

عدالة للجميع

Adala for all (AFA)



# Mawazin

## State of Law



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# Mawazin Magazine

State of Law

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«The opinions expressed here are those of the authors and do not necessarily reflect the views of the organization.»

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## Who are we

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Adala for all (AFA) is a non-profit association of lawyers and jurists that provides victims with free and voluntary legal aid.

## Our principles

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The five fundamental principles establish the ethical, operational, and institutional framework for the activities of the AFA association. These principles are at the heart of our approach towards achieving our objectives.

### Principle of humanity

The urge to provide assistance, without distinction, to detainees and victims of grave abuses engendered the birth of the AFA association. All such endeavors are to guarantee detainees' right to a fair trial, to obtain legal aid, and to access justice guarantees.

### Principle of impartiality

We work to provide equal treatment, without discrimination, on the grounds of nationality, race, religious beliefs, class, or political affiliations. The endeavors are to relieve the suffering of individuals, being guided solely by their needs, and to prioritize the most urgent cases of distress.

### Principle of independence

Adala for all (AFA) is an independent association that strives to maintain independence, at all times, to operate in conformity with its own set of principles.

### Principle of voluntary service

We work through a network of lawyers and jurists who offer free and voluntary legal aid to victims.

### Principle of Universality of Human Rights

We work to defend the full enjoyment of all Human Rights for all persons, undiminished.

## Our network

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Adala for all (AFA) association comprises a network of lawyers and jurists on both sides of the Mediterranean, with offices in France and the Netherlands.

The AFA's primary focus, in its initial operational phase, is seeking to reinforce its network and to strengthen the means of achieving its objectives in Libya and North African countries.

# Adala For All

Works on several axes:

1

## Legal support

Through this program, our objective is to offer free legal advices and provide strategic litigation support to victims of human rights violations. Furthermore, we strive to enhance the practical legal experiences of law students and trainee lawyers.

2

## Mawazin Magazin

A periodical magazine publishing research articles by legal experts on obstacles to accessing justice, and the extent of state authorities' commitment to fair trial standards and obligations arising from international agreements and conventions.

3

## Academy

Training of lawyers and members of the judiciary in international standards pertaining to access to justice and fair trial.

4

## Observatory

Marsad (the Observatory) of Adala For All Association (AFA) focuses on monitoring restrictions on public liberties and access to justice.

5

## Know Your Rights Campaign

“Know Your Rights” is an awareness-raising campaign based on the provision of valuable legal information. It is of concern to Libyan citizens in general and targets, in particular, the more vulnerable groups to verbal or physical abuse or violations in any form in Libya.



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# THE SUPREME COURT AND THE PRINCIPLE OF LEGALITY

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## Introduction

The principle of legality is one of the main foundations for judicial oversight over the Constitution in modern legal systems .It determines the work of the authority according to the powers granted to it by the laws in force depending on its hierarchy ,with priority to constitutional articles and principles .The principle of legality contributes to guaranteeing the principle of separation of powers and preventing authoritarian abuses .It further enables the Judiciary to monitor the decisions of the legislative and executive authority ,and to investigate their compatibility with the Constitution and its basic principles .Thus ,the principle of legality prevents abuses and violations of rights and freedoms and guarantees fair legal procedures and a fair trial for litigants.

According to the jurisprudence of law and the jurisprudence of politics ,there is a distinction between' légitimité-legitimacy 'and' légalité-legality '.The first principle of' legitimacy 'is related to the authority and how it is exercised ,while the second' legality 'relates to the extent to which the authority in its practices abides by the law.

The Libyan Supreme Court has applied these two principles in its decisions since the1970 s, shortly after the Independence .However ,the distinction between the two principles does not appear in its administrative and constitutional jurisprudence .The study of the Supreme Court position on the principle of legality requires defining the nature of legality in a first paragraph before addressing the results of its dedication to the principle of legality in a second paragraph

## First: What is legality in the jurisprudence of the Supreme Court?

### 1 .The concept of" the principle of legality "in the jurisprudence of the Supreme Court

In an administrative appeal case <sup>1</sup>filed by Plaintiff) Bosclod Domenico Silviolizito (versus Defendant) Head of the Executive Council of the State of West Tripoli (in ,1957 the plaintiff filed the case to object on the certificate issued by the defendant to vacate the apartment and hand it over to the property authority due to the administration's need for it .The court supported the plaintiff as this certificate violated the laws and was considered tainted by deviation or abuse of power .The court explained in its verdict that" An administrative decision must adhere to the Constitution ,laws ,regulations ,and principles of public law such as equality, public freedoms ,the right to defense ,and the non-retroactivity of administrative decisions. The decision must be in accordance with the administrative custom that the administration follows in facing a specific case ,and it must not contradict a judicial ruling issued by the ordinary or Administrative Judiciary that has the authority of convicting in the matter of the case "...The court identified aspects of the administrative decision in violation of the law :the violation of the law may be in violation of a text" from the texts of laws or regulations or their application when the dispute is often regarding the existence of the legal rule ".The violation may be" in the misinterpretation or application of laws and regulations ,when the legal rule is not clear and subject to interpretation".

In the aforementioned ruling ,the court also defined the difference between the defect of breaking the law and the defect of deviation or abuse of the power of the administration, where both share the objective nature of the defect ,but they differ in characteristics and nature" .The administrative decision tainted by the defect of deviation is sound in its other elements and conforms to the law in terms of its place ,and its danger appears in that the administration is trying to achieve all its illegal purposes in protection from legality "...The defect of abuse of power is related to the objectives of the decision and is related only to the discretionary authority" ,If the administration uses the decision to achieve purposes other than the purposes that the decision may be used to achieve ,then it is null and void due to its defect of deviation ,even if related to the public interest".

The sources of the principle of legality in the jurisprudence of the Supreme Court are multiple, and exceed the legislative rules ,disregarding their rank in the legislative hierarchy ,and include general principles of law ,including equality ,public freedoms ,the right of defense ,and the non-retroactivity of administrative decisions .They further include administrative custom and not violating the argument of rulings that have the force of a final verdict.

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<sup>1</sup> Supreme Court ruling .Administrative and Constitutional Judiciary .Appeal No 6 .of Year 26 .3 June .1957p.79 .

This approach is consistent with the jurisprudence of the Egyptian Supreme Administrative Court ,<sup>2</sup>which grants the court the right during monitoring the legality of an individual administrative decision to” apply the rule of law to the decision ,whether this law is represented in ordinary ,subsidiary or basic legislation) the Constitution .(The administrative decision should be considered not only within the framework of ordinary legislation or individual legislation, but also ,if necessary ,within the framework of the governing principles and guiding principles guaranteed by the Constitution .This is how the rule of the Constitution is achieved ,with its true status and true value“.

The Supreme Court applied its jurisprudence of legality in Appeal Case No 1 .of Year ,<sup>13</sup> when it ruled the invalidity of the royal order to dissolve the Legislative Council of the State of West Tripoli .The court considered that the order was not issued in the form regulated by the State Constitution and the basic law of the State of Tripoli” ,a decree signed by the Prime Minister next to the signature of the King after consulting the Executive Council of the State “.Legality or) the principle of the administration subjected to the rule of law ,(means to the Supreme Court” that all management actions must be legal actions that do not violate the law “,and the law discussed in a broad sense ,through the existence of a general legal principle or legal rule, whether this rule is written or unwritten“.

## 2 .Sources of the principle of legality in the jurisprudence of the Supreme Court

The jurisprudence of the Supreme Court shows that the sources of legality are either written or unwritten:<sup>4</sup>

### 2.1 Written sources

The written sources include the Constitution and lower legislations) laws and regulations.( Libya has witnessed development since September 1969 until now ,where it affected these sources ,where temporary constitutional declarations <sup>5</sup>and basic laws replaced the Royal Constitution) .This includes the Constitutional Declaration of ,1969 and the current Constitutional Declaration issued on 3 August .(2011 The court applied the concept of legality within the framework of the gradation between legislation) :The legislation in the

<sup>2</sup> Constitutional Appeal No 47 .of 5329 and .5344 Session of 27 August ,2001 Principle No ,83 .Group One ,2000-2001/2 a set of legal principles decided by the Supreme Administrative Court in a quarter of a century ,1991-2016 p ,2378 .and about the link between the defect of abuse of power and the purpose of the decision that the administration has succumbed to the public interest or issued the decision for a motive that does not belong to that interest :the same court 23 .3252 -32 ,April ,1995 ibid ,p 2290 .No.3 .

<sup>2 bis</sup> Administrative Appeal Case No 14 .of .9 Session of 9 May .1964 Supreme Court Journal .First Year .Issue ,3 p .9

<sup>3</sup> Supreme Court Judiciary .Session of 5 April .1954 Administrative and Constitutional Judiciary .Part One2 ,nd edition ,1967 .p.9 .

<sup>4</sup> Ruling of the Supreme Court in Appeal Case no 6 .of .3 ibid .Benghazi University Publications .1974 .p. .17Administrative Appeal no 14 .of .9 Session 9 May .1964 Supreme Court Journal .First Year .Issue .3 p.9 .

<sup>5</sup> The content of current Constitutional Declaration and its amendments as a source of legality .Khalifa al-Jehmi .Provisions and Principles of the Libyan Administrative Judiciary ,2013 .p.20. Constitutional Declaration of .1969 Sebih Meskoni .Administrative Judiciary in the Libyan Arab Republic1974





المحكمة  
العليا

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

الحمد لله رب العالمين

والصلاة والسلام على من لا نبي بعده

State has three degrees represented in basic legislation as the Constitution has the highest supremacy ,followed by the ordinary or main legislation such as laws ,and followed by the subsidiary legislation ,known as the regulations ranging between executive ,organizational, and control regulations .This gradation of legislation in power requires the subordination of the lower ones to the higher ones <sup>6</sup>.(Further to the legislation issued by the national legislator according to the previous concept ,the treaties ratified by Libya are among the sources of legality and come in a lower rank than the constitutional rules and higher than the law<sup>7</sup>).

## 2.2 Unwritten sources

The Supreme Court established what is recognized in jurisprudence to oblige the administration to the general principles of law and administrative custom .The general principles of law align ,because the Supreme Court law granted the principles set by the Supreme Court in its rulings ,a binding power for all courts and parties ,including administration) Article.(31 The most prominent of these applied principles include ,the principle of equality before the law ,the principle of public freedoms ,the principle of the independence of the Judiciary ,the principle of the right of defense ,the principle of the right to resort to the Judiciary ,and the principle of the non-retroactivity of laws and administrative decisions <sup>8</sup>.The administrative custom is the regularity of the administration's behavior in a certain way ,regarding a specific case ,and becoming a frequent and observed habit that rises to the rank of an abstract rule<sup>9</sup>. The first article of the Civil Code ,entitled " The Fundamentals of Law ,"considers legislation as the first official source ,and the rest of the sources are backup sources ,including custom, which occupies the third degree following the principles of Sharia ,where the role of custom in establishing the legality block remains limited to and in need of evidence for its existence<sup>10</sup>.

