Committee 1: Form of State and Fundamental Cornerstones

(Arabic; English)

Overview

Libya's Constitutional Drafting Assembly (CDA) released its first draft constitutional recommendations on 24 December 2014 on its website.[1] The work of Committee 1 on the Form of the State and Fundamental Cornerstones addresses some of the most critical issues that will shape the future of the country, including the identity and character of the state, and the sources, and hierarchy of sources, of law. It also defines some of the most anticipated and controversial concepts such as citizenship, and the relationship between religion and the state. Some of the key provisions are concerning – not only because they do not meet international and constitutional standards but because they do not represent a consensus view on issues where different opinions exist, and are far from reflecting a consensus view. Instead what is presented is incoherent and potentially divisive.

This overview sets out LFJL's five most urgent concerns in the work of Committee 1. However this does not represent every concern. LFJL considers all of its concerns in the detailed commentary that follows this overview.

1. **Article 6: Sovereignty**

   To possess sovereignty is to possess the power to make and enforce the law of the land. Article 6 places sovereignty in the hands of God alone, to be exercised by 'the nation'. By stating that God is sovereign in the constitution, and that God entrusts this power to the nation, exercising power amounts to interpreting God's Will, which could be understood to require the actions of government to comply with religious law and principles. This creates tension between democratic and theocratic institutions, as theocratic institutions may wish to rely on this article to exercise power. The provision is silent on the issue of who is to ensure religious compliance, leaving the possibility open that a religious body such as Dar Al-Iftaa may claim that only it may interpret a law's compliance with God's Will. A religious body, unelected, unaccountable and acting in this way, would effectively usurp the legislature and judiciary. LFJL's findings from its Rehlat Watan constitutional tour are clear that only the judiciary may have the power to strike down, overrule and amend legislation deemed incompatible with the constitution. 97% of survey participants expressed this view.

   Further, a fundamental tenet of democracy is that power is vested in 'the people', on behalf of whom the state exercises power, and to whom it is answerable. Stating that 'the nation' shall be the source of powers is problematic – 'the people' would be preferable to ensure clarity and to protect members of the population who are not citizens and guarantee their rights.

2. **Article 7: Identity**

[1] www.cdalibya.org

Article 7's characterisation of Libya as an Islamic State without expressly safeguarding the religious freedoms of persons, including religious minorities, is extremely concerning. That lack of protections for religious freedom is particularly concerning in light of the ongoing violations of this right in the country. This characterisation represents a notable departure from the 2011 Constitutional Declaration and the 1951 Constitution, both of which specified that the religion of Libya is Islam, but specifically protected the religious freedom of minorities. Defining the state as a religious state is subject to interpretation, but one reading of 'Islamic State' is that all civil, economic, and social aspects of the state are overseen in accordance with religious principles and law. 'Islamic State' is therefore a much stronger conception of the role of religion and the state than identifying the state religion of Libya as Islam.

3. **Article 8: Sources of Legislation**

The designation of Islamic Sharia as the source of all legislation, and the commitment to introduce legislation necessary 'to prevent propagating and spreading beliefs contrary to Islamic Sharia and criminalising aggression on Islamic holy places or *offenses against God*' is concerning and contradicts LFJL's findings on sources of law during its Rehlat Watan constitutional tour. Although Rehlat Watan participants were not unified on the issue of Sharia as a source of law, they were clear that if it is to be included as a source of law it should not be the primary source, and must be strictly defined to clarify:

- That only the established principles of Islam as shared across the various schools of Islamic jurisprudence will be applied;
- Who will hold interpretive power for legislative purposes; and
- Which source of law will take precedence in the case of a conflict between Sharia and another source of law.

Further, many participants expressed concern at the potential political abuse of Sharia to restrict fundamental freedoms, citing Iran and Pakistan as examples.

4. **Articles 10-12: Citizenship, Invalidation or Withdrawal of Citizenship, Naturalisation**

Articles 10, 11 and 12 regulate nationality and access to, and revocation of, citizenship. These articles in their current form repeat and enshrine the historic use of these mechanisms to discriminate against women, minorities and foreign residents.

   - Article 10 states that Libyan nationality will only pass from a Libyan father, thereby violating the constitution's own provision for gender equality in Article 13, and perpetuating disruption to family life where a Libyan woman is married to a non-Libyan man. This is discriminatory, violates Libya's international obligations and does not meet regional and constitutional standards on this issue. Further, Article 10 states that laws passed 'in accordance' with the 1951 Constitution will be considered as conferring citizenship. It is unclear to which laws this refers, which creates ambiguity as to the rights of those who obtained citizenship in the period since 1951. The limitations on dual citizenship-holders holding positions of political office are unusual and unnecessarily obstructive.

- Article 11 may apply to naturalised citizens or nationals by birth. Revoking nationality by birth is very likely to leave a person stateless; many constitutions state that no citizen by birth shall be deprived of nationality. Revocation in the case of naturalised citizens may only be exercised in strictly defined circumstances, on which Article 11 is silent. Constitutions tend to state that no one may lose nationality by birth and limit the ability to revoke naturalised citizenship to the circumstances detailed in the Convention on the Reduction of Statelessness 1961, to which Libya is a party.

