Comparative experience suggests that for these reasons the ‘essential’ or ‘core’ content rule plays no practical role in its country of origin, Germany, and was discarded after heavy criticism only three years after its adoption in South Africa. Both countries – and practically all effective national or international systems of human rights protection – instead rely on some form of proportionality analysis that balances on a case-by-case basis the legitimate interests of the state in regulating human activity (and thus in defining and reducing the scope of certain rights or freedoms) with the interest of the citizen in enjoying unlimited rights and freedoms. If used in combination with the principle of proportionality, as in the draft, the rule should at least be changed to *‘in no case/under no circumstances may restrictions affect the core of a fundamental right or freedom’* (as in Germany), which suggests that limitations outside this ‘core’ might *still* be disproportionate and thus unconstitutional.
- 57 Some final remarks concern provisions in the section on fundamental rights and liberties.
- 58 The principle of equality appears in several provisions throughout the draft. It would be preferable to consolidate these variations in a single article in order to avoid unnecessary difficulties in interpreting and applying the principle consistently in practice.
- 59 The same is true of the right to a fair trial, which appears in the section on fundamental rights and liberties and in the context of the judiciary.

- 60 Drafters should review the conceptualization of property as a right related to activity.
- 61 This author is unclear about the circumstances under which courts could reasonably impose forced residency on citizens.
- 62 The draft allows courts to disenfranchise citizens. This is one of the most far-reaching limitations on the principle of democracy and should be explained in greater detail and made subject to very strict conditions in the constitution itself. The provision ties in with the loss of civil and political rights, indicated as a possibility in the articles dealing with the conditions of membership of the National Assembly. Such a loss of civil and political rights, again highly consequential for citizens, must be addressed in the constitution itself.
- 63 Drafters should review the current approach to civil society organizations. Much of what such organizations do in practice – for example in the context of human rights protection, the provision of social services, or religious activities – could easily fall within a wide definition of political activity and hence be prohibited under the current language of the draft. This would stifle the development of a vibrant civil society, which forms the backbone of most democratic systems.
- 64 Drafters should consider carefully the relationship between the freedom, pluralism and independence of the press and media, on the one hand, and the role and functions of the National Council on Media and the Libyan Broadcasting Authority, on the other. The media code of ethics, which is supposed to take into consideration ‘the unity of the country, Islamic values, ethics of the profession, as well as a pluralistic and honest media’ and to be ‘imposed’ on public and private media institutions, has the potential to seriously limit the activities of press and media outlets as well as those of individual journalists.

### **Transitional Measures**

- 65 Transition from one regime to another can trigger a host of problems in a wide range of areas. It often requires: extensive regulation of past human rights violations, and of the legal position of individuals closely associated with a former regime; compensation for years of inequality and discrimination; the reorganization of courts and administrative authorities, including a transfer of assets and manpower between different – and possibly new – tiers of government; a review of the whole legal system in the light of a new constitutional paradigm; the dissolution of militias and the establishment of a new military and police security apparatus; the recovery of state assets lost through corruption and fraud; and special election arrangements. Most of these issues are mentioned in the draft – albeit in very brief terms. Other systems that have faced similar challenges (such as Germany after the end of World War II and later at reunification, or South Africa after apartheid) developed far more extensive frameworks in many of these areas. Much of the bilateral (German-German) state agreement that regulated German reunification in 1990 thus focused on the transfer of assets from one government entity to another in order to enable the newly formed states in the eastern part of the country to meet their administrative responsibilities under the Basic Law. In South Africa, particular care was taken with respect to



the functions and powers of the *Truth and Reconciliation Commission*, which in subsequent years faced the tremendous challenge of dealing with human rights violations perpetrated in previous decades and reconciling a highly fractured society.