## 3 .The Scope of the principle of legality in the jurisprudence of the Supreme Court

The principle of legality is a manifestation of the rule of law ,and its scope exceeds the administration's submission to the law ,which is the usual domain of Administrative Judiciary, and the Supreme Court applied the principle in many fields<sup>11</sup>.

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<sup>6</sup> Supreme Court .Criminal Appeal No 45 .of Year ,31 Session of 4 February .1986 Supreme Court Journal ,24 Issue ,2 ,1 p198 .

<sup>7</sup> Ruling of the Constitutional Court.

<sup>8</sup> Khalifa al-Jehmi .Ibid .p .28 .Mahmoud Omar Maatouk .The role of the administrative judge in protecting human rights through the general principles of law .Case Management Journal .Year .9 Issue.18 .2010p 42 .et seq .p 52 .et seq.

<sup>9</sup> The court said" ,the administrative custom is that the administration proceeds in a certain way in the face of a specific case ,so that the rule chosen adheres to become binding as the law ".Appeal No 6 .of Year.3 Session of 26 June .1957 ibid.

<sup>10</sup> Administrative Appeal No 14 .of Year .12 Supreme Court Journal ,April .1966 Referred to in Sabih Ecumenical ,previous reference ,p.45 .

<sup>11</sup> Sebih Meskoni .Aforementioned book .Administrative Court mentioned" ,all actions issued by public bodies and individuals are governed and regulated by legal rules decided in advance on these actions ".p,5 .  
<sup>11</sup>Confirming research is limited to administrative legality.

3.1 The function of enacting laws is not absolute ,whether exercised by the legislative authority or the executive authority .On 14 June <sup>12</sup>,1970 the Supreme Court issued a notable ruling in Constitutional Appeal Case No 1 .of Year” :14 It is illegal for the legislative authority to issue a law or for the executive authority to issue a decree of a law that undermines or detracts the independence of the Judiciary and the immunities of the members of the Judiciary ,or submit the judge under a non-judicial authority other than the Supreme Judicial Council .Numerous countries support this opinion ,by naming the laws regulating these cases as the laws of the judicial system ,not the laws of the independence of the Judiciary .The independence of the Judiciary and the immunity of its members are undisputable and decided by constitutions ,and what is intended is to organize this independence ,not to create or eliminate it “.Accordingly, the court ruled out the constitutionality of Article 4 of the contested decree ,which prohibits judges from challenging the decisions of the Committee for the Re-appointment and Transfer of Judicial Persons and violates the principle of the independence of the Judiciary.

The Supreme Court further ruled the unconstitutionality of Article 40 of Decree-Law No 6 .of 1964 related to elections <sup>13</sup>,for its content of stationing of security persons inside the voting chambers ,for aggressing the freedom of elections ,revealing its secrecy ,contrary to the constitutional principles in force when the law was issued.

The Constitutional Circuit of the Supreme Court confirmed that the legislator is bound by the principle of legality ,in another ruling issued in an appeal against the unconstitutionality of Article 65 of University Law No 20 .of ,1965 which prevents resorting to the Judiciary .The ruling stated” ,The Constitution alone has the power to restrict the jurisdiction of the Judiciary as one of the State authorities ,and the legislator concerned with arranging the judicial authorities and defining their competences ,has no right in preventing some disputes from the jurisdiction of the Judiciary ,when in a violation of the right of individuals ,whether the prevention is total or in partial “.The court further stated” ,If the law deviates from this constitutional right and does not comply with it ,the legislation is considered unconstitutional <sup>14</sup>“.The power of the legislator is restricted to preserving the rights guaranteed in the constitution.

3.2 One of the important applications of the concept of legality in the field of gradation of legislation in the criminal field is court decision in Criminal Appeal Case No ,45/31 .Session of 4 February <sup>15</sup>.1986 The court issued in its ruling ...” ,the right of the Public Prosecution to file and initiate a criminal case and the right of the civil plaintiff to raising it in the cases

12 Rulings of the Supreme Court and their combined effect .Court publications<sup>2</sup> .nd edition .p.113 . Constitutional Appeal Case No 1 .of .1 Session of 5 April .1954 The court nullified the royal decree dissolving the Legislative Council for not meeting the required conditions .Rulings of the Supreme Court with all its circuits .p. .59

.ibid .circuits its all with Court Supreme of Rulings .1970 January 11 .12 of 1 .No Appeal Constitutional ١٣ .102 .p

14 Constitutional Appeal No 1 .of .19 Session of 10 June .1972 Rulings of Supreme Court with all its circuits .ibid .p.131 .

15 Ibid .Ruling .Supreme Court Journal .Year .24 Issue .2 ,1 p.198 .

authorized by the law ,is an absolute right with source and basis in the law ,and could only be restricted by a special provision of the law “...Thus ,including this restriction in the internal regulations of the Central Agency for Public Administrative Control requires permission from the observer to file a lawsuit ,and should not be relied upon or eliminated” .The legal logic requires the equality of the two agents of determining the original and the exception ,and that the restriction ,even if mentioned in similar legislation ,must be estimated by its measure and status to avoid expansion of interpretation or measurement of what was stated in it“.

3.3 The Supreme Court faced on many occasions the problem of the authority’s reliance on acts of sovereignty ,which are outside the jurisdiction of the Judiciary ,including the hypothesis of putting the appellant’s money under custody .The court considered that the decision issued disregarded the Judiciary .The procedure of custody is” an exceptional procedure that can only be resorted to by legal means ,and when the danger is clear and imminent ,and that is through the Judiciary <sup>16</sup>“ .At an earlier date ,the Supreme Court ruled to annul a decision issued to deport a foreigner ,due to the deviation in the use of power ,and refused considering it an act of supreme sovereignty of the State and the procedures implemented by the Government with its supreme authority to preserve the sovereignty of the State and its entity at home and abroad .The decisions issued by the Government in implementation of the laws and regulations are not considered of this sovereignty nature ,because such decisions fall within the scope of ordinary governmental acts ,and do not hold such serious importance to elevate them to the rank of acts related to the supreme sovereignty of the state <sup>17</sup> .Furthermore ,measures relating to the nationalization of the property of some persons were considered acts of sovereignty, while guaranteeing the right to compensation<sup>18</sup>.

As a conclusion ,the Supreme Court surpassed administrative legality ,despite its importance due to the prevalence of administrative decisions ,but rather established constitutional legality, considering that the exercise of the legislative function can affect rights and freedoms ,through monitoring the constitutionality of laws and regulations .However ,political circumstances limited the ability of the Supreme Court in achieving the expected protection ,announced clearly in a number of its rulings <sup>19</sup> .The court further issued a decision regarding Law No36 . of 2012 related to managing the finances and properties of some people .The court confirmed that custody ,according to Law No 36 .of 2012 and its amending law ,is not considered a penalty of confiscation or seizure of finances or properties from its owner or deprivation of it but considered as a temporary measure related to a necessity that called for it and ends with its conclusion <sup>20</sup>“ .Therefore ,the appeal was unfounded and must be rejected .However, this law in terms of psychological ,social and economic effects is closer to penalty without

16 Supreme Court ,Administrative Appeal No 1 .of .3 Session of 8 March .1970 Supreme Court Journal. Year .6 Issue .1,2,3 p.64 .

17 Appeal Case No 1 .of Year .2 Session of 21 March .1956 Administrative and Constitutional Judiciary. Part One2 .nd Edition .1967 .p.36 .

18 Constitutional Appeal no 3 .of .19 Session of 20 March .1976 Rulings of the Supreme Court with all its circuits .p.141 .

19 Constitutional Appeal No 1 .of Year .19 Session of 10 March .1972 Rulings of the Supreme Court with all its circuits .p .131 .Stripping constitutional rights from legal protection under the pretext of regulating education or regulating litigation makes them a burden ,and it is not permissible for the legislator’s authority to regulate them to waste and confiscate them.

20 Constitutional Appeal No 24 .of Year .59 Session of 23 December.2013 Rulings of Supreme Court with all its circuits .Constitutional Court .Court publications .p.367 .

trial ,and differs from the law of isolation only in degree ,since the custodian responsible for observing the custody remains functional .The alleged purpose of the aforementioned law is to guarantee the legality of the properties of those concerned ;however ,this can be properly accessed through the judicial custody system in accordance with the Civil Law<sup>21</sup>. See more examples on the impact of political conditions in the next paragraph.

## Second: Results of the consecration of the principle of legality in the jurisprudence of the Supreme Court

Following up on the Supreme Court's jurisprudence in relation to legality ,the court attempted to advocate (1) the supremacy of the rule of law and (2) the protection of rights and freedoms, but the court's positions varied in strength ,whether under the previous regime ,or after the February 2011 uprising.

### 1. Supremacy of the rule of law

The Supreme Court ruling in the aforementioned Constitutional Appeal Case No 1 .of Year19<sup>22</sup> affirmed that the oversight of annulment derives from constitutional principles on the principle of legality ,the supremacy of the Constitution and the rule of law .The principle of legitimacy submission to effective judicial oversight limits altering such oversight with establishing or abolishing a law .Every system ,including exceptional systems ,based on the Constitution and the rule of law is subjected by default to the principle of the rule of law and therefore to the oversight of the Judiciary ,which is the only way to protect all rights and freedoms.

However ,the court refused arguing that a law was unconstitutional ,in which the legislator authorized the Supreme Leader to issue military laws and amend them ,while the document declaring the authority of the people states in its Article 3 that" the power belongs to the people and there is no authority for anyone else" ".Even if the legislative authority in Libya belongs to the People's Congresses that decide on the laws after discussion ,and then the General People's Congress formulates ,recites and issues them ,but it is not permissible according to the jurisprudence of constitutional law ,and only permissible in exceptional cases such as the case of necessity and the case of legislative mandate that the People's Congresses authorize the executive committees to enact specific laws ".The court considers that this authorization does not transfer the entire legislative mandate or its important aspects to the executive committees .It is strange that the court considered the Supreme Leader at that time an executive committee ,while deciding in public that the Leader does not rule<sup>23</sup>.

The court failed to defend the principle of the rule of law and therefore the rule of law under which a law that criminalizes retroactively was challenged .The court stated" 24,Since the

21 AFA article on Custody Law.

22 Session of 10 June .1972 Rulings of the court with all its circuits .P.136 ,131 .

23 Constitutional Appeal No 1 .of .55 Session of 11 November .2009 Constitutional Court .Supreme Court Publications .Part One .p .316 .Criticism of the Authorization Law .Koni Abuda .Fundamentals of Libyan Positive Law No.1 .