- Article 12 requires 20 years of residence before naturalisation may take place, making the process for becoming a naturalised citizen extremely lengthy. When read in conjunction with the Article 11 provision allowing citizenship to be revoked for 20 years after naturalisation, Article 12 creates a 40-year period of instability for those seeking naturalised status. Further, the stated factors for consideration when deciding whether to grant nationality are broad and could be used to legitimise discrimination based on ethnic, cultural or political factors. The requirement to wave one's nationality before gaining Libyan nationality is not consistent with the Article 10 provision permitting dual citizenship. The lengthy naturalisation process and vague conditions of Article 12 propogate the historic difficulty that minority communities have faced in obtaining citizenship.

- Participants during LFJL's Rehlat Watan constitutional tour were agreed with the 1951 Constitution provisions on citizenship which granted citizenship to a person born to a Libyan, or who is born in Libya, or has lived in Libya regularly for 10 years. Anyone who obtained Libyan nationality lawfully between 1951 and the present day must also have their nationality safeguarded.

5. Article 27: Language

The committee was unable to agree on recommendations regulating the national and official languages of the state. Language is a central element to the expression of identity and the right to speak and use one's own language is essential to human dignity. International law reflects this. Historically, members of Libya's minorities have had their rights to language repressed, and many expressed to LFJL that using their languages for official purposes, and especially in education, is essential to their efforts to maintain their cultural identity. In addition to Arabic, the constitution must grant official language status to, and permit administrative use of, Tamazight and Tebu languages in areas where they constitute density of population. The state must provide for all official interactions and resources to be made available in Tamazight, Tebu and Arabic, particularly in relation to education.

Section 1: Fundamental Cornerstones

Article 6 - Sovereignty

God alone is sovereign and sovereignty, by His will, is the nation trust. The nation is the source of powers that shall be exercised directly by referendum, or indirectly through constitutional institutions.

To possess sovereignty is to possess the power to make and enforce the law of the land. Over time, the exercise of sovereignty has changed. For example, where once it was common to see sovereignty exercised by a monarch it is now more common for sovereignty to be exercised by the people through democratic mechanisms. Modern constitutions reflect this, regardless of the system of governance selected. Constitutional provisions placing sovereignty in the hands of God are extremely rare; examples include Iran and Pakistan.

Democratic and constitutional institutions of government exercise power on behalf of the people. However by stating that God is sovereign in the constitution, exercising power through governance amounts to interpreting God's Will. As such, Article 6 could be understood to require that the actions of government comply with religious law and principles, creating tension between democratic institutions and theocratic institutions. Theocratic institutions may wish to rely on this article to exercise power.

The constitutional recommendations are unclear about who would act to ensure this compliance. The possibility is left open that a religious body such as Dar Al-Iftaa – and not the judiciary – might effectively claim that it is the only institution capable of interpreting a law's compliance with religious principles. In this case, religious bodies are effectively granted supremacy over the executive, legislature and judiciary. A system which works in this way is Iran.

Further, Article 6 contradicts Article 9 which states that "*supremacy of the law is the foundation for governance of the State; and this Constitution is the supreme law of the state*". Law will not be supreme where the ultimate source of sovereignty is ambiguous and the possibility is left open that constitutional provisions may be required to comply with what unaccountable institutions interpret as God's Will.

The decision to make 'the nation' the source of all powers is also problematic; 'the people' would be preferable to ensure clarity and to protect members of the population who are not citizens and guarantee their rights. Vesting powers in 'the people' clarifies that all state institutions exercise power on behalf of the people and are thus answerable to the people, a fundamental tenet of democracy. By contrast, 'the nation' ('Ummah') is ambiguous, and may imply a jurisdiction wider than the geographical one of Libya. Such a meaning would be legally incoherent and inconsistent with the aims of a constitution, which is to protect the rights of all the people within Libya's boundaries. Alternatively, 'the nation' may be understood to mean that members of the population who are not nationals may be excluded from holding government institutions accountable. Further, access to citizenship has long been a controversial issue, with women and minority communities facing difficulty passing or accessing citizenship. This issue is discussed in detail in relation to articles 10-12. As this difficulty is ongoing, the constitution must remove any ambiguity from this provision, which could otherwise exclude certain members of the population from enjoying their human rights.

i. Popular Consensus:

Accountability

As God is sovereign in the constitution, exercising power through governance amounts to interpreting God's Will, arguably creating space for a scholarly body to interpret God's Will. Two problems related to accountability arise:

- Popular Accountability

Religious bodies are unelected and therefore not subject to popular accountability. If Article 6 is interpreted as allowing a religious body to scrutinise the democratic and constitutional institutions of state, then this places it in a position of supremacy despite lacking a popular mandate or being subject to methods of popular accountability. When LFJL conducted its Rehlat Watan constitutional tour, 70% of participants stated that only the Supreme or Constitutional Court should be empowered to declare unconstitutional or repeal legislation. Participants stated the fear that without popular and judicial oversight, religion might become politicised and used for specific gains, highlighting examples such as Iran where it has been used to curtail certain freedoms. The consensus among Rehlat Watan participants was that religious bodies may only have a consultative role in government, and must be subject to judicial review as with all public bodies.