- 66 The approach taken in the draft on a number of these questions is comparatively opaque. Transitional justice is mainly a matter for the state. The state will be committed to put in place the necessary measures and mechanisms to, inter alia, promote community dialogue, uncover the truth about crimes and human rights violations committed in the past, foster reconciliation and reform the legal system. Little detail is provided, however, with respect to the ways in which these important and very difficult aims are to be achieved in practice. Compensation is promised for the victims of systematic human rights violations and military operations, as well as other very specific forms of help such as psychological counselling, but the mechanisms or public authorities responsible for providing such assistance are not identified. Perpetrators must expect criminal sanctions without hope for immunity, amnesty or time limitation, but the limits of such responsibility – for example with respect to ‘administrative corruption’ – remain unclear. Perpetrators of human rights violations shall be banned from public office, but the question of how the system will function if a wholesale discharge of public officials – regardless of their rank and influence under the previous regime – creates large gaps in a sufficiently qualified and much needed official workforce remains unanswered. The legal system is to be revised in the light of the new constitution, but the body responsible for this substantial task is not named. Armed organizations shall be disarmed and disbanded, but it remains unclear who will engage with them and how their members will be brought back into the fold of civil society. Public money lost to corruption or crime shall be recovered, but the authorities responsible for this important task remain unnamed. This author suggests that these provisions, which will probably determine the success or failure of the entire transition process in Libya, should be refined in the light of international experience with each of these issues.
- 67 Election law is a key factor in any system and can, in a way, be compared to the blood that runs through the constitutional infrastructure of a country. Fundamentally important decisions, including on constitutional amendment, are influenced by elections and, hence, by highly pliable rules of election law. Election law is, furthermore, the litmus test for some of the fundamental principles identified in the first section of the draft. Political pluralism, a peaceful transition of political power following elections, the separation and balance of powers between different branches of government, and good governance based on the principles of transparency and accountability are all linked to the election system and affected by the way in which elections are conducted in practice.
- 68 The section on transitional rules contains three important rules concerning the next three elections. Note should be taken of the fact that the language of these provisions focuses on the next three consecutive *elections*, and seems to envisage regular elections after the House of Representatives and the Shura Council have completed *three full terms*. These special rules would thus, unless extended, cease to be operational in nine years in the case of the Shura Council and 12 years in the case of the House of Representatives. Elections could, however, occur at shorter intervals if either body is prematurely dissolved. Drafters should review the

question of whether these rules should really be tied to the *number of elections* or instead to a *defined period of time*.

- 69 A special quota for women candidates, in this case 30 per cent, could potentially be an effective way of overcoming inequalities and enhancing the influence of women in the political sphere. Drafters should thereby note that women seem to be more successful in elections based on proportional representation along party lines rather than majoritarian systems featuring single member constituencies, and that the third of these transitional rules actually prescribes the latter – although admittedly for different reasons. The quota itself, moreover, will need to be translated into a mechanism by which additional women candidates are identified for specific constituencies should the outcome of an election fall short of the envisaged percentage. It may be preferable to define this formula in an addendum to the constitution rather than by ordinary statute.
- 70 The voting rights of members of the military are a contentious topic in many systems. There may be reasons to exclude them from elections permanently or for a certain period of time, subject to the transformation of army leadership structures and their integration into a system of civilian control. This is especially true in countries that have experienced extended and/or particularly harsh forms of military rule. There is much to be said, on the other hand, for giving members of the military the same voting rights as their fellow citizens, while perhaps limiting rights to assembly or freedom of political expression to some extent, and involving them in the democratic process as far and as early as possible. *Institutional* political neutrality, as opposed to the choices of *individual* members of the armed forces, is thereby certainly an important precondition of such voting rights. The German notion of ‘citizens in uniform’ (*Staatsbürger in Uniform*) reflects this concept.
- 71 Part of the draft seems to rely, as indicated above, on a majoritarian election system based on independent candidates rather than on proportional representation and the involvement of political parties. This could potentially work against the formation of and excessive influence by factions on the political process and decision making, and may seem desirable at least for a limited period of time (although both the United States and the United Kingdom are, to some extent, examples to the contrary). Proportional representation, on the other hand, offers a very different dynamic and can, in many respects, be more responsive to voter preferences and, ultimately, democratic rule. Drafters should note that both systems provide a great number of variations, and may wish to conduct a separate inquiry into the consequences of each model.

## **Local Administration**

- 72 The draft contains two different visions of local government. The first – the ‘governorates system’ – relies on 32 governorates spread unevenly across the three geographic regions of the country. The other – the ‘regions system’ – focuses on the three historical regions of Cyrenaica, Tripoli and Fazan. The first approach would allow for the creation of *economic* regions – a notion probably inspired by the French model – subject to the approval of the governorate councils, while the other would subdivide each of the three regions into governorates and municipalities.

Drafters should note that regions are also mentioned in other sections of the draft, as are obligations to treat all parts of the country fairly and to redress the inequalities of the past, which will require some fine-tuning between various sections regardless of the model of local administration eventually chosen.