24 Constitutional Appeal No 3 .of Year .28 Session of 30 October .1982 Constitutional Court .ibid .p.138 .

legislator has defined the jurisdiction of the Supreme Court in Law No 6 .of ,1982 and this jurisdiction has not been transferred to another court and did not establish a new court with jurisdiction to decide on the constitutionality or legality of laws ,the court rules that it has no jurisdiction to consider the case“.

The court also decided that the argument of” partners not employees “was unconstitutional, and the subsequent encroachment of producers on private funds ,because” according to the Green Book ,it came as a final solution to the problem of producers imposed by the natural rule of equality between the elements of production that are based on production materials, means and products <sup>25</sup>.Politics and circumstances after the February 2011 uprising had an impact evident in Constitutional Appeal Case No 17 .of Year <sup>26</sup>,61 where it ruled that Paragraph 11of Article 30 of the Constitutional Declaration ,amended by the Seventh Constitutional Amendment issued on 11 March ,2014 and all its implications ,were unconstitutional .This ruling forced the country into a dark tunnel from which it has not emerged to this day <sup>27</sup>,and did not abide by the principle of legality even though the court issued it ,which is the guardian of legality .The court violated its own law ,which grants State jurisdiction to hear appeals and constitutional matters .The court ruled earlier after reviewing Article (2.1) 23 of Law No 6 .of ,1982related to reorganizing the Supreme Court ,amended by Law No 17 .of 1994<sup>28</sup> that” the competence of the Supreme Court circuits collectively in constitutional appeals is limited to adjudicating the constitutionality of laws and fundamental issues related to the Constitution or its interpretation ,if it is raised in a pending case before the courts .This competence does not extend to oversight of the Constitution itself ,whether in terms of approval or validity to implement it “.The court justified its decision” ,The provisions of the Constitution represent the rules and principles on which the system of government in the State is based occupy the forefront among the rules of public order that must be respected ,restrict the three legislative, executive and judicial authorities in their functions and powers ,set the limits and restrictions that control their activity ,and support each authority to adhere to its limits and to return it to its precise controls set by the Constitution ,otherwise its work will be in violation of the provisions of the Constitution “.The constitutional Judiciary during transitional stages ,must observe the rules of appropriateness ,but the court’s ruling disregarded the public interest and ignored the possible consequences ,despite the fact that the surrounding circumstances that the court’s judges know necessarily govern expertise in public affairs .The court had the ability to apply the concept of” appropriateness “and rule out the validity of House of Representatives session held in Tobruk outside of its declared headquarters in Benghazi.

This raises concerns that the court has sacrificed legality in an indefensible manner within the framework of the legality that the court devoted itself to in defending rights and freedoms on many occasions.

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Ruling Commentary.

25 Constitutional Appeal No 2 .of Year .27 Session of 6 December .1980 Constitutional Court .ibid .p130 .

26 Session of 6 November .2014 Constitutional Court .ibid .p.461 .

27 Evaluation of this ruling in our article on our page on Facebook.

28 Constitutional Appeal No 12 .of Year .60 Session of 24 March .2014 Constitutional Court .ibid .pp,441 .  
.443Constitutional Appeal No 12 .of Year .60 Session of 24 March .2014 Constitutional Court .p.441 .

## 2. Legality and protection of rights and freedoms

Lawpersons in Libya recall the famous ruling issued by the court headed by the Egyptian councilor Ali Ali Mansour ,in Constitutional Appeal Case No 1 .of Year .14 The court decided in favor of the right of the judge to resort to the Judiciary ,and said” ,The legislator has reached the pinnacle in violating the Constitution in form and content ,and in assaulting the independence of the Judiciary and the immunities of judges ,when the fourth article of the decree-law subject to appeal issued on 27 July 1967 was enacted <sup>29</sup>“.In this ruling ,the court defended the right to litigation and stated” ,Obstructing any citizen from resorting to litigation contradicts with all the constitutions of the world in their written and unwritten texts in their content and form ,provided that if any written constitution is devoid of stipulating the right of every citizen to resort to the Judiciary with the rights of defense ,as this rule is derived from the orders of divinity and from the natural rights of humankind since existence“.

In the session of 10 June <sup>30</sup>,1972 Constitutional Appeal Case No 1 .of Year 19 related to the right to education ,confirmed that stripping constitutional rights from judicial protection over regulations renders them void .The court ruled in favor of the principle of equality between citizens in resorting to the Judiciary and considered Article 6 of the Judicial System Law of” 2006 unconstitutional “,which deprives judges of the right to challenge decisions of the Supreme Judicial Council related to their national affairs” .Judges ,among other segments of society ,have the right ,like other individuals ,to resort to courts for any infringement of their rights .It is not justified to say otherwise ,as this entails a breach of the principle of equality, and a violation of the function of the judge responsible of ruling between people with truth and justice ,and knowing that he is deprived of this right if his rights are violated<sup>31</sup>“.

The Supreme Court considers that the principle of equality before the law and non-discrimination between citizens is not limited to its application to the general rights and freedoms stipulated in the Constitution ,but rather extends to the rights established by ordinary law ,and is a source of inspiration ,and therefore the law may not establish unjustified discrimination ,where similar legal bodies disagree over it .Thus ,the court ruled out the constitutionality of Article ,6 the Paragraph 1 of Law No 28 .of ,1971 which distinguishes between passengers according to the type of car transporting them” .The contested article created a form of discrimination between two segments of car passengers ,one of which is the segment of private car passengers ,and the other is the segment of passengers of other cars, by specializing the last segment with a distinct insurance treatment embodied in the inclusion of insurance coverage for passengers of this type ,while withholding this feature from private car passengers ,despite the fact that all these passengers are regulated by an identical legal

29        *ibid* .Constitutional Court .p.73 .

30        *ibid* .Constitutional Court .p .96 .Constitutional Appeal No 1 .of Year .18 Session of 9 April.1982 Constitutional Court .p .136 .One of the constitutional rights guaranteed to all citizens is the right to litigation, when exercised ,the litigate has the right to waive it by dropping the litigation ,and it is accepted ,provided that the opponent has no interest in continuing the lawsuit.

31        Constitutional Appeal No 2 .of Year .55 Session of 11 November .2009 Former Constitutional Judiciary. p.325 .

position among them ,and the same description of passengers applies to them<sup>32</sup>”.

In another ruling on Constitutional Appeal No 2 .of Year 53<sup>33</sup> related to the unconstitutionality of Article 8 of Law No 1 .of 1986 on the regulation of the participation of Libyans in public companies ,the court ruled that it is unconstitutional because” this contribution is not optional and is not a public burden stipulated by the law ,or in return for a service provided by the community “.The aforementioned article contradicts with the constitutional principle of” any human has the right to their effort ,and their production is safeguarded “,and only this person is able to estimate the extent of their need for it ,ability to do it ,role in it ,and right to choose a partner .The article further violates the principle stated in the Freedom Promotion Law No. 20of ,1991 which addresses the invalidity to deduct from a Libyan’s work production ,except in cases that the law imposes to contribute to public burdens or in return for the services provided by society.

Equality is protected by the Constitution and guaranteed by legality ,and is not arithmetic equality .The Supreme Court rejected an appeal related to a provision in Law No 4 .of,2012 regarding the election of the General National Congress .The provision stated that members of military bodies are not eligible to exercise the right to vote ,because” the principle of equal rights among citizens before the law does not mean that their groups ,regardless of their legal positions ,should be treated equally ,nor is it a rigid principle contrary to practical necessity, and is not based on opposing the whole form of discrimination ,since some are based on objective grounds ,without violating Article 6 of the Constitutional Declaration <sup>34</sup>.Article6 states that the violation of the principle of equality is achieved when discrimination occurs between the members of the same group ,whose positions and capabilities are similar ,where some of them have rights and privileges that others do not ,or carries some of the obligations without imposing them on the rest<sup>35</sup>”.

In conclusion ,a reference to the ruling of the Supreme Court with its circuits in the constitutional appeal No 2 .of Year 42 dated on 23 December ,2013<sup>35</sup> regarding the plaintiff filing against Law No 25 .of 1993 on amending the provisions of Law No 11 .of 1992 on the determination of some provisions related to real estate ownership in violation of the constitutional provisions in force at the time and the protection of ownership .The court considered the law as” unconstitutional “after reviewing the relevant texts and concluded that, ”the legislator ,under the provisions of the contested law as’ unconstitutional ,’has restrained the courts from considering and adjudicating the return of real estate allocated under the provisions of Law No 4 .of 1978 to their legal owners ,despite the reasons ,even if they were owned or allocated to others in violation of the provisions of the law .The court decided to

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32 Constitutional Appeal No 2 .of Year .52 Session of 12 November .2008 Constitutional Court .ibid .pp. .153 ,152 ,148

33 Session of 12 November .2008 Constitutional Court .ibid .pp.159 ,155 .

34 Enshrines the principle of equality and the principle of non-discrimination.

35 Constitutional Appeal No 6 .of Year .59 Session of 5 February .2013 Constitutional Court .ibid .pp,271 . .273

<sup>bis</sup> Constitutional Appeal No 2 .of Year .42 Session of 23 December .2013 Constitutional Court .ibid .p.338 .



obligatorily halt all lawsuits related to the law since its enactment ,which the court considered as a flagrant assault confiscation on the right of ownership ,without the consent of its owner, and the owner has the right to resort to the Judiciary to protect his right ,and that the law is in contrary to all constitutional texts and charters .The law subject to appeal is marred by the defect of constitutional violation and must be ruled unconstitutional.

### 3 .Establishment of legality corroborations

The Supreme Court demonstrated the manifestations of illegality in Administrative Appeal Case No 6 .of Year ,3 filed by the Italian national) Bosclod Domenico Silviolizito (against the Head of the Executive Council of the State of Western Tripoli on 26 June .1957 Illegality may be represented in the usurpation of power or failure to respect the procedural rules established to guarantee the required form ,or violation of laws and regulations in the broadest sense, including constitutional rules and common law principles ,and respecting final verdicts.

Deviation or abuse of power <sup>36</sup>is defined as denying the absolute capacity of any of the authorities in the State ,and it is a manifestation of the rule of law .Accordingly ,the court built sanctions to support legality ,and ensure that each authority adheres to its limits and considers the restrictions imposed in this regard in order to develop confidence between the people and the authority.