- Institutional Accountability

The three branches of government, the executive, legislature and judiciary, each hold each other accountable in what is known as a system of 'checks' and 'balances'. The system ensures that no one branch holds disproportionate power or exceeds its mandate. No religious body forms part of the system, or is mentioned in the constitutional recommendations in this capacity, meaning that any religious body acting to interpret the constitution would be doing so without constitutional mandate and without being subject to the constitutional 'checks' ensuring accountability. This would disrupt the balanced system between the three branches of government and contradict Article 14, which affirms the separation of powers. 95.3% of Rehlat Watan survey respondents answered that the judiciary should have the power to strike down legislation deemed incompatible with the constitution or human rights. Participants viewed the supreme court as a vital 'check' on the power of the legislature and executive, and the only body which should be capable of reviewing their actions. Further, 97% of survey participants answered "no" when asked if any institution other than the Supreme Court should have the power to strike down laws. The constitution must not create ambiguity which might allow an 'unchecked' religious body to disrupt the constitutional design of the balance of power.

ii. Constitutional Standards

Internationally, constitutional provisions for divine sovereignty are extremely rare. While many constitutions make reference to religion when defining the character of the state, sovereignty is almost always exercised by the people.

The Constitution of Pakistan is one of the few examples of constitutions that make reference to divine sovereignty. However, this provision is made in the preamble to the constitution, and not as a feature of the state itself.

~~God alone is sovereign and sovereignty, by His will, is the nation trust.~~ The ~~nation is~~ people are the source of powers that shall be exercised directly by referendum, or indirectly through constitutional institutions.

Article 7 – Identity

Libya is an Islamic state part of the grand Arab West and part of Africa built on comprehensive and diversified constants. It takes pride in all social and cultural components represented by the Arabs, Amazighs, Tuareg, Tebo and others. It shall establish the means to ensure maintenance thereof.

Article 7's declaration of Libya as an Islamic state is notable because it marks a shift away from the Constitutional Declaration's Article 1 provision that the religion of the state is Islam. The new formulation identifying Libya as an Islamic state is subject to interpretation. One reading of this formulation is that it establishes that the country fully observes the Quran and Sunnah as supreme, endorsing and practicing Islamic Sharia including in relation to all civil, economic and social aspects of the state. Read this way, 'Islamic state' is a much stronger and far-reaching conception of the role of religion.

i. Popular Consensus

During LFJL's Rehlat Watan constitutional tour, LFJL encountered varying views on the role of religion and the protection of freedom of religion in the constitution. LFJL spoke with a small number of Christian, Jewish and Agnostic Libyans who felt they were unable to declare, or practice, their beliefs for fear of reprisal. None of these participants were willing to speak on film or to take part in official surveys, such was their fear. Additionally, practitioners of Sufism spoke of their religious freedom being violated, particularly through the targeted attacks on cultural and religious sites such as the mausoleum of Sheikh Abdessalem al-Asmar al-Fituri in Zliten, which was entirely demolished in 2012. Further, the recent targeting of, and violence against, Coptic Christians in Libya has brought the need for clear protections of the right to religious freedom in Libya into sharp focus. The constitution must protect the religious and cultural freedom of Libya's entire population.

ii. International Obligations

As a party to the International Covenant on Civil and Political Rights 1966 (**ICCPR**), Libya is required to safeguard the article 18 right to freedom of thought, conscience and religion. The Constitutional Declaration states that "The State shall guarantee for non-Muslims the freedom to practice their religious rituals." However, Article 7 of the constitutional recommendations departs from this: it acknowledges minority social and cultural identities and guarantees their maintenance, but does not provide specific protection for other religions. Where a state identifies itself as Islamic, and more so where sovereignty is stated to belong to God, such protections are vital for guaranteeing the right of religious minorities to practice their religion freely. Article 4(2) of the ICCPR is clear that freedom of religion is a non-derogable right (meaning that it is absolute and cannot be departed from in any circumstances); the constitution must safeguard it explicitly.

iii. Constitutional Standards

It is a constitutional norm to state that no constitutional provisions shall negatively affect minorities. The Tunisian Constitution identifies that the religion of Tunisia is Islam whilst providing clear and unambiguous protections for religious freedom in its Article 6 on 'freedom of belief, conscience and religious practice, neutrality of mosques' which states:

> *The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalisation.*
>
> *The state undertakes to disseminate the values of moderation and tolerance and the protection of the sacred, and the prohibition of all violations thereof. It undertakes equally to prohibit and fight against calls for Takfir and the incitement of violence and hatred.*

The religion of* Libya is *Islam* ~~*an Islamic state*~~*. Libya is* part of the grand Arab West and part of Africa built on comprehensive and diversified constants. It takes pride in all social and cultural components represented by the Arabs, Amazighs, Tuareg, Tebo and others. It shall ~~*establish the means to ensure maintenance thereof.*~~ *guarantee the religious and cultural freedom of all people.

Article 8 - Sources of Legislation

1. Islam shall be the religion of the State, and provisions of the Islamic Sharia shall be the source of all legislations. Any legislation in violation thereof may not be enacted. All legislations enacted in violation thereof shall be null and void.

2. The State shall be committed to enact the necessary legislations to prevent propagating and spreading beliefs contrary to the Islamic Sharia and practices contrary thereto.

3. The State shall be committed to enacting legislations that criminalize aggression on Islamic holy places or offenses against God, Holy Quran, Sunna, Prophets, Prophet Mohammed (PBUH), Mothers of Believers [Wives of Prophet Mohammed (BPUH)] or Prophet's Companions (May God be pleased with them).

(This Article may not be amended.)