- 73 There are some important differences between the two suggested approaches. These can be found mainly in the degree of self-governance awarded to the lower tiers of the system with respect to local *administration*, and the relationship between local and central *legislation*.
- 74 The *governorates system* allocates to the central level a general power to determine the details of administrative and financial decentralization by law. The governor is the head of a staff of governorate personnel, responsible for order and security, and implements both local and national projects within the geographic boundaries of his governorate. He is elected by the governorate council. Governorates would enjoy legislative powers in a fairly large number of policy areas. Governorate legislation must not, however, contradict the laws enacted at the central level, which ultimately leaves full legislative power with the centre subject only to the limitations that might follow from a duty of the centre to treat all parts of the country equitably. Interestingly, this approach allocates to the governorates the power to regulate local police and municipal guards – albeit within the constraints of any overriding central legislation in the field of internal security. Governorates may form regions but only with respect to economic matters. The procedure for this and the extent of any possible central influence over the process remain unclear.
- 75 The *regions system* focuses, as explained above, on the historical regions of the country. Each of these regions would contain a number of governorates and municipalities, and each region would have the authority to create these lower tiers of the system within its boundaries. The three regions would enjoy substantially more powers vis-à-vis the centre than the 32 governorates under the first model. The draft does not expressly state whether and to what extent the central level could determine the details of public *administration* in the regions. Regional *legislative* authority, while in terms of *policy areas* quite similar to that given to governorates under the governorate system, would, however, be *exclusive*; the authority to *execute* these laws will hence highly likely also rest with the regions and lead to a dual system of regional and central administration. References to the authority of the regional executive to implement sub-national ‘livelihood’ sectors and to establish a system of administration that manages the region and oversees governorates and municipalities seem to confirm this interpretation. The authority to legislate on all matters not assigned to the regions would rest with the centre.

Some level of interaction between the regions and the centre would nevertheless remain. There is, for instance, a reference to ‘joint legislation’, which could be proposed by the regional councils and require the approval of the National Assembly. The scope and nature of this intermediate type of legislation – and the question of which level would finance and administer such law – remain unclear. The budgets of the regions would be submitted to the National Assembly, but the authority of the central level in this process either to pass these budgets or merely to take note of them is not explained. Regional executive authority is subject to some

central accountability mechanisms by the National Assembly, which again suggests some measure of oversight, and – in terms of the budget – by central auditing bodies. Finally, regional councils and executives can be dissolved if they breach the constitution or violate the sovereignty of the state. This would involve an opinion by a special joint committee of the House of Representatives and the Senate/Shura Council, formed specifically to consider issues affecting the regions. It is, however, unclear which authority would dissolve a regional institution should this scenario ever arise. Both the central level in the guise of the President or Prime Minister and the regions through their regional councils would be able to challenge the validity of national or regional law if it were to violate the powers of the other level – probably through a complaint filed with the Constitutional Court.

- 76 As indicated above, there is considerable overlap between the policy areas that each approach would like to open up to sub-national legislation. Both levels would be responsible – within the limits set by national law in the case of the governorates system or exclusively under the regions system – for: the internal organization of governorates into municipalities, or regions into governorates and municipalities; urban planning and housing; public transport; fishing; tourism; agriculture, pasture and livestock; water; environmental protection; local economic development and the promotion of national investment; traditional and small industries; culture, historical places and monuments; sports, recreation and public parks; social aid and welfare; public health; and businesses and industrial/professional licences. The governorate system would, in addition, expressly allow governorate councils to approve local development plans and budgets, and regulate local police and municipal guards. Additional powers allocated to the regions under the regions system include public utilities, which might in addition to water and electricity cover waste management systems, and higher education.

