

# THE NEW VISION OF LOCAL GOVERNANCE IN LIBYA BY THE DRAFT CONSTITUTION OF 3 FEBRUARY 2016<sup>1</sup>

## EXECUTIVE SUMMARY

Since 2014 the Constitution Drafting Assembly (CDA) of Libya has embarked upon the formidable challenge of forging a political consensus on the draft constitution. The February 3, 2016 version of the draft constitution represents a major milestone in progress towards the ultimate goal of the adoption of a new constitution for the country. This paper reviews the provisions of this draft to form a perspective on the emerging new vision of local governance for Libya. It further suggests options for improving the draft provisions based upon lessons from good international practices. The following paragraphs present a summary of the analysis reported in the paper for (a) the overall role and structure of local government and intergovernmental relations; (b) the role of the governorates (aqaleems/wilayahs/districts); and the role of municipalities (baladiyahs). Finally, an overview of findings and recommendations is detailed.

### Overall Role and Structure of Local Government and the Institutions of Intergovernmental Relations

The Draft Constitution has opted for a 3-tier decentralized multi-order governance with the central government at the apex, 22 governorates (formerly called Sha'abyas in 2007)

forming intermediate order governments and 90 municipalities as the third tier. Both the second and the third tier together are considered as local governments in the draft constitution. Each of the three tiers will have yet to be defined autonomous self-rule and shared rule. The higher order governments would have the authority to contract out own responsibility to be administered by the lower orders provided that the lower orders are fully compensated for such additional costs. The local governments could also enter into partnership agreements among themselves to deliver services jointly. Overall the draft constitution embodies a decentralized unitary governance framework with a few hybrid non-unitary system features. The main hybrid features are: (a) the Senate having equal representation from the three historical regions; and (b) the governorates having political, fiscal and administrative autonomy (yet to be defined).

The Constitution is silent on the division of fiscal and regulatory powers among three orders of government and has not clarified self-rule and shared rule for each order. These provisions would be critical in determining whether or not public decision making would be closer to the people and as to what extent the new political order would mitigate inter-regional and inter-local conflicts.

The Draft Constitution implies that the three orders of government will be independent yet interlinked and interdependent. Interdependencies would arise from shared rule as well as from the fact that taxing powers are more likely to be centralized and the spending powers are more likely to be decentralized, creating the need for central financing of local expenditures especially for social services due to their redistributive nature i.e. the poor and the needy receiving net positive benefits from public provision. In a decentralized multi-order governance, consideration may be given to limit

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the shared rule as it easily leads to confusion, conflict and failure in the provision of essential public services.

The Libya Draft Constitution is silent on intergovernmental coordination with the exception of inter-governorate coordination. It establishes the Higher Council of Local Governance comprising of provincial governors to strengthen provincial-local cooperation and resolve inter-local conflicts. This Council can at best serve inter-provincial (inter-governorates) coordination and conflict concerns. It may be desirable to amend this article to upgrade this body to the Higher Council of Governance comprising the Prime Minister of Libya (or his designee minister) and the Provincial Governors and one municipal government representative from each of the governorates to serve as the apex political, economic and fiscal relations, coordination and conflict resolution institution for central-governorate-municipal coordination.

#### The Governorates

The Draft Constitution recognizes governorates as the intermediate order of government and has recognized financial and administrative autonomy of governorates. This is a welcome provision but its effectiveness requires clarity in division of powers among various orders of government. The Draft Constitution has left open the question of existing governorates' boundaries as well as providing for a process of redrawing of such boundaries subject to determination by an act of the Shura Council. Positively, it has nevertheless laid down the basic principles guiding such determination in future.

It would be desirable to clarify the institutional arrangements for governorate executive and legislature and their relationship. Different models could be considered here, such as elected governors or that the Prime Minister presents a number of candidates, one of whom is chosen by the governorate council. It is noteworthy also that in some countries governorate councils include ex-officio elected heads of municipalities. By interlacing the levels of government, such set-ups can result in more co-operative relationships between the three levels, avoiding that each follow their own exclusive interests.

The Draft Constitution does not clarify what is self-rule and shared-rule at the governorate level. Division of fiscal and regulatory powers among multi-order governments is a question of paramount importance in any constitutional order as it defines the balance of powers and the degree to which public decision making would be closer to the people. There is also need to have minimum service standards across the nation to ensure an economic and social union and a common internal market. National government must also ensure regional and interpersonal equity and should have the ability to use fiscal transfers to ensure that subnational governments comply with the national objectives. Finally, local governments should limit self financing of redistributive services (education, health and welfare) and higher order governments should assist in financing these services to ensure equitable access to all citizens regardless of their place of residence.

The Draft Constitution would have to develop guidance on expenditure assignment to suit Libyan preferences and delineate the fiscal and regulatory powers of national, governorates and municipal (local) governments. Note that the draft treats governorates as part of local governments. This is fine so long as clear distinction is made between the roles of governorates and other lower order local/ municipal governments. Overall, the Libya Draft Constitution would have to adapt economic principles to suit local circumstances and develop a political consensus on tax instruments as well as taxing powers of various orders of government and have these spelled out as an annex to the constitution. It may be desirable for the draft constitution to endorse fiscal transparency and fiscal responsibility and no bailout principles for public sector borrowing but leave the details to a future fiscal responsibility legislation to be enacted by the Shura Council.