Article 8 is explicit that Sharia shall be the source of all legislation and prohibits any non-compliant legislation. This means that any legislation deemed non-compliant may be struck down, meaning that Sharia is at the top of the hierarchy of sources of law, above the constitution and international law; meaning that, on issues where Sharia is determinative, it becomes the only form of law. Where, for example, a human rights principle is deemed not to be Sharia-compliant, it would not be upheld by the state. This is inconsistent to LFJL's findings

from Rehlat Watan, where 91% of survey participants expressed support for human rights being superior to other sources of law.[2]

This strong Sharia clause is highly unusual when considered against similar provisions of other countries where the predominant religion is Islam. The Tunisian constitution, whilst identifying the religion of Tunisia as Islam and affirming its people's commitment to Islam's teaching contains no reference to Sharia, instead guaranteeing freedom of belief and conscience generally. In contrast, constitutions that contain specific reference to Sharia use it in specific circumstances. Jordan recognises the exclusive jurisdiction of Sharia over only certain issues. Two interlinked questions arise from Article 8's strong Sharia clause in Libya's current constitutional recommendations. Does this represent popular consensus? How will this work in practice, for example how will Sharia be defined and interpreted, and by whom?

i. Popular Consensus

When LFJL carried out its Rehlat Watan constitutional tour, the population was not unified in its view of the desired role for religious law in the new constitution:

- Some participants were in favour of the constitution requiring legislation to be compatible with Islamic principles and to contain a mechanism for reviewing laws against those principles. This would mean that Sharia would be the primary source of legislation. One participant clarified that "Sharia is not only central in the government, but central in the whole *Ummah*."
- Others expressed that the constitution should remain silent on the issue of whether religion is a source of law, believing that the legislature should be left to reflect the electorate's religious and ethical beliefs (in accordance with the fundamental provisions in the constitution) on a case by case basis.
- One in five participants stated that there should be many sources of law and that Sharia should not be stated as the primary source; the legislature should draft laws taking into account all available sources. One participant explained, "Stating that a source is the primary source, is like stating it is the only source because it will always overrule the other sources."
- LFJL also heard support for the recognition of customary law during Rehlat Watan when considered in terms of the issues that cultural norms impact, such as marriage and dispute resolution. Many countries with distinct cultural communities allow for circumstances where customary law is used. South Sudan provides that "customs and traditions of the people" shall be considered a source of legislation.[3] There is no role for customary law set out in the recommendations.

However, the population was clear and unanimous in its concerns and considerations in the event that Sharia is used as a source of law, namely the fundamental importance of clarifying:

[2] During discussions, participants often understood human rights to mean international conventions.
[3] Constitution of South Sudan 2011 Article 5(c)

- That only the established principles of Islam, as shared between the different schools of Islamic jurisprudence will be applied;
- Who will hold the power to interpret Sharia for legislative purposes; and
- What interpretive use it will have in relation to other sources of law, which source of law will take precedence in the case of a conflict between Sharia and another source of law.

Participants stressed that clear definitions on these points are vital to guarantee that the application of Sharia will not be open to abuse. Unless defined clearly, a future legislature might politicise the use of Sharia to make specific gains such as to restrict freedoms or to permit actions otherwise deemed morally impermissible. This concern was commonly articulated to LFJL by women – citing religious *fatwas* such as *fatwa* 1587 calling for a ban on Libyan women travelling without a male chaperone.

Further, with Sharia as the only source of law regulating issues over which Sharia is determinative, and the Article 6 provision placing sovereignty in the hands of God, a religious body may seek to assert itself as the only body capable of interpreting Sharia and ensuring that laws and the actions of government are compliant. Such a body may also seek the power to strike down laws that it deems as not compliant with Sharia and religious principles. Any religious body acting in this way would effectively hold the power to supersede the executive, legislature and judiciary.

As it stands, the formulation of Article 8, especially when read together with Article 6, does not represent the views LFJL heard from the Libyan people. Irrespective of the role participants wished Sharia to play in the constitution, there was consensus that clear and definable limits should be placed on its application to ensure that it would not be open to abuse. Additionally, the fact that Article 8 is not amendable is of real concern, given its interaction with Article 6 on sovereignty and the arising powers it potentially grants to religious bodies without containing sufficient safeguards to prevent its abuse.

On the topic of defining and interpreting Sharia, Rehlat Watan participants highlighted that:

- Libya has people adhering to at least two schools of Islamic Jurisprudence (*mathahab*), the Maliki and Abadhi - the constitution will need to clarify that only the established principles of Islam, as shared between the different schools of Islamic jurisprudence will be applied;
- The constitution must clarify who is empowered to arbitrate between schools of jurisprudence in the case of a conflict; and
- If Sharia is left as the only source of law, the constitution must specify who would adjudicate between, and what would result where there is a conflict between, Sharia and another source of law.

Despite relying heavily on the interpretation of Sharia, the recommendations do not clarify who holds that power. This is likely to result in a conflict between the traditional branches of government and religious bodies claiming authority. It is important to note that 70% of participants during the Rehlat Watan tour were definite that unelected bodies without popular mandate should not be empowered to create, amend or overrule legislation. 97% of

Rehlat Watan survey respondents said that only the Supreme Court should have the power to strike down legislation, stating that other bodies may only have a consultative role. This is because of the population's desires for a system of clear 'checks' and 'balances' between the branches of government, and their fears that any other institution might disrupt this balance leading to abuses of power. Participants were clear that a religious institution such as Dar Al-Iftaa should only have a consultative role in government where its views would not be binding, and should be subject to judicial oversight. On participant in Jalu stated 'Who is the arbiter if there is a problem? Who decides if something is constitutional or not? We have a constitution. The judiciary, the judiciary.'