Powers – whether legislative, administrative or (sometimes) judicial – must be carefully designed in order to match administrative realities, local capabilities and, ultimately, the legitimate expectations of citizens with respect to the efficient provision of services regardless of the levels of government involved in a particular policy area. These considerations must be balanced with the interest of local communities in regulating their own affairs, diversity and – in some systems – the potentially positive effects seen in a level of competition between the composite units of a decentralized or federalized system. Drafters should, furthermore, not lose sight of the fact that local interests can also feature prominently in the intelligent design of *national* powers. Currently, this potential is not being exploited since the Shura Council – more than the National Assembly a representative of regional interests – can only have a limited impact on national legislation with local/regional relevance. ‘Local administration’ is the only subject matter that matches the list of policy areas currently allocated to the governorate/regional levels by the drafters of the two sections on local administration. This author therefore suggests that more thought be given to strengthening *local* impact on *national* legislation. This could very well create an area of compromise between the governorate and the region systems, and provide a more effective legislative template than the traditional national/local paradigm. Note should also be made of the fact that legislation, as an art, is both difficult and expensive. Given the experience of other systems in the region, it seems extremely

doubtful whether the local level in Libya will have sufficient expertise to draft laws efficiently. Robust local influence on national legislation thus seems to be the better way forward.

The legislative powers allocated to the local level by both proposals, finally, should be reviewed with some degree of caution. National solutions – rather than an overly fragmented patchwork of laws enacted by a large number of governorates, or even three regions, might be preferable or even necessary with respect to a number of the policy areas listed in the two proposals – including airports, water resources and environmental protection, tourism, social security, health care, energy and higher education. That is *not* to say that local or regional views should *not* impact strongly on these matters – but this should preferably occur at the central level and within nationally coordinated and effective approaches to these critical issues.

- 77 The distribution of financial resources between the national and the local levels envisaged in both proposals is equally problematic. The governorate system would allocate 30 per cent of the *general budget* to the governorates on the basis of population, 30 per cent to the governorates regardless of population, 30 per cent to the central level for investment in the governorates and 10 per cent to governorates particularly affected by the production, transport and transit of natural resources. The regional system would adopt the same ratios with respect to income generated from *natural resources*, which is likely to be most of the country's revenue, but not earmark the central share for local investment.

Both approaches raise questions about the funding of national tasks. National transportation and communication grids, the education system, defence, policing, the entire institutional infrastructure set out in the constitution, the diplomatic service, large-scale industrial development and the management of natural resources – to name just a few responsibilities that the centre would continue to be responsible for under both approaches – will obviously require considerable funds. It is inconceivable that these tasks could be performed within the financial parameters that both systems suggest. Further inconsistencies could result from an unequal number of governorates within the historical regions and large disparities in their respective populations. Drafters should therefore note that areas with low populations are likely to face considerable costs because they will have to provide a minimum level of services to highly disparate communities. In the light of these difficulties, this author suggests a complete overhaul of the provisions dealing with the distribution of financial resources with a view to reassessing the specific tasks that should be performed at each level of government. International experience provides a large number of different approaches that could inform this review.

- 78 Organizing multi-level governance in a way that is both efficient and meets the political, economic and social expectations of local, regional and national stakeholders is a challenge but could be one of the most important keys to the resolution of some of the conflicts that lie at the heart of Libya's current crisis. Other systems have grappled with similar problems and provide a wide range of solutions that should be further explored by the drafters before final decisions are taken. Five concluding remarks that might provide guidance are offered below.
- 79 Breaking up a centralized system into a number of different constituent units that enjoy legislative and administrative powers distinct from the centre often calls for structures that

facilitate communication and cooperation between them – both horizontally at the same tier of government and vertically between different tiers of government. Intelligent collaboration can result in more coherent and efficient administrative solutions that retain the benefits of decentralization – or even federalization. Drafters are thus strongly urged to review the concept of *cooperative government* found, for example, in Germany and South Africa.

- 80 One of the most important guidelines for the distribution of responsibilities between different tiers of government should be the ability of such tiers to perform the assigned tasks. Although obvious and perhaps even banal, this principle is nonetheless often ignored when designing decentralized or federal systems. Modern legislation and administration have become increasingly complex, and can easily exceed local or regional capabilities even in countries like the United States or Germany. A realistic assessment of what each level can do is therefore crucial.
- 81 Symmetrically designed systems that allocate the same powers and responsibilities to all units of a given tier of government may not always be the best solution, given the great disparities in capabilities such as revenue, administrative experience or human resources that may exist in different parts of a country. The United Kingdom and Spain offer models of *asymmetrical* decentralization that might be worth considering.
- 82 Dual systems of administration involving central structures for some tasks and local structures for others may not be the most efficient way of providing services to the citizen. Power sharing arrangements can be designed to protect local and regional interests within centralized administrative structures.
- 83 One of the most neglected problems in transforming a centralized system of governance into a multi-tiered structure is the transfer of assets that necessarily needs to take place if newly created lower tiers are to meet their responsibilities and provide efficient services to their citizens. Governorates and/or regions in Libya will need the human resources, infrastructure, and financial resources to perform their functions – however defined – and will need them fairly quickly. Transitional arrangements, either in the constitution itself or in a schedule/annex to the text, should set out in some detail how this transfer of assets is going to take place.