The Draft Constitution vests ownership of natural resources in Libyan people but assures that all regions (provinces) will have equitable access to the benefits of natural resources. Natural resources are typically unequally distributed and provincial ownership would contribute to regional fiscal disparities. National ownership of natural resources is desirable for common citizenship but care must be taken to ensure that resource rich provinces are properly compensated for providing services for resource exploration and exploitation and overcoming degradation of natural environments resulting from resource exploitation.

The Draft Constitution's articles provide a good basis for resource ownership by vesting this ownership in the Libyan people. The Draft Constitution has further assured that benefits from natural resources would be equitably distributed among governorates while a proportion of reinvestment will go to the producing governorates. Further, a proportion of current revenues will be set aside as savings for use by future generations.

The Draft Constitution stipulates supplementary central financing to assure that the provinces have adequate funds to discharge their obligations. Further inter-provincial and inter-municipal equalization principles are enshrined in the constitution. There is also assurance that there will not be any unfunded mandates from the centre to local governments.

Positively, the Draft Constitution attempts to limit central intervention in provincial affairs and provides only after the fact oversight to ensure compliance with the existing laws. However, in a decentralized system, there is always on-going need to monitor economic and fiscal developments at all orders of government and the need to coordinate governmental action. There is therefore a need to have institutional arrangements for information sharing and coordination on a frequent and regular basis. The Draft Constitution may embody guidance on such institutions of intergovernmental relations.

1. The role and the structure of lower order judiciary requires elaboration in the draft constitution. This is especially important in the Libyan context as at the local level,

various judicial and quasi-judicial processes are currently in operation.

2. The Draft Constitution has emphasized financial and administrative autonomy of provincial governments, but these provisions remain incomplete as long as the degree of political autonomy and center – governorate relations are not clarified.

The Draft Constitution has not spelled out the nature and principles of cooperative governance. It has however demonstrated a commitment to decentralized and autonomous local governance. This commitment would help advance national unity. Decentralizing powers to governorates and municipalities will diffuse tensions and conflicts. These arrangements, however, needs to be complemented by strong institution of intergovernmental consultation and coordination such as creating a possible Higher Council on Governance, to strike political compromises, build consensus and mitigate conflicts in the interest of national harmony.

### The Municipalities

The draft constitution has highlighted the importance and the administrative and financial autonomy of municipalities in ensuring good government. Further clarity is nevertheless needed in municipal functions and financing powers and borrowing privileges. It would also be helpful to have clear channels of municipal/local voice in policy making at governorate and the national levels. The draft constitution provides for municipal government oversight based upon post-audits. The draft constitution may also consider emphasizing institutional safeguards through a regulatory framework for prudent financial management at the municipal level. The Draft Constitution may strengthen provisions regarding municipal government accountability to own residents for service delivery performance. Much further institutional and legal developments especially the design of fiscal transfers will have a bearing on creating an incentive and accountability regime for integrity and accountability of municipal operations.

#### 1. *Lessons from International experiences*

International experience suggests that a substantive and autonomous role of the lowest orders of local governments (municipalities in Libya) is critical in establishing people's trust in government as well as ensuring peace, order, national unity, good government and growth. Empowerment and autonomy of local governments units plays a critical role in facilitating people empowerment and participation in public decision making; to ensure delivery of local services consistent with local preferences; to strengthen local government accountability to local residents and; to ensure transparency and integrity of local government operations; to achieve local economic development and improve social and economic outcomes for local residents.

Multi-order governance often works best when the central government assumes a leadership (not a managerial) role in policy making and financing and leadership-cum-managerial role in provision of national public goods (e.g. defense and security and ensuring internal common market and political, social and economic union), the provinces taking on the role of

central and local coordination, inter-local functions and municipal government oversight and the lowest order of local governments are entrusted with all local service delivery responsibilities. In addition, finance should follow functions such that all orders of government have adequate sustainable finances to deliver on their mandates and be accountable to local residents.

#### 2. *Overview of Findings and Recommendations*

- i. Division of powers is not clarified. Clarify the constitutional division of powers (taxing, spending and regulatory functions and borrowing privileges) among national, governorate and municipal orders of government. Elaborate on self-rule and shared rule while keeping the shared rule to a minimum.
- ii. Institutions of intergovernmental coordination require further attention. Consider enshrining cooperative governance principles in the draft constitution. Consider alleviating the High Council of Local Governance to the High Council of Governance with representation from national, provincial and municipal government and having a wider mandate for policy making, coordination and conflict resolution. This Council may be required to meet at least once every quarter.
- iii. Local (municipal) voice in provincial and national affairs. Consider local representation at the High Council. Also consider ex-officio membership of elected municipal heads of government to provincial legislature.
- iv. Clarify in the draft constitution, organization and structure of legislative, executive and judicial branches at provincial and municipal levels.
- v. Establish an intergovernmental fiscal arrangements committee of national, provincial and local government technical officials aided by an expert advisory committee to develop technical consensus on the fiscal arrangements compact (design of revenue sharing and grants) to be vetted subsequently by the Higher Council on Governance prior to presentation to the Shura Council for review and approval.