Further, participants throughout Rehlat Watan spoke about the risks of Sharia being manipulated for political means or a restrictive agenda, in violation of the separation of powers. As one participant in Jadu explained, if such a body is '…appointed by the executive and, so, even if theoretically independent, it is possible for the executive to appoint members… that will serve its own purpose under the cloak of religious legitimacy.' Examples of the political use of Sharia that participants gave included the curtailment of freedoms, particularly for women, citing women's access to education in Afghanistan under the Taliban as an example, and where it has been used to permit certain actions which some participants considered culturally undesirable, such as in the United Arab Emirates where the sale of alcohol has been tolerated. Participants noted recent attempts in Libya to politicise religion in order to ban women travelling without being accompanied without a male chaperone, as well as attempts to prevent Libyan women marrying non-Libyan men.

When asked to identify the hierarchy of importance of various sources of law (the constitution, international law, customary law and Sharia), participants frequently placed international law at the top, with Sharia usually positioned below or joint top. One participant noted that "We are members of the global world and should all abide by the same laws", which was a common view. International law is seen as a vital protection for human rights and as a safeguard against governmental abuses of power. This links to Rehlat Watan participants' clear preference that they want the constitution to provide for a strong judiciary that can uphold human rights principles.

ii. International Obligations

The current recommendations are unclear about how sources of law other than Sharia might fit into the legislation-making process. Article 17 makes space for international treaties and agreements in the hierarchy of legal sources, placing them above domestic law but below the constitution, provided they do not contravene Sharia. As such, although other sources of law will be significant in relation to issues on which Sharia is not determinative, this does mean that Sharia will take precedence over all other sources on issues where it is determinative. Despite this strong conception of the role of Sharia as a source of law, no guarantee is made to protect the freedom of conscience and belief of religious minorities. The need to provide comprehensive safeguards of the right to freedom of conscience and belief in line with Libya's ICCPR Article 18 obligations is discussed in depth in the discussion of Article 7, above.

Another key consideration related to Article 8 is the requirement for the state to "enact the necessary legislations to prevent propagating and spreading beliefs contrary to the Islamic Sharia and practices contrary thereto" (8(2)) and to criminalise aggression on Islamic holy places or "offenses against God" (8(3)). "Offenses against God" is a broad formulation which is subject to interpretation and could easily be used to restrict fundamental freedoms, for example by interfering with the rights of religious minorities to practice their religions freely. Libya has signed and ratified international treaties that safeguard religious freedom such as the ICCPR. The Human Rights Committee has interpreted the ICCPR as prohibiting freedom of religion being exercised in a way that may restrict the rights and freedoms of others.[4] As Article 8 of the recommendations is drafted widely and does not contain safeguards that could prevent its abuse, legislation could easily be enacted that would breach Libya's international obligation for freedom of religion.

These provisions could lead to the enshrining of restrictive blasphemy laws, which have frequently been abused as a pretext for violations against freedom of expression in other countries. It is essential to guarantee an environment where critical discussion can be held. Blasphemy laws have resulted in violence between religious groups in Pakistan and vigilantism against individuals in Bangladesh. Blasphemy laws may legitimise these acts as the groups' existence is said to offend mainstream religious sensibilities. Additionally, blasphemy laws establish a hierarchy of beliefs which would undermine the provision for 'equality between all people' made in the 'Interpretation of Texts Related to Rights and Liberties' article in the Rights and Liberties section. Sufficient constitutional safeguards must exist to protect against such interpretations.

iii. Constitutional Standards:

A number of constitutions make reference to Sharia as a source of law. The strength of references to Sharia varies widely:

- Iran's constitution requires 'All civil, penal, financial, economic, administrative, military, political, and other law and regulations' to be based on Islamic Sharia. This is an absolute form of Sharia clauses.
- Pakistan's constitution requires legislators to 'take steps to amend the law so as to bring the provision into conformity with the injunctions of Islam' or the law ceases to have effect. However, the Pakistani Constitution does also provide that 'Nothing in this Part shall affect the personal laws of non-Muslim citizens'.[5]
- The Constitution of Kuwait states that Islamic Law is *a* principle source of legislation.[6] This has been held to permit the passing of legislation which complies with alternative sources of law but not necessarily Sharia.
- The Constitution of Iraq states that Islam is a foundational source of legislation, and that no law may be enacted that contradicts the established provisions of Islam, principles of democracy or the rights and basic freedoms enshrined in the constitution.[7] This conception

[4] General Comment 22
[5] Constitution of Pakistan 1973 (reinst 2002, rev. 2012) Article 227(3)
[6] Constitution of Kuwait 1962 (reinst. 1992) Article 2
[7] Constitution of Iraq 2005 Article 2

of a Sharia clause is intended to prevent legislation being passed in compliance with Sharia unless it also complies with democratic principles and human rights.

- The Gambian and Jordanian constitutions permit the application of Sharia before certain courts and only in relation to certain matters such as marriage, divorce and inheritance.[8]
- Tunisia identifies the religion of the state as Islam but does not include Sharia as a source of law.

The current conception in Article 8 is one of the strongest, most closely resembling the Iranian model. By contrast, LFJL's findings from Rehlat Watan suggest that a majority of the population would prefer a conception which states that Sharia is *a* source of legislation. Further, as 91% of participants surveyed during Rehlat Watan expressed positive support for human rights principles being superior to other sources of law, international human rights law should take precedence, along with the constitution, in the hierarchy of law. The constitution may state that religious bodies shall be consulted during the legislative process but their views should not be binding, participants stated to LFJL during Rehlat Watan.