### **The Financial System and Natural Resources**

- 84 A number of provisions relating to the financial system interact closely with choices that will have to be made with respect to local government. This is especially true for the structure of the Central Reserve Bank (which seems to assume the existence of three *regional* banks) as well as the organization and responsibilities of auditing bodies, which may be involved in controlling revenue and expenditure at the governorate and regional levels. Lower tiers of government may also wish to be represented at the central level to monitor revenue and the allocation of resources. This could involve the creation of special committees, either free standing or as a part of the National Assembly.

- 85 The whole section on natural resources clearly assumes that the central level will play an important role in managing and distributing the country's wealth of natural resources. The distribution of legislative and administrative powers between the centre and the lower tiers of government should reflect this approach.
- 86 Article 5 greatly influences the distribution of revenue from natural resources between the central and decentralized levels, on the one hand, and among different parts of the decentralized tier, on the other, by setting out a number of guiding principles that should be taken into account in the allocation of shares. These factors include, inter alia, population, geography, past marginalization and poverty (need), current levels of service provision and infrastructure, regional development, human development and local expertise. The provision obviously assumes that the central level will retain an undefined share of the revenue. These principles are much more refined than the simplistic allocation of fixed percentages to the governorates or regions suggested in the section on local administration, and provide a good starting point for the equitable distribution of wealth and development opportunities that seems to lie at the heart of the draft. A common factor of both sections is the allocation of 10 per cent of the revenue to producing areas for the purpose of creating alternative sustainable streams of revenue. Article 5 would also allocate a fixed share of 3 per cent of the revenue to adjacent areas for these purposes. Both ideas are in line with the general spirit of the constitution and can be found – with numerous variations – in other systems that seek to equalize special burdens caused by economic or natural inequalities between different parts of a country.
- 87 The management of natural resources, including the distribution of the revenue resulting from them, is not the only policy area that this section of the draft allocates to the central level. Responsibilities for sustainable development (article 6), the creation of a fund for future generations (article 7), the environment generally (articles 8 and 9), water (articles 10–13), new and renewable energies (article 14), animal protection (article 15), sea life (article 16), plants (article 17) and archaeological sites (articles 18–20) seem to lie with the centre, which may lead to tensions with the envisaged allocation of powers and revenue to the local tiers of government.

## Security

- 88 The section dealing with the security sector is conspicuously brief, given the tremendous importance of this area and the considerable challenges that the country is facing with respect to the development of national security forces (the army, police and intelligence agencies), their integration into a system of civilian rule, and the dissolution and disarmament of the many local and regional militias that currently control large parts of Libya.
- 89 The President chairs the National Security Council and is directly responsible for the armed forces and general intelligence. He is thus given a key role in organization and planning as well as operational questions involving security. The army, interestingly, must be loyal to God and nation (article 5) while the police must, in addition, *respect human rights and freedoms* and

*abide by the requirements placed on it by the constitution and the law* (article 8). Intelligence authorities, the text seems to suggest, are subordinate only to the President and whoever is appointed to head them, and free from any other constitutional constraints. This distinction is very worrying. All public authorities, which includes the armed forces, intelligence agencies and even the President, should be bound by the constitution and the law, which includes the fundamental rights and liberties of the citizens they are called on to protect.