## 1. INTRODUCTION: THE CONSTITUTION MAKING PROCESS AND THE EMERGING NEW VISION OF MULTI-ORDER GOVERNANCE IN LIBYA

Libya, a country with a size of 1.8 million square kilometers, had in 2014an estimated population of 6.3 million. During the 42 years of his rule Moammar Gaddafi ruled the country by forging tribal alliances and bestowing political favours as rewards for loyalty to the regime. This resulted in exclusion of groups and regions and uneven access to political power and public services across the nation. Resource rich regions suffered relative neglect by the regime perpetuating backwardness, deprivation and poverty. Gaddafi's removal in October 2011, however, did not yield a peaceful order but instead resulted in re-emergence of regional and tribal groups and alliances and militias with each group vying for greater power and influence. These dynamics created conditions that

could not guarantee the safety of life, liberty and personal property of its residents. The Libyan economy also suffered a major setback as a result of the internal conflict with per capita GDP declining from about US\$12,250 in 2010 to US\$7820 in 2014 (World Bank, 2016).

On 20th February, 2014 Libyans elected a 60-member Constitution Drafting Assembly (CDA) with equal representation from each of the three historic regions (Cyrenaica, Tripolitania and Fezzan) that is continuing to work on a new constitution despite the adverse conditions.. Since the beginning, the international community including Democracy Reporting International (DRI) supported the CDA, which has attempted to forge a consensus on the draft constitution. The latest draft version of the Constitution was released by the CDA on 3 February 2016.

This paper reviews the draft constitutional provisions to form a perspective on the emerging new vision of local governance. It makes suggestions on improving draft provisions based upon lessons from international experiences. The paper is organized as follows. Section 2 reflects on the overall structure of local governance and intergovernmental relations. Section 3 reviews the proposed role of governorates. Section 4 reviews the role envisaged for the municipalities. A final section presents an overview of findings and recommendations.

## 2. OVERALL ROLE AND STRUCTURE OF LOCAL GOVERNMENT AND INSTITUTIONS OF INTERGOVERNMENTAL RELATIONS

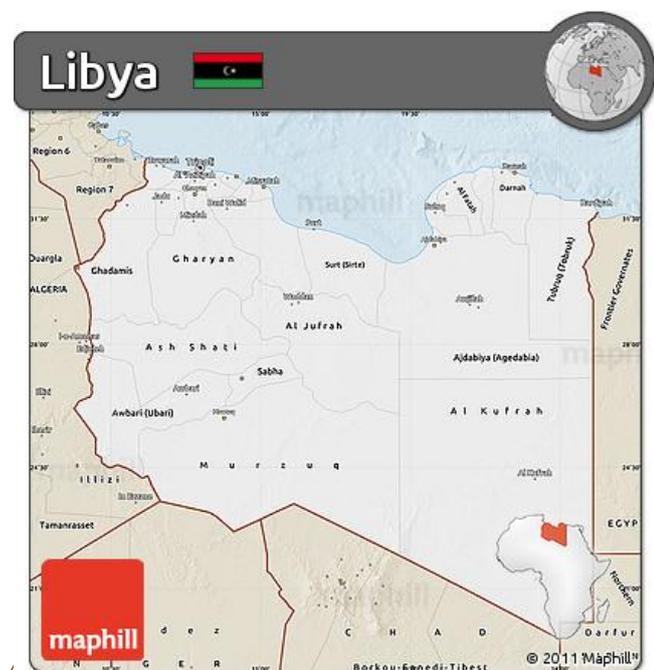
The Draft Constitution has opted for a 3-tier decentralised multi-order governance with the central government at the apex, 22 governorates (formerly called Sha'abyas in 2007 -see Annex A for details) forming intermediate order governments and 90 municipalities as the third tier (see Figure 1). Both the second and the third tier together are considered as local governments in the draft constitution. Each of the three tiers will have yet to be defined autonomous self-rule and shared

rule. Higher order governments would have the authority to contract out own responsibility to be administered by the lower orders provided the lower orders are fully compensated for such additional costs. The local governments could also enter into partnership agreements among themselves to deliver services jointly. Overall the draft constitution embodies a decentralised unitary governance framework with a few hybrid non-unitary system features. The main hybrid features are: (a) the Senate having equal representation from the three historical regions; and (b) the governorates having political, fiscal and administrative autonomy (yet to be defined).

The Constitution is silent on the division of fiscal and regulatory powers among three orders of government and has not clarified self-rule and shared rule for each order. These provisions would be critical to determining whether or not public decision making would be closer to the people and as to what extent the new political order would mitigate inter-regional and inter-local conflicts.

A decentralized unitary governance framework is considered by many to be suitable for post-conflict societies provided the centre assume a policy making and financing role, intermediate order governments (provinces) coordinating and regional functions and most service delivery responsibilities are assigned to the lowest order of local governments i.e. municipalities in Libya. This also requires that the lowest order governments are afforded political, administrative and fiscal autonomy in their areas of responsibility so that they can tailor local and national programs to local preferences and needs. To reduce potential for secession and internal conflict, several countries including Indonesia, China and the Republic of South Africa (RSA) constrained the role of provinces while strengthening the role of municipal governments. Other countries such as Denmark and Finland (more recently, Spain is considering a similar reform) have gone further and eliminated the role of provinces and shifting most functions to local/municipal levels to achieve greater efficiency and equity in service delivery performance. In China more than 2/3rd of national public expenditures is undertaken by counties and municipalities.