Historically, constitutional monarchies often contained unamendable provisions safeguarding the monopoly of power held by the monarch. In modern constitutions, unamenable provisions tend to be used only to protect democratic principles and fundamental rights and freedoms. For example, the Tunisian constitution states that 'There can be no amendment to the Constitution that undermines the human rights and freedoms guaranteed in this Constitution.'[9] A similar provision is made in the constitution of Kosovo.[10] However, the constitution must be designed as an inclusive document in which all Libyans find protection in, and are represented by, in order to be long-lasting. This can only be achieved through consensus, and not through unamendable provisions which may bind future generations to provisions that do not represent their needs. For this reason, the majority of modern constitutions avoid unamendable provisions as they are seen as undemocratic and not responsive to changing expectations.

1. Islam shall be the religion of the State~~.~~ ~~and provisions of the~~ Islamic Sharia and international law shall be ~~the~~ source~~s~~ of ~~all~~ legislation~~s~~. Any legislation in violation of international law, principles of democracy or the rights and freedoms enshrined in the constitution ~~thereof~~ may not be enacted. ~~All legislations enacted in violation thereof shall be null and void.~~

2. Religious bodies may be consulted during the law-making process, but their views shall not be binding.

3. The role of customary law and traditional authority is acknowledged within the local government system.

4. Nothing in this Article shall interfere with the rights of all people to exercise their right to freedom of religion, belief and conscience.

[8] Constitution of Gambia 1996 Article 7(f) and 170(5); Constitution of Jordan 1952 (rev. 2011) Article 105
[9] Constitution of Tunisia 2014 Article 49
[10] Constitution of Kosovo 2008 Article 113(9);

~~*2. The State shall be committed to enact the necessary legislations to prevent propagating and spreading beliefs contrary to the Islamic Sharia and practices contrary thereto.*~~

~~*3. The State shall be committed to enacting legislations that criminalize aggression on Islamic holy places or offenses against God, Holy Quran, Sunna, Prophets, Prophet Mohammed (PBUH), Mothers of Believers [Wives of Prophet Mohammed (BPUH)] or Prophet's Companions (May God be pleased with them).*~~

~~*(This Article may not be amended).*~~

Article 10 - Nationality

1. **A Libyan is everyone who obtained Libyan nationality in accordance with provisions of the Libyan constitution issued on October 7, 1951 and the laws passed in accordance with it.**
2. **A Libyan is everyone born to a Libyan father or obtained Libyan nationality later on in accordance with a law in force.**
3. **A Libyan might have another nationality besides the Libyan nationality. Nevertheless, a Libyan who holds another nationality, or a person who has obtained Libyan nationality for less than 10 years, might not hold the following positions:**
    - **President of the State;**
    - **Prime Minister, Minister and Deputy Minister;**
    - **Member of the Legislative and Judicial Authorities;**
    - **Governor of the Central Bank of Libya and his deputy;**
    - **Representatives of permanent diplomatic missions;**
    - **General and branch Chiefs of Staff of the Libyan army;**
    - **Director of intelligence, passports, customs, general security or the police;**
    - **The Higher Elections Commission, presidents and members of independent constitutional bodies;**
    - **Civil Registrar;**
    - **Any other position stated by the law.**

i. Popular Consensus

Article 10(2) does not grant a Libyan woman the right to pass on her Libyan nationality to her child independently in any circumstances. This means that a Libyan woman married to a non-Libyan man will not be able to pass her nationality to her children, whereas a Libyan man married to a non-Libyan woman can. This provision is discriminatory and contradicts Article 13 of the draft recommendations which provides for equality between men and women. It has a far-reaching effect on Libyan women and their children. During LFJL's Rehlat Watan constitutional tour, women with foreign spouses expressed how they feel that their family life is disrupted by the difficulty that they face in passing on their nationality to their children. In particular, this has impacted the property and inheritance rights of affected families, as well as causing difficulty accessing healthcare and education in some cases.

ii. International Standards

- As a party to the Convention on the Elimination of all forms of Discrimination Against Women 1979 (**CEDAW**), Libya has an obligation to grant women equal rights with men with respect to the nationality of their children under its Article 9. The current

recommendations fail to meet that obligation, as Libyan men have the opportunity to pass on their nationality irrespective of their spouse's nationality whereas Libyan women do not.

- Article 10(1) is ambiguous; it is unclear which laws would be deemed to be 'in accordance' with the 1951 Constitution and therefore unclear who might be considered to be a national. Article 10(1) may or may not be interpreted as allowing those who obtained nationality between 1951 and the present day to retain it. If certain laws passed on nationality are not deemed in accordance with the 1951 Constitution, this risks leaving members of the population who gained nationality by means of those provisions stateless. As a party to the Convention on the Reduction of Statelessness 1961, Libya may not deprive a person of nationality where to do so would render a person stateless.[11]

iii. Constitutional Standards

- The historical trend of not providing women the right to pass their nationality is a regional theme that has come under intense criticism in recent years. In 2010 Libya passed legislation on nationality to prevent Libyan women from passing their nationality except in cases where the child would be left stateless.[12] The Lebanese constitution has been criticised for not protecting a woman's right to pass nationality to her children. Tunisia, Algeria and Morocco have recently reformed their national legislation to allow nationality to pass from a mother, although their constitutions are silent on this point. The Turkish Constitution states that 'The child of a Turkish father or a Turkish mother is a Turk'; the Iraqi Constitution mirrors this provision.[13]

- Article 10(3) places limits on the ability for dual citizenship holders to hold public positions. The placing of limits on political office holders is not unusual. The Australian Constitution also prohibits dual citizenship holders from high political office.[14] However the decision to limit positions such as governor of the Central Bank is unusual as this is not a position that impacts the sovereignty of the state in a traditional sense. Appointments to this position should be based on technical merit only; by way of example, the Bank of England's current governor is Canadian. Further, the United Kingdom is an example of a state which places nationality requirements only for positions that deal with national secrets, such as in the intelligence services. The Prime Minister of the United Kingdom is subject to the same requirements as all Members of Parliament: citizenship of the United Kingdom, meaning that he or she may also be the national of another country. Considering the high numbers of Libyans living in the diaspora, the public office limitations are likely to have a very wide impact.