3.1 The administrative decision marred by the defect of lack of jurisdiction <sup>37</sup>is considered a null decision that does not limit the filing of a lawsuit to cancel it by a specific date .The court ruled out the validity of the order ,a royal decree by law to dissolve the Legislative Council of West Tripoli State and its consequences <sup>38</sup>.The court applied the same sanction on Article40 of Decree-Law No 6 .of 1969 regarding the election law .The court ruled out the validity of Article 40 of Decree-Law No 6 .of 1964 for its unconstitutionality and considered this text null and void <sup>39</sup>.A ruling that a law ,legal text ,or decision is unconstitutional without stating that it is null or void does not change the sanction.

3.2 The combined circuits of the Supreme Court stated" <sup>40</sup>,The oversight on the constitutionality of laws aims to protect and preserve the Constitution by ending the implementation of a contradicting law to the Constitution .This constitutional case is a valid case against the legislation itself ,the implication of the ruling issued on the unconstitutionality of a text or

36        ibid .Administrative and Constitutional Judiciary .Part One .p.79 .

37        " The defect of lack of jurisdiction varies ,sometimes it is objective ,such as an employee or an authority issues a decision within the competence of another authority ,and at other times the defect in jurisdiction is spatial ,as the management issued a decision that effect extends beyond the regional borders established to practice its competence .The defect of lack of jurisdiction is temporal ,as if a person exercises competence management after losing capacity to practice public business .(Appeal No 6 .of Year .3 ibid.

38        Constitutional Appeal No 1 .of Year 5 .1 April .1954 ibid.

39        Constitutional Appeal No 1 .of Year .12 Session of 11 January .1970 Constitutional Court .p.60 . Constitutional Appeal No 1 .of Year .14 Session of 14 June .1970 ibid .Declaration pf the unconstitutionality of the contested text and the same argument in Appeal No 1 .of Year .19 ibid' .the unconstitutionality of Article6 of Law No 28 .of 1971 on compulsory insurance'.

40        Constitutional Appeal No 1 .of Year .59 Session of 19 February .2013 Constitutional Court .ibid .p.275 .

law abolishes the implementation of the text or law and renders it legally null “The court adds” ,Since this effect is indivisible by nature ,the authority of the ruling issued on the unconstitutionality of a legislative text is not limited to the parties to the dispute in the case in which it was decided ,but rather its effect applies to all ,and it is an argument against them, and all State authorities are committed to it “.However ,according to the same ruling ,the binding force of a decision is relative ,and limited to the parties to the dispute if the ruling rejects the constitutional case .The court justified this distinction in effect by saying that the ruling of refusal” does not affect the challenged legislation for unconstitutionality ,as this legislation remains in place after the issuance of the ruling and possesses only relative binding force of a decision between its parties and within the limits of the reasons presented, and therefore ,it is permissible to respond to the unconstitutionality appeal against this legislation if new reasons are raised “.This distinction is not acceptable in principle <sup>41</sup>.The court attempted to follow a different procedure in its ruling issued in Constitutional Appeal No 1 .of Year ,60 Session of 23 December” <sup>42</sup>:2013 The rulings issued by the Supreme Court in the constitutional appeals have an absolute binding force .They are the rulings that determine the constitutionality or unconstitutionality of a particular legislative text .If the ruling is limited to refusing to challenge a constitutional matter without disclosing constitutionality ,then it does not have this authority and does not prevent the dispute from being raised again by other opponents or on other grounds “.The common conduct of the combined circuits was not adhered to by one of the court’s circuits ,which ruled” <sup>43</sup>,The rulings issued in constitutional appeals ,which by their nature are valid lawsuits in which the litigation is directed to the contested legislative texts with a constitutional defect have an absolute binding force ,and their impact is not limited to the litigants in the concerned lawsuits ,but rather this effect extends to everyone ,and all state authorities are committed to it<sup>44</sup>”.

3.3 The Supreme Court also adopted the idea of nullity in judicial rulings ,even though it was not stated in the implemented legislation ,which supported the protection of legality by claiming invalidity contrary to the established principle .The means of objecting to judicial rulings is to challenge them by one of the established methods of appeal<sup>44</sup>.

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41 Evaluation of the court’s conduct .Khalifa Al-Jehmi .Monitoring the Constitutional Laws in Libya ,Egypt, Kuwait and Bahrain .2018 .p.476 .

42 A published ruling in the constitutional court .ibid .p.385 .

43 Civil Appeal No 56 .of .2012 Session of 24 April .2013 Khalifa al-Jehmi .ibid .p.478 .

44 Administrative Appeal No 12 .of .20 Session of 9 May .1974 Administrative Appeal No 7 .of Year.18 Session of 10 January .1974 Indexed edition .Part One .Rule No .107 .p .132 .Rule No .110 .p.135 .

## Conclusion

The aforementioned cases of the Supreme Court enshrining the principle of legality based on constitutional documents and legislations implemented at every stage of the development of political life in Libya ,since the Constitution of Independence in ,1951 through the Constitutional Declaration issued by the Gaddafi regime in ,1969 and the current Constitutional Declaration issued on 3 August .2011 The most prominent findings of the researcher in this field are as follows:

1 -The court did not adopt the principle of dualism that is familiar to jurisprudence and Judiciary in many countries :legitimacy and legality .Legitimacy is one of the components of legality :An action or decision must be issued by a person or entity that has access to authority in accordance with the Constitution to be legal.

2 -The court's positions regarding legality ranged between strength and weakness ,depending on the political stage or circumstances at the time of adjudication of appeals .When the court's jurisdiction was withdrawn by Law No 6 .of 1982 on reorganizing the Supreme Court ,the court recognized the law without an attempt to challenge it .The court regained its jurisdiction in ;1994 however ,its General Assembly contributed to disrupting oversight by refraining from issuing internal regulations for nearly a decade until .2004 The General Assembly further attempted to freeze the work of the Constitutional Circuit ,until a ruling was issued by the Tripoli Court of Appeal annulling the decision.

3 -The court's initiation of legality control often strayed away from the rule of appropriateness, imposed by the nature of this control ,considering it a legal and political oversight at the same time .The court's ruling on the session of the House of Representatives is an example to witness that.

Accordingly ,the allocation of judges is an urgent necessity ,whether in the Supreme Court or an independent court ,and training them on specific qualifications ,while adopting the principle of diversity ,so that they acquire multiple specializations ,to avoid the same route of the court throughout its history since its establishment in .1954 The specialization that we defended here and was enshrined in a draft law on the judicial system in 2010 constitutes a pillar of the quality of justice and the independence of the Judiciary and contributes to protecting the principle of legality.

# Decentralization and Local Governance Requirements: A READING OF THE DRAFT CONSTITUTION

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### **Introduction**

Local administration in Libya has long endured the effects of the centralized governance system of the former regime, primarily between 1969 and 2011. Centralization was a major reason for the increased resentment against the Gaddafi regime and led to the downfall of his regime in February 2011. For a long time, the central authority monopolized the decision-making process, leading to a poor distribution of services and a significant deepening of disparity among cities and regions in Libya.

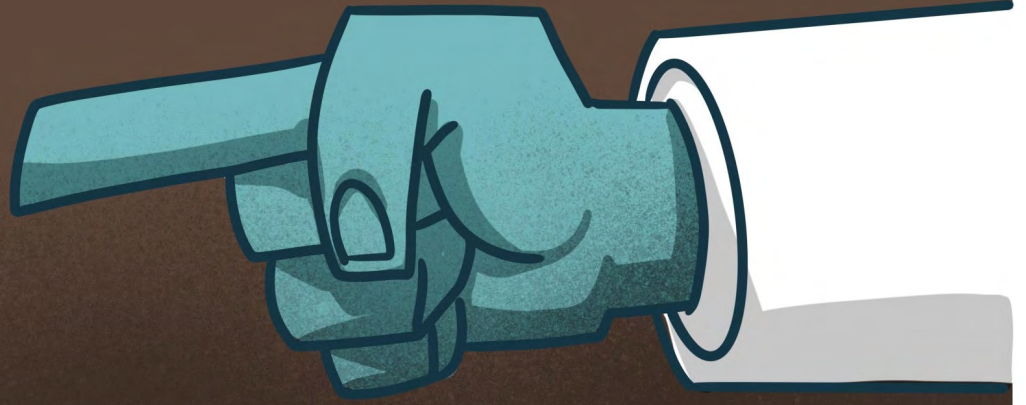
The political shift in February 2011 further increased the demands for the implementation of decentralization and the redistribution of power and resources among the various levels of governance. Such demands came as a response to the feeling of injustice emerging from the unfair distribution of resources and political values over the past decades. Law No. 59 of 2012 was enacted for the local administration system to lighten the centralized system in Libya but was unable to regulate the relationship between the central authority and local authorities, especially after suspending work in the governorates in accordance with Amendment No. 9 of 2012. The Constituent Assembly or Constitution Drafting

Assembly was elected in accordance with Law No. 17 of 2013, in an attempt to remedy this shortcoming in its draft. Numerous attempts to draft the chapter on "Local Governance," initially titled "Outputs of Specific Committees," in December 2015, reflected the confusion of the Local Governance Committee, and lack of agreement on a single system to establish a local authority with clear structure and competencies. Subsequently, the local governance chapter organized a more coherent draft than the preceding one. The third attempt known as the "Consensus Committee" draft, was subjected to some changes before the Assembly finally approved it in July 2017.