The Draft Constitution implies that the three orders of government will be independent yet interlinked and interdependent. Interdependencies would arise from shared rule as well as from the fact that taxing powers are more likely to be centralized and the spending powers are more likely to be decentralized, creating the need for central financing of local expenditures especially for social services due to their redistributive nature. In a decentralized multi-order governance, it should be considered to limit shared rule as it easily leads to confusion, conflict and failure in the provision of essential public services. A tragic example of such intergovernmental coordination failure was witnessed in 2005 in the USA as the victims of Hurricane Katrina in New Orleans, Louisiana were deprived of emergency assistance for almost a week.



## 2.1. PRINCIPLES OF COOPERATIVE GOVERNANCE

The South African Constitution provides a good example of such principles. It states that all orders of government and all organs of state within each order must:

- Be loyal to the constitution and be subservient to the people (recognize people as rulers/principals as opposed to subjects);
- Preserve peace and good order, national unity and indivisibility of the Republic;
- Work to improve economic and social outcomes for the citizens;
- Earn people's trust by working harder and costing less and ensuring fully transparent operations of government organs;
- Commit themselves to provide, fair, accountable, incorruptible and responsive governance;
- Respect the constitutional status, institutions, powers and functions of other orders of government;
- Strive to create a friendly, helpful, collaborative, consultative, open, cooperative and harmonious environment for working together to advance public interest; and
- Work together to resolve conflicts.

## 2.2. INSTITUTIONS OF INTERGOVERNMENTAL COORDINATION

In a decentralized system of multi-order governance, institutions of intergovernmental relations play a critical role in ensuring coordinated well functioning governments. In most countries with decentralized governance, such institutions are included in the Constitution or an act of national parliament. For example, the Pakistan Constitution establishes a Council of Common Interests comprising the Prime Minister and the Chief Minister of Provinces to deal with federation tasks (shared rule). Australia has established the Council of Australia Governments (COAG) comprising the Prime Minister of Australia, and the Chief Ministers of State and a representative of Local Government Association.

The Libya Draft Constitution is silent on intergovernmental coordination with the exception of inter-governorate coordination. Article 164 establishes the Higher Council of Local Governance comprising of provincial governors to strengthen provincial-local cooperation and resolve inter-local conflicts. This Council can at best serve inter-provincial (inter-governorates) coordination and conflict concerns. It may be desirable to amend this article to upgrade this body to the Higher Council of Governance comprising the Prime Minister of Libya and the Provincial Governors and one municipal government representative from each of the governorates to serve as the apex political, economic and fiscal relations, coordination and conflict resolution institution for central-governorate-municipal coordination.

Alternately an act of the Shura Council could establish institutions and mechanisms for consultation and coordination and intergovernmental fiscal relations and resolving conflict among various orders of government. All

organs of the state involved in intergovernmental disputes would undertake to make every possible effort to resolve such disputes amicably through consultation prior to resorting to a court of law for dispute resolution.

## 3. THE GOVERNORATES

The Draft Constitution recognizes governorates as the intermediate order of government.

### 3.1. CONSTITUTIONAL PROVISIONS REGARDING PROVINCIAL AUTONOMY

The Draft Constitution has recognized financial and administrative autonomy of governorates. Article 156 (Independence of Local Government Units) states:

“Local Government units shall enjoy legal personality and financial and administrative independence. Local interests shall be administered in accordance with the principle of free management.”

This is a welcome provision but its effectiveness requires clarity in division of powers among various orders of government

### 3.2. CONSTITUTIONAL PROVISIONS ON GOVERNORATE BOUNDARIES

The Constitution is silent on the geographical boundaries of governorates. However, given that these governorates existed in the past, it is reasonable to assume that the 2007 boundaries will be re-instated. Article 155, nevertheless, leaves open the option of redrawing governorates and municipal boundaries in the future. Article 155 (Levels and Standards of Local Government) states that:

“The State may be divided into governorates and municipalities in accordance with the demands of national security and the balancing of residential standards, space and geographical contiguity, necessities of social justice, peace and communal harmony, economic and historical factors, and requirements of development, while taking efficiency and effectiveness into account. It shall be permissible to create, integrate, or dissolve administrative units if the public interest requires it, as prescribed in the law.”

The Draft Constitution has left open the question of existing governorates' boundaries as well as providing for a process of redrawing of such boundaries subject to determination by an act of the Shura Council. Positively, it has nevertheless laid down the basic principles guiding such determination in future.

### 3.3. CONSTITUTIONAL PROVISIONS REGARDING GOVERNORATES LEGISLATURE, EXECUTIVE AND JUDICIARY

*Local Executive.* The Draft Constitution is silent on the executive structures at the governorates and municipal levels. It is also not clear how executive heads of governorates and

municipal governments will be selected and what will be the nature of their interactions with the Governorate and Municipal Councils.

*Local Legislatures.* Article 157 (Governorate and Municipal Council) suggests that governorates and municipal council will be formed by direct elections. It states that:

“Governorates and Municipal Councils shall be chosen directly through free elections, taking into account the formation of the governorate assembly, which represent municipalities located into its circumscription, as the law regulates.”

*Governorate and local judiciary.* The Draft Constitution is also silent on the role and jurisdiction of governorates and local courts. The establishment of these courts may be the purview of the Higher Judicial Council established by Article no. 137.