[11] Article 8(1)
[12] Law Number (24) for 2010/1378 On the Libyan Nationality, Article 3
[13] Constitution of Turkey 1982 (Rev 2011) Article 66; Constitution of Iraq 2005 Article 18(2)
[14] Constitution of Australia 1985 Article 44

~~1. A Libyan is everyone who obtained Libyan nationality in accordance with provisions of the Libyan constitution issued on October 7, 1951 and the laws passed in accordance with it.~~

~~2.~~ 1. ***A Libyan is everyone born to a Libyan father or Libyan mother, or who was born in Libya, or has lived in Libya regularly for 10 years, ~~father~~ or obtained Libyan nationality later on in accordance with a law in force.***

~~3.~~ 2. ***A Libyan might have another nationality besides the Libyan nationality. Nevertheless, a Libyan who holds another nationality, or a person who has obtained Libyan nationality for less than 10 years, might not hold the following positions:***

- ***President of the State;***
- ***Prime Minister~~Minister and Deputy Minister~~;***
- ~~***Member of the Legislative and Judicial Authorities;***~~
- ~~***Governor of the Central Bank of Libya and his deputy;***~~
- ***Representatives of permanent diplomatic missions;***
- ***General and branch Chiefs of Staff of the Libyan army;***
- ***Director of intelligence~~passports, customs, general security or the police~~;***
- ~~***The Higher Elections Commission, presidents and members of independent constitutional bodies;***~~
- ~~***Civil Registrar;***~~
- ~~***Any other position stated by the law.***~~

Article 11 – Invalidation and Withdrawal of Nationality

It is prohibited to deprive any Libyan of Libyan nationality for any reason; but it might be withdrawn from a person who obtained it within the 20 years which follow obtaining it. The law states the cases where it might be withdrawn.

i. Popular Consensus

During its Rehlat Watan constitutional tour, LFJL spoke with Tebu participants about the arbitrary revocation of citizenship they experienced following the Chadian-Libyan war which left them stateless. Many of the population of the Aouzou Strip, which was at the centre of the conflict, had historically possessed Libyan citizenship, which was revoked after the International Court of Justice finding that the area had belonged to Chad in 1994.[15] The revocation of citizenship in this case clearly violates Libya's obligations under the International Covenant on the Reduction of Statelessness 1961, which prohibits revocation where to do so may lead to statelessness apart from in strictly defined exceptions.[16] Affected participants were clear that statelessness severely impacts their access to fundamental services such as health and education, and enjoyment of their human rights.

ii. International Obligations

It is unclear whether Article 11 applies only to naturalised citizens or also to nationals by birth. The Universal Declaration of Human Rights Article 15(2) states that nobody may be

[15] http://www.icj-cjj.org/docket/files/83/6897.pdf

[16] Article 8, for example 'where the nationality has been obtained by misrepresentation or fraud'.

arbitrarily deprived of her or his nationality (Article 15(1) states that 'Everyone has the right to a nationality'.) Because revoking nationality by birth is much more likely to leave a person stateless due to the lack of another citizenship, and because even where a person has citizenship elsewhere that status is much less secure than nationality by birth, revocation should only be permitted for naturalised citizens. Many constitutions state that no national by birth shall be deprived of nationality, such as in Iraq[17].

Revocation for naturalised citizens may only apply in strictly defined circumstances. A 2013 Report of the Secretary-General of the United Nations General Assembly clarified that permitted conditions for revocation must serve a legitimate purpose, be the least intrusive instrument to achieve the desired result and be proportional to the interest to be protected.[18] Leaving the criteria for revocation entirely open is arbitrary and open to use which may not satisfy the necessary conditions. The Constitution of Bosnia and Herzegovina provides guarantees that citizenship will not be deprived on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, and no one may be stripped of citizenship where they would be left stateless.[19]

iii. Constitutional Standards

Article 11 does not specify the cases where naturalised status may be revoked, meaning that this provision could be exercised arbitrarily. As the process for naturalisation in Article 12 requires applicants to drop their original nationality, any subsequent revocation could leave the person stateless in violation of Libya's international commitments regulating statelessness. Because of this obligation, where provision for revocation is made in the constitution, application must be limited to the stated exceptions in the International Convention on the Reduction of Statelessness 1961, i.e. cases where citizenship was acquired unlawfully or for acts prejudicial to the state, such as in the Ugandan constitution. Generally constitutions state that no one shall be deprived of nationality by birth; article 18(3)(a) of the Iraqi Constitution is one such example. The Tunisian Constitution states that 'No citizen shall be deprived of their nationality, exiled, extradited or prevented from returning to their country', which represents best practice.