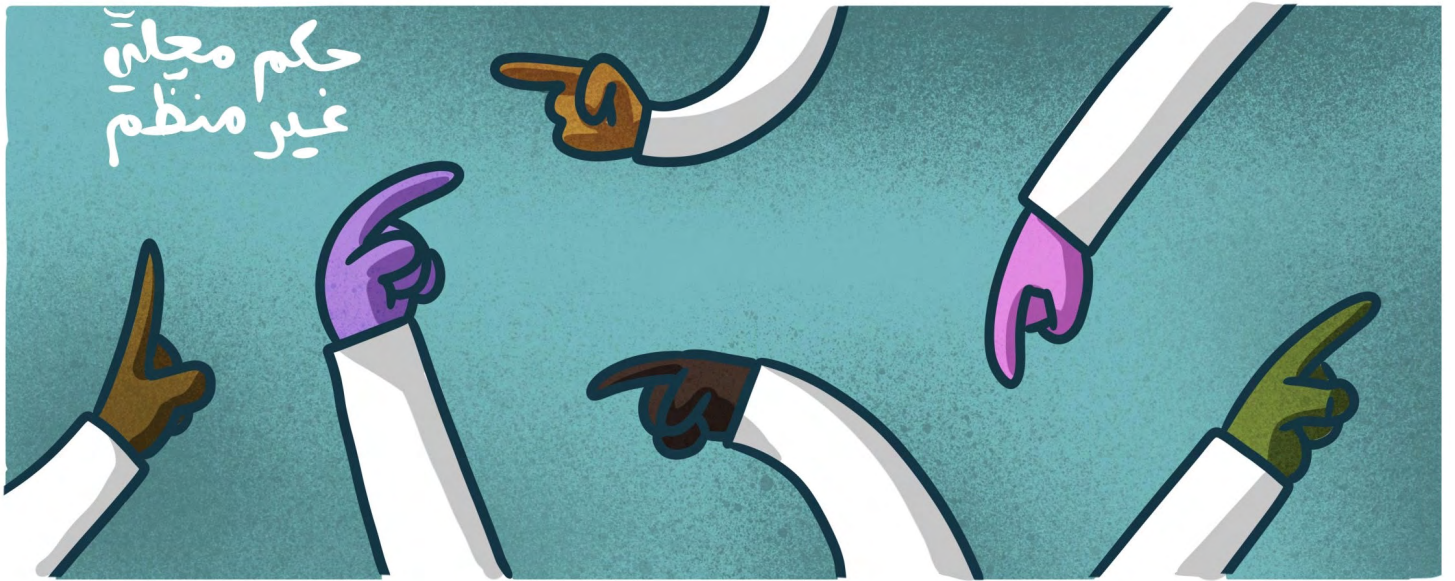
### **Conditions for the Independence of Local Governance in the Draft Constitution**

The United Nations Development Program defines local governance as "comprising the mechanisms, processes and institutions, through which citizens and groups articulate interests, exercise legal rights, uphold obligations and mediate differences.» Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs, to achieve local development and deliver services in a participatory, transparent, accountable, and

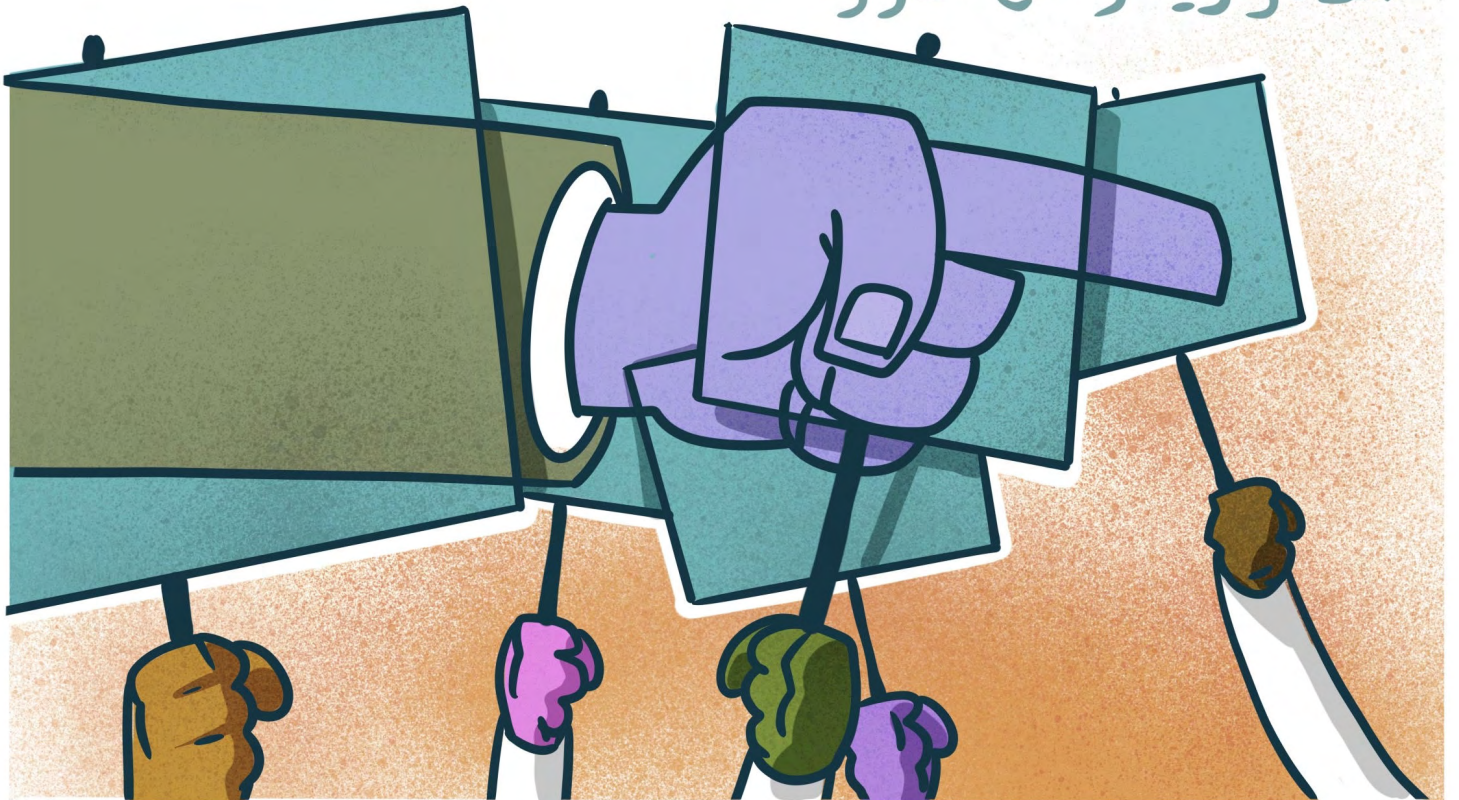
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equitable manner. This requires enabling local governments to deal with power and resources and build their capacities to act as responsive and participatory institutions responsible for the concerns and needs of all citizens. Local governments were concerned with popular democracy and enabled citizens, communities, and their organizations, such as community-based organizations and non-governmental organizations, to participate in local governance and the local development process as equal partners. Local governance

- Election of a local authority that represents the citizens of the local community, works to manage local affairs, and fulfills the needs and aspirations of citizens in providing necessary services and achieving local development.

The need to meet the above-mentioned conditions prompts us to wonder about the effectiveness of the 2017 draft constitution in terms of articles promoting decentralization to be a viable model for achieving local governance in Libya.

**The adoption of the “independent legal personality” principle aims to enable local units to manage their local affairs independently**

The effectiveness of the local governance model can be monitored through the following:

- First: Recognition of legal personality, financial, and administrative independence
- Second: Elections and strengthening participatory democracy in the decision-making process

is based on a constitutional basis, with relation to governance and the distribution of competencies between the central authority and the rest of the administrative levels, and it requires a number of conditions including:

- The need for local governance units to enjoy independence, enabling them to exercise their powers, develop policies, and take decisions regarding local affairs, and implement them without direct interference from higher authorities.
- The availability of sufficient financial and human resources to enable the local governance unit to carry out its tasks without relying on others.

**First: Recognition of legal personality and financial and administrative independence**

Article 156 of the draft constitution indicated that local governance units enjoy legal personality and administrative and financial independence, making these units a legal entity independent of the State at all administrative, legal, and financial levels. The article affirms the independence of local units by managing their affairs in accordance with the principle of “free management,” indicating that local units assume their affairs freely within the framework of the unity of the State and the freedom to dispose of resources. Local units have the freedom to exercise their powers within the current

situation, while maintaining the control of the judiciary monitoring these actions. The concept of free management carries the same connotation as the concept of “the autonomy of local units,” which may confuse the interpreters of the constitution, when enacting laws and establishing organizing regulations, and further deciding on disputes that may arise between local units later. The adoption of the “independent legal personality” principle aims to enable local units to manage their local affairs independently and to dispose of their own budget separately from the State’s general budget. This is difficult to achieve with the primary dependence of local units on central resources as a source of funding, as stated in Article 159.

### **1.1 Administrative independence**

Article 155 of the draft constitution organized the State into governorates, municipalities, and other non-specific administrative levels. Rather, the legislator is left to specify these levels according to criteria of the requirements of national security, population and geography, and economic and historical factors. The specification of other administrative levels is not mentioned in the draft and will be defined by future authorities, which will create a lot of confusion regarding the distribution of competencies. Article 158 of the draft related to defining the competencies of local governance units states that there are three types of powers: (1) autonomous power, (2) powers transferred from the central authority, and (3) powers shared with central authority; and this cannot be decided by the law because it is related to the distribution of powers according to the principle of subsidiarity.

The competency to establish other additional units was left to future authorities, and the failure to specify the type of powers that the units of local administration exercise, through various administrative levels, whether exercised by themselves, or shared with the central authority, or transferred to it, raises many questions. How to guarantee the application of the principle of subsidiarity to enhance the true significance of the concept of administrative and financial autonomy, with the constitutional text failing to specify the final number of administrative levels for local administration units, and the subdivision of competencies among them. This negligence allows the next authority to limit the work of transferred or autonomous authorities with the presumption of the weakness of financial resources of these units, and that the central authority lacks an abundance of resources to finance these units in the required manner. So, the situation remains stagnant, and decentralization is not achieved, thus narrowing the scope for free management.

### **1.2 Financial autonomy of local governance units**

The implementation of local governance requires the elected local bodies to be provided with some expenditure responsibilities, and power to mobilize local revenue to finance the activities to be carried out, to enable these local bodies to achieve independence of their financial decisions. To finance expenditures requires a process of providing financial resources to provide services and respond to the needs of the population, while playing a key role in achieving local development and fiscal decentralization, including both revenue and spending authorities. Revenue authority

refers to the share of taxes that local levels receive either from local voters or the central government, while the spending authority refers to the funds that are spent at the local level on public projects and services from local budgets.

The local units' degree of financial independence affects their freedom to work, and the extent to which they can initiate planning for local development projects,

transferred to local governance units from the central authority is associated with appropriate financial resources. Local governance units have the freedom to dispose of their resources within the framework of the approved budget, according to the principles of good governance.

If local governance or administrative units at the local level have the legal power to levy taxes, the tax base remains very weak, and then the central government's transfers will be heavily relied upon. The shift toward financial decentralization requires a central state capable of managing macroeconomic policies, the availability of technical and administrative capabilities and skills for local levels, and the development of clear and direct regulations to determine the responsibilities of expenditure and the allocation of revenue and transfers from the central government to the various sub-national levels with full transparency and clarity. These requirements are not available at the present time, which will later affect the timeframe required to shift toward financial decentralization as a condition of local governance.

**The implementation of local governance requires the elected local bodies to be provided with some expenditure responsibilities,**

increase the volume of investment, and thus provide more job opportunities for young people who are willing and able to work in local communities, and thus raise the standard of living of local citizens.

The draft constitution indicated in Article 159 that governorates and municipalities have central resources consistent with the amount necessary to carry out their specializations and self-resources such as fees, penalties, and local taxes and the returns of their investments, gifts, and bequests, and loans and any other returns they determine, according to the law. The State guarantees the financial balance between local governance units to ensure solidarity between them. Every competence

Furthermore, failure to define the terms of reference and leaving them to the law raises concerns regarding the associated assessment of the central authority for the resources transferred according to the terms of reference to the local units. The State's financial system impedes direct collection of localities and requires the transfer of revenues collected from local governance bodies to the Public Treasury, as stated in Article 176. This requires a review of the financial system and its regulating law.