It would be desirable to clarify the institutional arrangements for governorate executive and legislature and their relationship. Different models could be considered here, such as elected governors or that the Prime Minister presents a number of candidates, one of whom is chosen by the governorate council. It is noteworthy also that in some countries governorate councils include ex-officio elected heads of municipalities. By interlacing the levels of government, such set-ups can result in more co-operative relationships between the three levels, avoiding that each follow their own exclusive interests.

The role and the structure of lower order judiciary requires elaboration in the draft constitution. This is especially important in the Libyan context as at the local level, various judicial and quasi-judicial processes are currently in operation.

### 3.4. CONSTITUTIONAL PROVISIONS ON GOVERNORATES RESPONSIBILITIES, CONCURRENT POWERS AND THEIR DELINEATION

The Draft Constitution does not clarify what is self-rule and shared-rule at the governorate level. Instead Article 158 (Competencies of Local Government Units) provides a vague description of their responsibilities as follows:

“Local Government Councils shall enjoy autonomous, transferrable, and shared powers from and with the central government. Shared and transferrable powers shall be distributed. Governorates will also be charged with issuing regulatory legislation in accordance with the law.”

Division of fiscal and regulatory powers among multi-order governments is a question of paramount importance in any constitutional order as it defines the balance of powers and the degree to which public decision making would be closer to the people. An important guiding principle for such assignment is the subsidiarity principle adopted by the European Union, i.e. all taxing spending and regulatory responsibilities belong to the lowest order of government unless a convincing case can be made for higher order assignment.

Beyond this general principle, the division of expenditure responsibility in a multi-order form of governance is guided by considerations of efficiency, equity and macro stability. Technical efficiency requires that in assigning a service to a specific order of government, one must ensure that economies of scale and scope are fully exploited, spatial externalities are internalized, and administrative and compliance costs are minimized. Further, factors and goods mobility need to be free and solely guided by economic considerations.

There is also need to have minimum service standards across the nation to ensure an economic and social union and a common internal market. National government must also ensure regional and interpersonal equity and should have the ability to use fiscal transfers to ensure that subnational governments comply with national objectives. Finally, local governments should limit self financing of redistributive services (education, health and welfare) and higher order governments should assist in financing these services to ensure equitable access to all citizens regardless of their place of residence. The application of these principles usually results in the following representative assignment of responsibilities:

- Almost always national: central banking, currency, defense, national security, international treaties, cross border pollution, internal/external migration, external trade, interstate commerce, regulation of telecommunication, intellectual property rights, civil aviation, social insurance. Social safety nets and interstate highways.
- Usually national/provincial shared: education, health and social welfare
- Usually provincial: intrastate highways, inter-local functions, local/municipal affairs.
- Almost always local: municipal services

The Draft Constitution would have to develop guidance on expenditure assignment to suit Libyan preferences and delineate the fiscal and regulatory powers of national, governorates and municipal (local) governments. Note that the draft treats governorates as part of local governments. This is fine so long as clear distinction is made between the roles of governorates and other lower order local/ municipal governments.

### 3.5. CONSTITUTIONAL PROVISIONS ON TAXING POWERS AND BORROWING PRIVILEGES OF THE GOVERNORATES

Article 159 (The Funding of Local Units of Governance) provides only generic guidance on provincial taxing powers. “...localized funds derived from duties, sanctions, local taxes, investment returns, and what shall be received from donations and wills, in addition to what shall be obtained through loans and other returns specified by the law.”

#### *Taxing powers*

Clarifying the taxing powers of various orders of government is an important task of any constitution. It is desirable to match taxing powers with expenditure responsibilities to ensure

accountable governance. However, central government must be afforded greater access to revenues than warranted by its direct expenditure needs. This is necessary to enable the central government to use its spending powers through fiscal transfers to influence lower order government priorities in achieving national economic, political and social union and equalisation objectives.

The use of several economic principles is helpful in guiding the assignment of taxing responsibilities under a multi-order governance system. Efficiency of an internal common market requires that taxes on mobile factors such as capital and labor income and multi-stage sales taxes such as VAT be assigned to the national government to have a harmonised tax system. Similarly, equity considerations warrant that progressive income taxes be assigned to the national government. However, provincial-local governments may be allowed to levy supplementary rates on national tax base (piggybacking option). Efficiency in tax administration and reducing collection and compliance costs require that a tax base may be assigned to the government that has the best knowledge on that tax base. This suggests that taxes on immobile factors such as land and property taxes are better suited for assignment to local governments. Finally, in grey areas, fiscal need considerations may tip the balance in favour of the government order having the greater need for additional revenues. Often taxing powers are distributed as follows:

- National taxes: Customs, VAT, Corporate Income Tax, resource rents/profits taxes, wealth taxes, taxes on cross-border pollution (carbon taxes)
- National-Provincial-Local Shared taxes: Personal income tax (PIT), payroll tax, excises on alcohol and tobacco.
- Provincial taxes: Single stage sales taxes, motor vehicles tax, business tax, resource royalties and fees, severance (e.g. forestry) and production and output taxes (e.g. fishery) on natural resources, conservation charges,
- Local taxes: land and property taxes, betterment taxes and impact fees, parking charges, congestion tolls, local environmental pollution taxes, surcharge on PIT, conservation charges for natural resources
- Taxes suitable for all orders: Energy taxes, motor fuel taxes, taxation of bads (pollution, congestion, environmental degradation), poll taxes, user charges for services rendered.