- 90 The army has a mandate to preserve the security and integrity of Libya. Given the fact that the President is Commander-in-Chief and chairs the National Security Council, which in turn is responsible for the external *and* internal security of the country, it would seem that the army is not limited to defence but could also be deployed to avert *internal* ‘disasters and crises’ (article 1). Drafters might consider the restrictive approach that other systems take with respect to the use of the military in situations that do not involve defence against outside forces. Constitutional language often makes the deployment of the army *within* a country subject to stringent conditions. This issue is particularly important here because the draft establishes different – and potentially competing – lines of command and loyalties for the army and the police. It would, for example, be desirable to establish a degree of permanent legislative oversight over the security sector, in particular over the army and all intelligence services, and to require the approval of the National Assembly, and in addition perhaps even approval by members of the Shura Council from the affected geographical region, for the use of military force for any purposes not connected to foreign aggression against Libyan territory.
- 91 The draft is very clear with respect to the monopoly of the state to establish and use military force (articles 4 and 5). This is crucial for the future of the country. Drafters should consider the establishment of a special commission and the allocation of funds dedicated to disbanding the many militias, reintegrating their members into civil society, and gaining control over the large amounts of weapons that are currently in circulation.
- 92 The various sections of the draft are currently inconsistent with respect to political activity by members of the armed forces and the police. Article 3 of this section very clearly and permanently prohibits military and police personnel from engaging in political activities such as standing for office, voting or founding and engaging in political parties. The section on transitional measures, on the other hand, would allow military personnel to take part in the electoral process after three election cycles, provided that the armed forces have been successfully restructured and remain institutionally neutral. Members of the police are not mentioned in this context. The section on fundamental rights and freedoms, finally, prohibits judges, prosecutors, and military and police personnel from affiliating with political parties but makes no exception from the right to vote, which is guaranteed to every person. The political activities of members of the intelligence services are not mentioned in any of these sections. This author would prefer to integrate both army and police into the societal fabric of Libya’s fledgling democracy as far and as soon as possible, and to allow their members to participate in elections while subjecting them to proportionate limitations on specific rights and freedoms, such as assembly or free speech, which might compromise the proper functioning and institutional neutrality of the security sector if exercised without restraint. Members of the



security forces should also be exposed to educational programmes that emphasize key concepts of human rights protection, democracy and civilian rule.

- 93 The jurisdiction of military courts with respect to civilians is discussed above. Experience in Egypt shows that language such as that used in article 6 is capable of very wide interpretation and can lead to a great expansion of military trials.
- 94 National responsibilities for the police may to some extent collide with the legislative authority and control over local police and municipal guards given to governorates under the governorates system.
- 95 The proper functioning of the entire security sector with regard to its constitutional duties as well as its respect for the fundamental rights and freedoms of the citizens and the rule of law will be crucial for Libya. Given past human rights violations by members of the army, the police, intelligence agencies and the many militias that currently exercise control over various parts of the country, drafters should consider seriously the establishment of independent commissions or ombudsmen with the power to investigate and publicly report on human rights violations or unlawful activities by members of the security sector. This would send a powerful signal to civil society that civilians should not endanger or even attack members of the army or police, or their facilities, but that the security sector is also subject to effective civilian control mechanisms.
- 96 These considerations are even more important with respect to the intelligence sector, which by its very nature operates secretly but nevertheless must *not* stand beyond the constitution and the rule of law, including human rights guarantees, lest it become a threat to the very values and principles it is supposed to protect. Special standing committees of the legislature with the right to demand information on all issues involving the activities of intelligence services, and special reporting duties of the heads of intelligence can strike a balance between democratic, civilian control and confidentiality requirements. This may even involve *a constitutionally imposed requirement* for legislative, rather than judicial, permission for and oversight of particularly intrusive operations, such as long-term wiretapping or Internet surveillance of citizens who are suspected of serious crimes. Constitutional limits with respect to the right to privacy of communications exist in Germany, where curtailment of the right to the privacy of correspondence and telecommunications *without* the knowledge of the suspect and *without* the authorization of a judge is only permissible if carried out pursuant to a law *and* if the restriction serves to protect the free democratic basic order (i.e. the fundamental structures and values of the constitution) or the existence or security of the Federation or a state *and* if the legislature – or special bodies appointed by the legislator – authorizes the measure (see article 10 of the Basic Law). In South Africa, all national security operations are subject to the authority of the executive and the *legislative* branch, and must be pursued in compliance with a law, including international law. In addition, national security agencies must act, and teach and require their members to act, in accordance with the constitution and the law, including customary international law and international agreements. Intelligence agencies are expressly made subject to civilian monitoring through an inspector appointed by the President with the support of two-thirds of the members of the legislature (see sections 198, 199 and 210 Republic of South Africa Act 1996). Drafters should thus consider formulating a clearly circumscribed

constitutional mandate for all intelligence agencies, including any special units that may exist, for example within the armed forces, that binds their activities to the constitution – in particular as regards human rights protection – and secures a greater amount of civilian control through the legislature.

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