## Second: Elections and strengthening participatory democracy in the decision-making process

### 2.1 Elections

Elections are a crucial pillar in strengthening local governance and are related to the democratic and participatory process in utilizing the role of citizens in determining members of the local authority, and further engaging in the decision-making process to establishing development policies.

In Article 157, the legislator mentioned that the selection of provincial councils and municipalities is conducted through general, free, direct, and anonymous election, and that the formation of the provincial council should consider the representation of the municipalities within its scope, in accordance with regulations of the law. The draft constitution included, through Article 205, a special quota for women to represent 25 percent in municipal councils for a period of two elections only, to guarantee greater opportunities for women to participate in local bodies.

The legislator refrained from specifying the mechanism for selecting the president of the provincial council and the municipal council, and refrained from determining whether the process is run through a direct anonymous ballot among the elected members, or an automatic designation as governor or mayor of the municipality for the one with the most votes. This reluctance to define the selection mechanism of the president of the governorate and the municipal council, increases the polarization within the municipal councils, since elections are no

longer subject to the will of the voters, but to a consensus based on fragile balances and ideological tensions, emerging immediately after the announcement of the final results of the municipal elections, and causing tension and instability between council members. This is the case of the elected municipal council in Benghazi 2015-2014. Numerous opinions suggest that the aforementioned details should be included in the regulating law, and only requires amending the legal text to meet this standard. Others suggest that there is no objection to referring to these details within the articles of the constitution as a foundation for the desired democratic basis.

The draft constitution failed to address the possibility of having two levels of administration for the governorate, the first is the head of the provincial council, and the second is the position of Governor, and whether the latter was appointed to represent the executive authority, or the sufficiency with the Head of the Provincial Council only. A question arises about the nature of the relation and the coordination mechanism between the executive and local authorities, if any. The popularly elected Head of the Provincial Council is unable to express the directives of the central authority and supervise its implementation under the popular will. The legislator left these decisions to the upcoming law and the next authority, when it was possible to decide the topic of local governance, and not leave it to the whims of the legislative authority later, since it affects the foundations of local governance.

## 2.2 Strengthening the mechanisms of participatory democracy adopted at the local level

Participatory democracy is a form of joint management of public affairs, involving the residents of the local unit in political decision-making by inviting them to consult with local bodies about public projects or decisions. This is done through open public debate to unify visions and perceptions between the local authority and the residents.

**the article is general and nonspecific, and lacked emphasis on some participation mechanisms overlooked by the laws, such as participation in setting budgets, and the obligations entrusted to local units to facilitate the involvement of citizens, civil society, and the private sector, which the draft constitution neglected**

The availability of sufficient information among participating citizens is crucial for contributing to the discussion about the nature of the programs offered, and this falls within the standard of transparency that requires the availability of accurate data in a timely manner, to support decision-making and expand the scope of participation, oversight and accountability.

Article 163 of the draft constitution discusses local governance units' adoption of the necessary measures to guarantee the participation of citizens and civil society organizations in preparing local development programs and following up on their implementation in accordance with the regulations of the law. However, the article is general and nonspecific, and lacks emphasis on some participation mechanisms overlooked by the laws, such as participation in setting budgets, and the obligations entrusted to local units to facilitate the involvement of citizens, civil society, and the private sector, which the draft constitution neglected.

Although Article 54 (discusses obligating the State to set measures of transparency, the right to exchange and access information, and multiply its sources without affecting military and public security confidentiality, the requirements for the administration of justice, the sanctity of private life necessary for transparency, and confidentiality of agreements with another country and the confidentiality of the source), it was better to address this within the context of obligating local units to provide the necessary information for the exercise of participatory democracy by the residents of the local unit in accordance with the requirements of governance, and further specifying the mechanisms used such as petitions, demands, dialogue, and consultation to guarantee the participation rights of the local population.

## Conclusion

The extent to which the draft constitution reinforces the principles of local government

requires determining the nature of the administrative powers enjoyed by decision-makers at the local and national levels, and how officials of the higher levels of the local authority are selected in terms of appointment and election, and finally the nature of expenditure powers for the central government and local government. Despite referencing important principles of local governance represented in free management, expanded centralization, and subsidiarity, the constituent body failed to reach a final consensus on many aspects related to the authorities of local governance. Therefore, the Constituent Assembly decided to leave the decision to the next elected bodies, which leads to the continuity of the same concerns regarding the sustainability of the status quo.

The experiences of other countries indicate that the exclusion of the decentralized system of Government with its important details from the constitution will often pose an obstacle in the foundation of effective decentralization, as it will depend on political balances and their position on local governance and the promotion of decentralization. These concerns increased due to the absence of detailed transitional provisions clarifying when the main legislation implement local governance into reality and when will it be enacted, and the absence of a provision to impose penalties on the next council if the dates included in the constitution are not respected. The negligence of addressing these concerns indicates that it will take a long time before the implementation of the new decentralization system, further delaying the reformation of local authorities to prepare for the requirements of expanded decentralization and free management.

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# A research paper on

# **THE CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN THE LIBYAN DRAFT CONSTITUTION**

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One of the foundations of the state of the rule of law is respect and protection of human rights, including the separation of powers, and the rule of law by all individuals and public and private institutions. The constitutional framework plays a pivotal role by regulating the relationship of state institutions, powers, and mutual functions among each other, and further between the latter and individuals in society. The effective protection of human rights requires a constitutional framework guaranteeing the protection, respect, and implementation of human rights, adopted through a representative body following a participatory process at the national level.

The process of drafting a new constitution, or amending an existing constitutional framework, represents an important event for the state and society and poses an opportunity to strengthen constitutional guarantees for the protection of human rights. The implementation of the rule of law and respect for human rights begins with drafting a new constitution and the method of designing the drafting this constitution because of its impact on the final draft of the constitution, whether in terms of content or legitimacy and effectiveness.

Libya's Constitution Drafting Assembly (CDA) for drafting the constitutional draft, amid political division, adopted the draft constitution with the approval of more than two-thirds of its members, after 74 plenary sessions of the CDA in July 2017. The adoption of this draft can be described as a participatory process. The CDA included representatives from all parts of Libya and communicated with political and social parties throughout the process of drafting the constitution, whether through official or unofficial channels. Its deliberations were public and relatively transparent. The CDA planned to present a referendum for approval, according to the constitutional declaration and its amendments. However, more than five years have passed since the completion of the draft, and it has not been presented.



There were numerous debates on the necessity of activating the draft Libyan constitution of 2017 and holding elections according to its jurisprudence after a referendum, following the faltering of holding the presidential and legislative elections scheduled for December 2021, as required by the international road map for a political solution. In addition, debates on the draft constitution raised the question about the extent to which it contains guarantees for human rights, or, whether there is a text in the draft devoted to these rights and freedoms, and further the procedures and institutions to guarantee respect for the text enshrined? This paper discusses, in general, each of the rights and their guarantees, including the standard aspect of guaranteeing human rights and the institutions guaranteeing respect for human rights (first). It also discusses the procedures for defining rights and freedoms (second).

### **First: Rights and guarantees:**

#### **A. Enshrining rights and freedoms in the draft constitution:**

Constitutions are usually preceded by an introduction called a preamble, but it is not necessary. Some constitutions do not include an introduction. However, the tendency of various constitutions is to adopt a brief introduction, including a reaction to the past and an aspiration for the future. Numerous constitutions have references in the introduction to values, including respect for human rights, human dignity, the rule of law, social justice, democracy, or other religious principles and values. The preamble plays an important role in interpreting the articles of the constitution and the rights contained therein. Contrary to previous draft constitutions, the draft constitution of 2017 had no preamble and merely stated, "We, the people of Libya, Libyan men and women. Herby adopt this Constitution." The draft constitution devotes an entire chapter to rights and freedoms, through Articles 31 to 66. Similar to many constitutions, it stipulates a list of rights and freedoms as legal standards, rules, and principles. Articles related to rights and freedoms in the draft constitution are not limited to those in the chapter on rights and freedoms. Others are distributed among the legal articles in all its chapters. The first chapter contains the right to a healthy environment (Article 18), and some cultural rights, including the right to identity and language (Article 2), citizenship rights, equality and non-discrimination (Article 7), and equal opportunities (Article 16). Chapter four on the judicial authority enshrines rights related to the right to a fair trial, such as the right to a natural judge and the prohibition of exceptional judiciary (Article 123), and the right to litigation on two levels (Article 122). Other chapters include constitutional provisions stipulating the method of activating a right mentioned in another article of the draft constitution. Article 185 includes in terms of transitional provisions related to guaranteeing a quota for women of 25 percent of the total seats in the House of Representatives and local councils for two electoral terms, which is stated in Article 49 related to the support of women's rights, and to guarantee the activation of women's right to representation in general elections. The right to participate in political life (Article 42) includes citizens and civil society submitting legislative proposals and is confirmed in Article 72 related to draft laws and their proposals, and referred the regulation of this right to law.

The draft constitution represents progress in enshrining rights and freedoms at the level of Libyan national law. However, several articles included in the constitution may raise a number of problems. The draft constitution recognizes the right to equality and non-discrimination for male and female citizens only, without taking into account the rights of individuals subject to Libyan legal jurisdiction (Article 7). The draft constitution recognizes the right to nationality, as a relative and not absolute right, and the possibility of withdrawing nationality from Libyans based on considerations of public interest (Article 10).

The draft constitution enshrines, in the rights and freedoms chapter, various political and civil rights, including rights to human dignity (Articles 31, 32, and 34), the right to safety (Article 32), freedoms of the press, media, expression, and publication (Articles 37 and 38), and electoral rights, such as the right to vote and to be elected. (Article 39). It includes rights on participation in political life, formation of political parties, civil society, demonstration, assembly, transparency, and the right to information (Articles 40-43 and 46). It includes rights related to a fair trial, which appear progressive and detailed on most of the elements of a fair trial, supporting alternative punishments for penalties of deprivation of freedom (Articles 62-64).