Overall, the Libya Draft Constitution would have to adapt economic principles to suit local circumstances and develop a political consensus on tax instruments as well as taxing powers of various orders of government and have these spelled out as an annex to the constitution.

#### *Borrowing Privileges*

All orders of governments should have access to capital market finance to overcome infrastructure deficiencies provided they adhere to a fiscal responsibility framework legislated by the national parliament. This framework should ensure the integrity and independence of the financial sector and an arm's length relationship between the government and the financial sector and the rating agencies to evaluate government borrowing proposals. To achieve that, often government ownership of financial sector institutions is not

permitted. The fiscal responsibility law should further specify fiscal transparency provisions and fiscal rules for responsible borrowing and sustainable government finances and establish "gate keeping institutions" such as an Independent fiscal council and independent public prosecutor to ensure government compliance with the law as done in Brazil. Direct democracy checks requiring referenda on mega investment projects as done in Switzerland are helpful in ensuring responsive governance and responsible fiscal management. Further there should be no bailout of any order of government that faces insolvency.

It may be desirable for the draft constitution to endorse fiscal transparency and fiscal responsibility and no bailout principles for public sector borrowing but leave the details to a future fiscal responsibility legislation to be enacted by the Shura Council.

### 3.6. CONSTITUTIONAL PROVISIONS ON NATURAL RESOURCE OWNERSHIP AND SHARING OF NATURAL RESOURCE REVENUES

The Draft Constitution vests ownership of natural resources in Libyan people but assures that all regions (provinces) will have equitable access to the benefits of natural resources. Article 184 (Ownership of Natural Resources) states:

"Natural resources, including oil, gas, minerals and water, belong to the Libyan people, and the State shall exercise control over the natural resources in the name of the people. The State shall work towards the exploitation, protection, development, investment, and improved management of natural resources, so as to ensure the public interest and that all regions benefit from natural resources in an equitable manner, thus preserving the rights of future generations."

Article 186 stipulates that a percentage of returns from natural resources will be reinvested in the producing regions. Article 186 (Localization of Alternative Projects) states:

"A law shall allocate a percentage of returns from non-renewable resources to establish alternative projects giving priority to them in areas of production, depending upon spatial possibilities and supplies to develop its infrastructure, then the least developed areas."

The Draft Constitution also guarantees a share of natural resource revenues to be set aside for the use of future generations. Article 187 (Guaranteeing the Rights of Future Generations) states:

"A law shall allocate a proportion of the returns from natural resources for the benefit of future generations. The State shall be committed to enacting the necessary measures to develop and invest in them with high quality and in accordance with the necessary safety standards."

For provinces with groundwater resources, the Draft Constitution provides assurance that they will be compensated for the groundwater that is exported to other regions (Article 188, Water).

Natural resources are typically unequally distributed and provincial ownership would contribute to regional fiscal

disparities. National ownership of natural resources is desirable for common citizenship but care must be taken to ensure that resource rich provinces are properly compensated for providing services for resource exploration and exploitation and overcoming degradation of natural environments resulting from resource exploitation.

The Draft Constitution's articles provide a good basis for resource ownership by vesting this ownership in the Libyan people. The Draft Constitution has further assured that benefits from natural resources would be equitably distributed among governorates while a proportion of reinvestment will go to the producing governorates. Further, a proportion of current revenues will be set aside as savings for use by future generations.

### 3.7. CONSTITUTIONAL PROVISIONS ON CENTRAL REVENUE SHARING AND GRANT FINANCING OF PROVINCIAL GOVERNMENTS

The Draft Constitution stipulates supplementary central financing to assure that the provinces have adequate funds to discharge their obligations. Further inter-provincial and inter-municipal equalization principle is enshrined in the constitution. There is also assurance that there will not be any unfunded mandates from the centre to local governments. Article 159 (The Funding of Local Units of Governance) states:

"There shall be for governorates and municipalities centralized funds, which shall be consistent with the necessary amount of funds required to execute their duties, along with localized funds derived from duties, sanctions, local taxes, investment returns and what shall be received from donations and will, in addition to what shall be obtained through loans and other returns specified by the law. The State shall guarantee financial balance between the local government units to ensure solidarity among them. Every competence transferred to local government units by the central government shall be connected to the appropriate financial resources. Local Government units, within the bounds of its ratified budget, shall be free to spend its resources according to the rules of good governance."

The Draft Constitution further spells out specific factors to be used in central-provincial-municipal revenue sharing allocation criteria. Article 175 (Public Finance) states:

"National revenues shall be distributed fairly and equitably between local and national levels of governance, taking into account population density, local population distribution, levels of infrastructure and services and indexes of spatial and human development."