The rights and freedoms chapter further includes a group of economic, social, and cultural rights, right to water and food (Article 47), right to health (Article 48), right to a decent life, right to social security (Article 50), right to education (Article 52), and right to work (Article 56). The Libyan draft constitution addresses the issue of access to the right, and further the quality of services provided for the realization of the right. Article 45 of the draft constitution stipulates, "The right to comprehensive and quality healthcare for all citizens." The article does not limit the right to only access to health services, but to quality health services. These articles related to rights and freedoms, whether distributed over different chapters of the draft constitution or included in the list of rights and freedoms, raised some observations and questions, the most important of which are:

The first observation relates to whether the list of rights and freedoms in the draft constitution is exclusive to these rights or inclusive to other rights. The draft constitution does not present a clear answer to this question. However, we can deduce that the list is non-exclusive and open, from other constitutional articles, including Article 66 on legislative and executive policies, stating, "All legislative and executive policies shall be based on the protection and promotion of human rights." However, the case of the draft constitution explicitly stipulating that the list of rights and freedoms is open is more useful and worthy, similar to other countries' constitutions.

The second observation relates to the enforceability and justiciability of rights and freedoms. Despite the number of rights the constitution includes, the constitutional texts must be enforceable and litigated, and the courts have the authority to enforce these texts. Civil and

political rights are subject to judicial review, and thus do not pose any problem, but when it comes to economic, social, and cultural rights, the debates continue. The usual argument presented is that such rights often express political aspirations or goals and depend on the resources availability to achieve them, and that litigation in these rights means interfering in political choices amid scarce resources. The Libyan draft constitution lacks mechanisms for the implementation of economic and social rights, which could facilitate the work of the judiciary and facilitate litigation of these rights. These mechanisms include stipulating a specific percentage of the state's general budget to allocate for health, education, scientific research, or other mechanisms for the realization of rights, to avoid being mere aspirations or a dead text.

The third observation relates to the contradictions of exercising some rights and freedoms. Article 7 enshrines the equality of male and female citizens in and before the law and prohibits discrimination for any reason. However, other articles enshrine the "Islamic Sharia" as a source of legislation, which proposes contradictions, including those related to equality between women and men.

#### **B. Institutions guaranteeing rights and freedoms in the draft constitution:**

We cannot avoid discussing the mechanisms and institutions effectively guaranteeing respect for the constitutional legal text and its implementation. Setting controls and regulations on restricting any rights is not sufficient to guarantee effective exercise of these rights. Institutions that protect rights and freedoms against the arbitrariness of the executive authority and the legislator must exist. The Libyan draft constitution provides the necessary institutional guarantees for this, including the ordinary judiciary, the constitutional judiciary, independent bodies, and the National Institution for Human Rights.

##### **I. Ordinary Judiciary:**

Chapter four of the draft on the judicial authority defines the basic functions of the judicial authority in administering justice, guaranteeing the rule of law, and protecting rights and freedoms. Judicial oversight represents an essential guarantee related to defining rights in all democratic systems, and its independence is a crucial condition for the effectiveness of this oversight.

The draft constitution provides a coherent constitutional framework regarding the independence of the judiciary. The constitution states, "Judges shall be independent in performing their functions, shall only be subject to the law, and adhere to the principles of integrity and impartiality. Interference with the work of the judiciary shall be a crime that is not subject to the statute of limitation." The draft constitution provides a set of guarantees on the appointment and dismissal of members of the judiciary, stating that the Supreme Judicial Council is the only authority empowered to make decisions affecting judges. The draft constitution refers the formation of the Supreme Council to the law, in Article 126 and stipulates the necessity of respecting its independence when formed. However, this referral



opens a source of great weakness and allows the Council to be easily exploited by the political majority in the Shura Council in the future. This may render the independence of the Supreme Judicial Council void and negatively affect the independence of the judiciary in general.

Chapter four of the draft constitution provides other guarantees related to the judiciary, including the prohibition of exceptional courts, and the exclusive jurisdiction of military courts over military crimes committed by soldiers. This enhances the independence and impartiality of the oversight role of the ordinary judiciary over the arbitrariness of the state regarding the exercise of rights and freedoms.

### **II. Constitutional Judiciary:**

Chapter five of the draft constitution includes the establishment of an independent constitutional court consisting of 12 members, of whom the Supreme Judicial Council shall choose six, and the President of the Republic and the legislative authority each shall choose three (Article 136). The court is responsible for monitoring the constitutionality of laws and regulations for the work of the executive and legislative bodies. The Constitutional Court further looks into the constitutionality of constitutional amendment procedures and cases related to the legislative authority not fulfilling its constitutional obligations (Article 139). The constitutional judiciary plays a pivotal role in guaranteeing rights and freedoms in the draft constitution, through the subsequent oversight on the constitutionality of laws, and in reviewing and amending the constitution. Article 19 stipulates that any amendment to the constitution must not prejudice the principles of political pluralism and the peaceful transfer of power, nor the guarantees related to rights and freedoms, except for the purpose of strengthening them. The upcoming Constitutional Court plays an essential role in guaranteeing this.

### **III. Independent Bodies:**

In numerous contemporary constitutional systems, independent bodies play a fundamental role in promoting societal accountability of public authorities in the state, including promoting transparency, pluralism, combating corruption, and promoting and respecting human rights. Chapter seven of the draft constitution includes a group of independent constitutional bodies, stipulating their administrative and financial independence necessary to carry out their duties effectively.

The National Council for Human Rights is one the most important of these institutions, working to promote and protect human rights in Libya. The draft constitution sets general principles relating to independent bodies and the National Council for Human Rights. Guaranteeing the independence of the Council and equipping it with a broad and strong mandate, in accordance with the Paris Principles, enhances the institution's ability to protect and promote human rights at the national level.

## Second: The limits of rights and freedoms in the draft constitution:

### A. Restrictions on rights and freedoms:

Similarly to being completely silent about restrictions, the United States Constitution of 1787 left the control of freedoms to law and the judiciary. Constitutions follow two methods of setting and controlling restrictions on rights and freedoms. The first method is special limitation, placing restrictions on each of the rights guaranteed by the constitution with a set of special controls. The second method is based on including an inclusive article within the constitution that guarantees the controls applicable to all rights and freedoms. It is also possible to combine the two previous methods, which some call the method of double defining rights and freedoms.

The Libyan draft constitution adopts a double definition of rights and freedoms. Some articles on rights and freedoms stipulate some limits. The legal articles vary regarding the controls of these restrictions, sometimes clear and accurate. Others are unclear and completely inaccurate. Some articles refer the regulation of this right or its limits to law at other times. Article 34 relates to human dignity and stipulates, "Forced labor shall be prohibited unless it is out of a necessity or to carry out a penalty in accordance with a court ruling." This article of the draft constitution fails to specify the conditions of authorizing forced labor. Article 37 guarantees freedom of expression and publication, attributing this right to specifying that the state must "take the necessary measures to protect private life and prohibit incitement to hatred, violence, and racism based on ethnicity, color, language, gender, birth, political opinion, disability, origin, geographic affiliation, or any other reason whatsoever. Accusations of unbelief (takfir) and imposition of opinions by force shall also be prohibited."

More articles came with other conditions related to placing restrictions and limits on the exercise of freedoms, including freedom of the press and the media. Article 38 focuses on guaranteeing the freedom of the press and the media, pluralism, and independence of the press and media outlets, and prohibits their suspension except through a judicial order, and their dissolution except through a judicial ruling. The draft adopted these controls regarding some other articles, such as Article 41 on civil society.

The draft constitution established in Article 65 an inclusive article to define rights and freedoms, stipulating conditions necessary to place restrictions on rights and freedoms. Article 65 includes a set of overlapping and sequential guarantees that accompany the process of limiting rights.

The article mentions that any restriction on the exercise of rights and freedoms must be "necessary, clear and specific," which establishes that any infringement of rights must be justified by some necessity and that this infringement be clear and specific. However, this article of the draft constitution does not specify the cases of necessity, leaving that to the whim of the legislator at a later stage. The Tunisian constitution of 2014, for example, contains

in Article 49 cases of necessity in which infringement of rights and freedoms is permitted. Article 65 sets the condition of proportionality with the interest in protection, by measuring the appropriateness of the restriction imposed with its purpose and weighing whether the restriction poses a threat to the interests of the right holder, compared to the importance of the factors justifying it.

Article 65 further sets a condition for any limitation of rights, which is the non-return of the guarantees established by the law. This means that any legal texts restricting rights and freedoms should not limit rights to a greater extent than in existing laws. The article contains conditions of non-conflict between limitations and the provisions of the constitution, which enshrine the principle of the supremacy of the constitution and its provisions. However, there are concerns to justify adding this aforementioned sentence, considering it a clear reference to a previous condition that Islamic Sharia is the source of legislation (Article 6), which could conflict with international standards of rights and freedoms in issues related to inheritance. The article remains vague on who can place restrictions on rights and freedoms or their regulation, whether this is within the exclusive jurisdiction of the law, or is there possibility for the administration's will to interfere. Some constitutions assign exclusive competence in the field of rights and freedoms to law and choose to have laws on rights and freedoms laws that are adopted by an enhanced majority.

### **B. Exceptional cases, rights, and freedoms in the draft constitution:**

Most constitutions provide for the regulation of the state of emergency, for its importance to the rule of law, respect for rights and freedoms, the stability of the political system, and the separation of powers. The stipulation of the procedures for declaring a state of emergency or other exceptional cases in the constitution clearly and precisely is a guarantee that such procedures will not be abused. These constitutional exceptions enable the partial or total suspension of the rights and freedoms contained therein.

The Libyan draft constitution of 2017 addresses these cases in chapter 12 on general provisions in Articles 187 and 188, mentioning two exceptional cases. The first is the state of emergency and the second is the state of martial law. Articles 187 and 188 explain the procedures and reasons for declaring each of the two states.

This suspension is considered a threat to the exercise of rights and freedoms. Therefore, many constitutions establish a set of guarantees to effectively protect rights and freedoms in states of emergency and other cases of exception, including the procedures for declaring the state of exception, its reasons, and method of practice.

According to recognized international standards, the declaration of a state of emergency must be subject to a set of conditions, including the state of emergency must be time-bound or temporary, and to achieve goals related to the public interest, and the possibility of reviewing the decision to declare a state of emergency.

The powers accompanying the state of emergency must be limited as much as possible, the measures taken must be proportionate to the intended purpose, and effective remedies must be made available to persons. The stipulation must include a set of unlimited rights, including the right to life and freedom from torture, slavery, and servitude, etc.

The Libyan draft constitution establishes a set of procedural controls for declaring both state of emergency and a state of martial law. The state of emergency is declared by the President of the Republic in specific cases exposing the country to catastrophe, siege, or danger threatening its safety. The president declares the state of emergency in consultation with the Prime Minister and the President of the Shura Council, with the latter approving or revoking it three days after announcing it in the event that the Shura Council is convened or seven days in the event that it is not convened. Article 187 of the draft constitution specifies 60 days as a period of time for a state of emergency based on the approval of the majority of the Shura Council members, renewable for another 120 days based on a two-thirds majority of the council.