Article 159 positively reiterates constitutional commitment to equalization grants, no un-funded mandates and provincial/local autonomy principles. Article 175 nevertheless may be amended to ensure that the constitution does not enshrine specific grant formula factors and thereby closes opportunity for future review and reform. The Constitution could simply specify general principles of equity, efficiency and fiscal need for the division of fiscal pie and the design of fiscal transfers. Experience from Brazil suggests that it is not

advisable to specify specific formula factors such as indicators of spatial and human development etc. in the constitution. This is better done as a law. Enshrinement of such factors into the constitutional text stymies efforts to reform an existing allocation criteria that later on is deemed unfair. Keeping this guidance in mind, for example, the 1982 Canadian Constitution simply enshrines the equalization grant principle i.e. that "...the Government of Canada is committed to making equalization payments to provinces to ensure that all citizens of Canada have access to comparable levels of public services at comparable burdens of taxation" and left the determination of allocation criteria to a joint federal-provincial forum of senior policy makers.

### 3.8. CONSTITUTIONAL PROVISIONS ON CENTRAL OVERSIGHT OVER PROVINCIAL GOVERNMENTS.

The Draft Constitution stipulates central oversight to ensure legality of provincial works. Article 160 (Subsequent Oversight) states:

"The local government units shall be subject to subsequent oversight regarding the legality of its works."

Further, the Draft Constitution identifies circumstances under which central interference in provincial affairs may be justified. Article 161 (Interference of Executive Authority) states:

"The executive authority shall not interfere with the competencies of local government units, except to prevent the transgression of jurisdictional boundaries, when it is to the detriment of public interests, national security, or the other interests of local units. The executive authority may intervene if the units cannot perform their tasks or they fail to comply with national standards, plans and policies. Interference shall be done with a direct decree clarifying the length of inability to perform their tasks and determine the remedies as the law requires.

Positively, the Draft Constitution attempts to limit central intervention in provincial affairs and provides only after the fact oversight to ensure compliance with the existing laws. However, in a decentralized system, there is always on-going need to monitor economic and fiscal developments at all orders of government and need to coordinate governmental action. There is therefore a need to have institutional arrangements for information sharing and coordination on a frequent and regular basis. The Draft Constitution may embody guidance on such institutions of intergovernmental relations.

## 4. THE MUNICIPALITIES

### 4.1. GENESIS OF LOCAL (MUNICIPAL) GOVERNANCE

Article 154 (Decentralization) states that:

"Local governance shall be based on the principle of extended decentralization. The State shall support this within the framework of State unity."

A rewording of this article is suggested to state more clearly the objectives and the role of local self-government.

#### 4.2. CONSTITUTIONAL PROVISIONS AS TO WHICH TIER OF GOVERNMENT HAS OVERALL RESPONSIBILITY FOR LOCAL GOVERNMENT INCORPORATION, AMALGAMATION, DEMARCATIION. LOCAL VOICE AT PROVINCIAL AND NATIONAL LEVELS.

Article 155 (levels and Standards of Local Government) leaves determination of local jurisdictions to a future act of the Shura Council. The Draft Constitution, is however silent on the channels of local voice at provincial and national levels.

#### 4.3. CONSTITUTIONAL GUIDANCE ON LOCAL GOVERNMENT RESPONSIBILITIES

Article 158 is vague on specific responsibilities to be shouldered by municipal governments.

The legal status and the specification of local government functions vary across countries. In Brazil, India, Chile and RSA, local government status and functions are enshrined in the Constitution. In Indonesia, Kazakhstan and Poland, local governments are defined by national legislation. In the USA, Argentina and Canada, local governments are created and their functions are defined by states' legislation. The CDA may consider including general guidance in the draft constitution.

#### 4.4. CONSTITUTIONAL GUIDANCE ON LOCAL FINANCING

Article 159 (the Funding of Local Units of Governance) provides broad guidance on the type of financing that would be available to municipalities.

Greater clarity in the taxing powers and borrowing privileges of local governments is desirable. The Draft Constitution may consider spelling out specific tax instruments that would be available to municipalities.

The Local Government Act or Local Government Finance Act could provide operational details and the Fiscal Arrangements Act could provide details on revenue sharing and grant financing and a Fiscal Responsibility Act would be needed to create regulatory framework for municipal borrowing.

#### 4.5. CONSTITUTIONAL GUIDANCE ON LOCAL GOVERNMENT OVERSIGHT

Article 160 (Subsequent Oversight) provides for post-audits of local governments to ensure compliance with existing laws.

Post-audits on a sample basis as provided for by Article 160 is desirable. The article could be strengthened by referring to institutional safeguards for prudent financial management which could be adopted by law.

In principle, local (municipal) government oversight should be based upon a regulatory framework that ensures that local governments follow fiscal transparency and prudent financial management and provides continuous regular but non-obtrusive monitoring of local government fiscal health and service delivery performance. This can be done by requiring

submission and web posting of local annual development plans and budgets on an annual basis and audited financial statements.

#### 4.6. IMPLICATIONS OF THE CONSTITUTIONAL PROVISIONS

##### *For Local Autonomy and sustainable finances*

The Draft Constitution stresses the importance of local autonomy and sustainable local finances. However, how these objectives will be achieved remains an open question. The Draft Constitution may clarify the division of powers and leave the rest to appropriate legislations.

##### *For Service Delivery Performance*

The Draft Constitution may strengthen provisions regarding municipal government accountability to own residents for service delivery performance. Much further institutional and legal developments especially the design of fiscal transfers will have a bearing on creating an incentive and accountability regime for integrity and accountability of municipal operations.

#### 4.7. LESSONS FROM INTERNATIONAL EXPERIENCES

International experience suggests that a substantive and autonomous role of the lowest orders of local governments (municipalities in Libya) is critical to establishing people's trust in government as well as ensuring peace, order, national unity, good government and growth. Empowerment and autonomy of local governments units plays a critical role in facilitating people empowerment and participation in public decision making; to ensure delivery of local services consistent with local preferences; to strengthen local government accountability to local residents and; to ensure transparency and integrity of local government operations; to achieve local economic development and improve social and economic outcomes for local residents.

Multi-order governance often works best when the central government assumes a leadership (not a managerial) role in policy making and financing and leadership-cum-managerial role in provision of national public goods (e.g. defense and security and ensuring internal common market and political, social and economic union), the provinces taking on the role of central and local coordination, inter-local functions and municipal government oversight and the lowest order of local governments are entrusted with all local service delivery responsibilities. In addition, finance should follow functions such that all orders of government have adequate sustainable finances to deliver on their mandates.

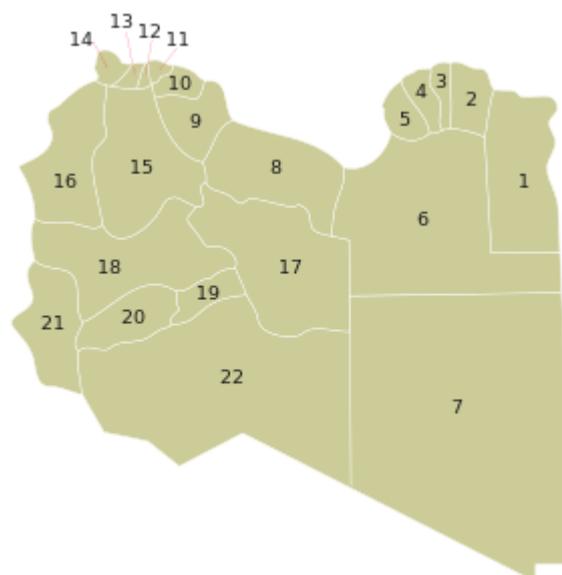
## CONCLUSION AND RECOMMENDATION

1. Division of powers is not clarified. Clarify the constitutional division of powers (taxing, spending and regulatory functions and borrowing privileges) among national, governorate and municipal orders of government. Elaborate on self-rule and shared rule while keeping the shared rule to a minimum.

- Institutions of intergovernmental coordination require further attention. Consider enshrining cooperative governance principles in the draft constitution. Consider alleviating the High Council of Local Governance to the High Council of Governance with representation from national, provincial and municipal government and having a wider mandate for policy making, coordination and conflict resolution. This Council may be required to meet at least once every quarter.
- Local (municipal) voice in provincial and national affairs. Consider local representation at the High Council. Also consider ex-officio membership of elected municipal heads of government to provincial legislature.
- Clarify in the draft constitution, organisation and structure of legislative, executive and judicial branches at provincial and municipal levels.
- Establish an intergovernmental fiscal arrangements committee of national, provincial and local government technical officials aided by an expert advisory committee to develop technical consensus on the fiscal arrangements compact (design of revenue sharing and grants) to be vetted subsequently by the Higher Council on Governance prior to presentation to the Shura Council for review and approval.

World Bank (2016). Libya Economic Data. [www.worldbank.org](http://www.worldbank.org)

## ANNEX A: GOVERNORATES IN LIBYA (22 DISTRICTS WITH TOTAL 2006 POPULATION OF 5.6 MILLION)



The current twenty-two district system in Libya (since 2007)

شعبية	English	Area (km <sup>2</sup> )	Population (2006)	N° (on map)	Capital
البطنان	Butnan	84,996	159,536	1	Tobruk
درنة	Derna	31,511	163,351	2	Derna
الجبل الاخضر	Jabal al Akhdar	11,429	203,156	3	Albaydha
المرج	Marj	13,515	185,848	4	Al Marj
بنغازي	Benghazi	11,372	670,797	5	Benghazi
الواحات	Al Wahat	105,523	177,047	6	Ajdabiya
الكفرة	Kufra	433,611	50,104	7	Kufra Al
سرت	Sirte	225,437	193,720	8	Sirte
مرزق	Murzuq	356,308	78,621	22	Murzuq
سبها	Sabha	107,310	134,162	19	Sabha
واديالحياة	Wadi al Hayaa	31,485	76,858	20	Awbari
مصراتة	Misrata	29,172	550,938	9	Misrata
المرقب	Murqub	6,796	432,202	10	Khums Al
طرابلس	Tripoli	835	1,065,405	11	Tripoli
الجفارة	Jafara	2,666	453,198	12	Al Azyziya
الزاوية	Zawiya	2,753	290,993	13	Zawiya
النقاط الخمس	Nuqat al Khams	6,089	287,662	14	Zawara
الجبل الغربي	Jabal al Gharbi	76,717	304,159	15	Gheryan
نالوت	Nalut	67,191	93,224	16	Nalut
غات	Ghat	68,482	23,518	21	Ghat
الجفرة	Jufra	117,410	52,342	17	Hun
وادي الشاطئ	Wadi al Shatii	97,160	78,532	18	Adiri

Source: [https://en.wikipedia.org/wiki/Districts\\_of\\_Libya](https://en.wikipedia.org/wiki/Districts_of_Libya)

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