In the second case, the President of the Republic can declare the state of martial law in cases of war and serious threat to the security of the country, based on a request submitted to the Shura Council, provided that the Council decides on the request by an absolute majority within three days. Article 188 stipulates that the state of martial law cannot be imposed on the entire country, limiting its geographical scope. However, the article does not address the issue of the duration of the state of martial law, and refers that to the law regulating its provisions. The article only contains raising this case within the competence of the Shura Council, based on the request of the President of the Republic. In addition, the President of the Republic must submit a monthly report to the council.

Article 189 adds a set of controls and restrictions to both states of emergency and martial law and refers to the law some organizational and procedural matters for both states. This includes the reasons for declaring the state, time period, scope of each of the two states, and the rights that may be restricted. The draft constitution should have specified these matters, given their importance to the effective protection of human rights, and the guarantees that this entails of non-arbitrariness, and not leaving these matters to the legislator's whim.

The draft places in the second and fourth paragraphs of Article 189 a set of restrictions on the exercise of rights and freedoms. The article requires that no restrictions be placed on rights and freedoms during states of emergency and martial law and can only be placed to the extent necessary to maintain public security and public safety of the country, considering Articles 31, 32, and 34. However, this does not explicitly indicate whether these rights are part of the list of rights that cannot be restricted. The fourth paragraph of the same article adds, clearly and explicitly, that the right to a natural judge and the prohibition of trying civilians before military courts are among the rights that cannot be violated.

Article 189 further adds a set of restrictions on the practice of both the state of emergency and the state of martial law. These restrictions include the submission of all decisions and actions taken during the two states to the oversight of the judiciary, respect for the principle of legality, and the inability to amend the constitution, suspend its provisions, or dissolve elected councils.

The legal framework proposed in the draft constitution regulating both states of emergency and martial law provides a set of procedural and practical guarantees related to taking the decision of the declaration of the two states and controlling and restricting practices and powers during the two states. However, the draft constitution referral to the law to organize procedural issues and measures, such as the time period for both states and the rights that can be restricted, may render these guarantees void.

### Conclusion:

Three years following its foundation, Libya's Constitution Drafting Assembly (CDA) adopted the Libyan Draft Constitution of 2017. The draft constitution contains many human rights guarantees, including its dedication to a wide range of civil, political, economic, social, cultural, and sports rights, distributed among most of its chapters. The draft constitution comes with a set of procedures constituting immunity for the rights and freedoms enshrined in the draft constitution, including the procedures for limitations and restrictions on rights and freedoms and according to Article 65 of the draft.

Despite all these guarantees, the draft constitution remains incomplete in its current form. Some articles provide vast scope for the authority of the legislator and political authorities at a later stage. This case may void the guarantees of the draft constitution and needs to be addressed.

Interview with Judge

Abdul Karim Bouzid

# THE STATUS OF INTERNATIONAL AGREEMENTS IN LIBYAN LAW AND JUDICIARY AND THE PRINCIPLES OF THE RULE OF LAW

**Abdul karim Bouzid al-Mesmari**

Judge at the Primary Court of South Benghazi, holds a PhD in Public International Law, from Faculty of Law, Ain Shams University in Egypt.

Adala For All

1- Theoretically, what is the status of international agreements ratified by the Libyan state as a source of law?



Abdul karim Bouzid al-Mesmari

On the status of international agreements in the Libyan legal system, neither the constitutional nor the ordinary legislator provided a general rule governing this topic. The ordinary legislation includes several scattered articles granting priority in application to international agreements, if the legislative texts conflict with the agreements, but within a limited framework. This framework includes the case of extradition in the Criminal Procedure Code, and the case of the rules of conflict of laws in Civil Code.



Adala For All

2- What is your opinion on the development of the jurisprudence of the Libyan Supreme Court regarding the principle of the supremacy of ratified international agreements?



Abdul karim Bouzid al-Mesmari

Due to the absence of a legal text, the Supreme Court attempted to address the supremacy of international agreements, until the Constitutional Chamber established an important principle to emphasize that international agreements in Libya have a higher rank than national laws after their ratification by the competent authority. This is consistent with the prevailing opinion in international law, considering it with a higher rank than national laws.



Adala For All

3- In practice, implementing the principle of the supremacy of ratified international agreements in judicial dispute and the ruling in civil matter. Should the disputing parties adhere to the inconsistency of the ordinary law with the international agreement, and the application of the principle, given that the procedures are allegations in the civil matter?



Adala for All

Or is the rule of concern to public order and the court can raise it? What about the penal article, where procedures can be inductive, and the margin of the court's jurisprudence is broader, with the existence of numerous laws such as the Libyan Penal Code that bluntly contradicts these agreements?



Abdul karim Bouzid al-Mesmari

On applying the principle of supremacy of international agreements, whether in the field of civil or criminal matters, the judge is required to implement it without requiring that the litigants adhere to it. Ratified international agreement becomes an enforceable law for the judge to apply the law and not for the litigants. Despite this, the opponents' role remains in drawing attention to these agreements.



Abdul karim Bouzid al-Mesmari

On the conflict between articles of the penal code and international conventions, a distinction must be made between criminalization articles and other articles. International conventions stipulate the obligation of the state parties to criminalize a certain behavior, requiring the intervention of the legislative authority to criminalize that behavior and impose a penalty for it. Ratification of international agreements further require the intervention of the legislator first, in order for the judge to apply these agreements.



Abdul karim Bouzid al-Mesmari



Otherwise, international conventions are expected to be applied without hindrance, in case of international convention allowing behavior criminalized by national criminal law, or narrowing the scope of criminalization, provided that it does not conflict with public order in Libya.

Adala For All

4- How do you assess the percentage of Libyan courts implementing the principle of supremacy of ratified international agreements and the development direction of jurisprudence in that area?



Abdul karim Bouzid al-Mesmari



Libyan courts lack experience in the international field, due the lack of interest and special importance in such topics by the competent authorities contributing to the making of judges, lawyers, and members of the prosecution. We find many cases applying the national law instead of international agreements, despite the national law contradiction with those agreements and in many fields, including cases of international air transport.

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5- What are the obstacles preventing a proper and normal consecration of the principle of supremacy of ratified international agreements? Are they related to the legal culture, the making of lawyers, or the making of judges? Is it the dominant conservative tendency or other problems?



Abdul karim Bouzid al-Mesmari



Numerous obstacles prevent implementing the principle of supremacy of international agreements, including the making of justice workers and lack of familiarity with that, and the lack of interest of the authorities supervising justice affairs in preparing courses and seminars on the topic, in addition to the failure of distributing international agreements ratified by Libya to courts and judicial bodies.



6- What is the extent of utilizing Articles of the Constitutional Declaration of 2011, articles 7 and 31 (concerning the principles of a fair trial), and the first paragraph of article 35: “All provisions established in the existing legislation shall remain in force insofar as they are not inconsistent with the provisions of this Declaration until they are amended or repealed”? And the extent of Transitional Justice Law to bypass the rules and legal articles contradicting the ratified international agreements, including these related to human rights?



Abdul karim Bouzid al-Mesmari

Article 7 of the Constitutional Declaration obligated the state to safeguard human rights and basic freedoms. Article 31 and following articles of Chapter Four of the Constitutional Declaration stipulated judicial guarantees, derived from international conventions. These constitutional articles of international origin support the constitutional judiciary to rule of the unconstitutionality of certain legislations contradicting its provisions. However, these articles and the transitional justice law for the ordinary and administrative judiciary are not sufficient for excluding the legislation contradicting them.



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7- Regarding laws enacted by previous regimes in historical and political contexts with no relation to the desired paradigm shift following the Libyan revolution, what about the laws issued after the Constitutional Declaration and in violation of it and international agreements? Can all courts bypass them in accordance with the principle of the supremacy of ratified international agreements? Or should the theory of the screen law (loi-écran) be adopted, where the courts of origin should refrain from ruling on the law, and only resort to appeal of unconstitutionality?



Abdul karim Bouzid al-Mesmari

The principle of the supremacy of international agreements over national legislation, confirmed by the Supreme Court, requires the application of international agreements in case of conflict with national legislation, whether those laws precede or follow the ratification of international agreements. The Supreme Court decided to implement the labor agreements ratified by the Libyan state, which contradicts the Labor Relations Law, which was subsequently passed in 2010. Therefore, the implementation of this principle does not require resorting to an appeal for unconstitutionality.



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8- Is there any difference in the margin of independence of the Libyan judiciary before and after 2011?



Abdul karim Bouzid al-Mesmari

Perhaps, the of independence of the judiciary is not much different before and after 2011. Although after 2011, there were many attempts for the independence of the judiciary, the successive political crises cast a negative impact on the work of the judiciary.

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9- How do you assess the reforms of the Libyan judicial system since 2011? What difficulties continue to threaten the independence and effectiveness of the judiciary?



Abdul karim Bouzid al-Mesmari

There were no significant reforms in the judicial system, since 2011, except for the re-formation of the Supreme Judicial Council, the removal of the executive authority (the Minister of Justice and the Deputy of the Ministry of Justice) from its formation, and the approval of the principle of electing members of the Supreme Judicial Council.

Abdul karim Bouzid al-Mesmari

However, according to the latest amendment, the head of the Supreme Judicial Council is chosen by Parliament from among those who have the rank of head of the Court of Appeal. Thus, the Parliament is considered to blatantly interfere in judicial matter. The head of the Supreme Judicial Council requires the approval of the elected members of the Supreme Judicial Council, and for a specific period, which is not as stated in the latest amendment.

10- Which reforms are necessary for the structure and the functionality of the Libyan judiciary?



Abdul karim Bouzid al-Mesmari

The judiciary needs to carry out numerous reforms, starting with amending the jurisdiction of the courts with clear standards that follow the international development, and in a way that eliminates the circulation of cases for many years to address the issue of jurisdiction only, through the establishment of specialized courts such as the Constitutional Court, administrative courts, family courts, and commercial courts.



Abdul karim Bouzid al-Mesmari

Supreme Judicial Council needs restructuring and limiting its competencies to drawing up general policies, with delegating some important issues, such as disciplining members of judicial bodies, to a disciplinary council, whose members are selected from advisors for a specified period at least every three years. The prevention of transferring judges to other judicial bodies, as is the case now, undoubtedly constitutes isolation of judges.



11- What recommendations can Judge Abdul Karim Bouzid share with young judges or university graduates who seek to join the judiciary in Libya?



Abdul karim Bouzid al-Mesmari

My recommendation to new judges and to those interested in joining the judiciary is to recognize that their strongest tool is knowledge and increased awareness of recent developments, with a focus on a specific specialization; to enroll in postgraduate programs and develop their abilities on their own; and to work independently and not be affected by any other means that may affect their integrity and impartiality.





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