~~***It is prohibited to deprive any Libyan of Libyan nationality for any reason;*** ***but it might be withdrawn from a person who obtained it within the 20 years which follow obtaining it. The law states the cases where it might be withdrawn.***~~

No citizen shall be deprived of their nationality, exiled, extradited or prevented from returning to their country'

Article 12 - Obtaining Libyan nationality

[17] Constitution of Iraq 2005 Article 18(3)(a)
[18] A/HRC/25/28 page 4
[19] Constitution of Bosnia and Herzegovina 2009 Article 7(b)

1. **The law regulating granting the Libyan nationality shall take into account the national interest and preserving the demographic structure on the regional and national levels and facilitating integration in Libyan society.**
2. **Granting Libyan nationality shall be conditional on the applicant dropping the original nationality, legal entry into the country and legal uninterrupted residence for at least 20 years, unless the applicant has rare and distinguished expertise regionally and internationally. The law states the other conditions.**

i. Popular Consensus

Difficulty in accessing citizenship is a notable burden and concern for members of minority communities in Libya, many of whom have lived for generations without being able to obtain citizenship. During LFJL's Rehlat Watan constitutional tour members of the Tebu and Tuareg communities highlighted the impact of their struggle to acquire citizenship, for example being denied access to fundamental services such as health and education because they do not have a family booklet. Article 12, regulating naturalisation, may permit the continuation of the restriction of access to nationality through its vague provision for factors that the state may have regard to when regulating nationality. 'National interest', 'preserving the demographic structure regionally and nationally' and 'integration within Libyan society' are broad considerations that could easily be manipulated to restrict access to nationality. These considerations may also be used to legitimatise discrimination based on ethnic or cultural factors.

ii. International Obligations

Article 12 requires one to waive their original nationality as a requirement for gaining Libyan nationality. This conflicts with the Article 10 recognition of the ability to hold dual nationality. Further, the waiver requirement risks creating situations of statelessness because of the possibility that Libyan nationality can later be withdrawn within 20 years of naturalisation (Article 11). Such a situation is contrary to the right to a nationality and the right not to be arbitrarily deprived of one's nationality. Although it is common for states to allow for naturalised status to be revoked, the constitution would need to provide adequate safeguards to ensure that this mechanism is not open to abuse on the basis of discrimination and does not result in the statelessness of the person concerned. Any discriminatory application of the mechanism would be in violation of Libya's international obligations for equality and non-discrimination, such as Article 2 of the ICCPR.

iii. Constitutional Standards

The requirement for at least 20 years of uninterrupted legal residence is onerous. When considered in conjunction with the Article 11 provision for naturalised status revocation during the 20 years following naturalisation, the complete process for naturalisation is extremely lengthy – resulting in insecurity for 40 years. In Libya's 1951 Constitution, Articles 8 and 9 require 10 years of residence in Libya before becoming a naturalised citizen, and is silent on the issue of revocation. In Europe, the conditions for naturalisation usually require between 5 and 10 years of residence in the country. Morocco requires 5 years, Kenya 7 and Egypt 10. Overwhelmingly, the process for naturalisation is regulated by legislation and not

by the constitution. This is the case in Tunisia, Morocco, Egypt, South Africa and South Sudan.

~~1. The law regulating granting the Libyan nationality shall take into account the national interest and preserving the demographic structure on the regional and national levels and facilitating integration in Libyan society.~~

~~2. Granting Libyan nationality shall be conditional on the applicant's dropping the original nationality, legal entry into the country and legal uninterrupted residence for at least 20 10 years, unless the applicant has rare and distinguished expertise regionally and internationally. The law states the other conditions.~~

1. *Conditions for naturalisation shall be regulated by law.*

Section II: Economic Cornerstones

Article 23: Zakat

Zakat is essential to the society. The State shall oversee its payment and spending on legal disbursements in accordance with the provisions of Islamic Sharia.

i. Popular Consensus

Although Zakat was not an issue discussed during LFJL's Rehlat Watan constitutional tour, discussion of the level of state regulation of religion generally was. Participants were divided over how prescriptive they want the constitution to be on the role of religion in their daily lives. While some participants stated the primacy of religion in all aspects of life, others considered religion a personal issue that need not necessarily be prescribed by law. As Zakat is commonly seen as a spiritual and moral obligation between the individual and God, rather than one to be regulated by the state, its inclusion in the draft recommendations is unusual. However, participants consistently raised concerns over the need to address corruption in Libya. Measures to ensure that Zakat is overseen to prevent mishandling are therefore in accordance with the aspirations of the participants spoken to by LFJL.

ii. International Obligations

International instruments do not discuss Zakat directly. However, the CDA must ensure that Article 23 cannot be construed as an obligation on the whole of society, otherwise Libya's international obligations relating to freedom of religion may be compromised. The ICCPR is interpreted, in the Human Rights Committee's General Comment 22, as prohibiting religion being exercised in a way that may restrict the rights and freedoms of others.

iii. Constitutional Standards

Only a small minority of countries contain a reference to Zakat in their constitutions. Examples include Pakistan, Sudan and Yemen. The majority of states leave Zakat entirely

unregulated, but a handful oversee it through legislation for the purpose of protecting against its improper use. Lebanon and Jordan are examples of states where Zakat is organised by the state, but remains voluntary.

Above all else, a constitution must enshrine protections for the country's inhabitants. The CDA must ensure that this provision cannot be interpreted as characterising Zakat as an obligation, but should be concerned with ensuring the proper distribution and use of Zakat by guaranteeing transparency at a constitutional level. Whereas the recommendation currently makes no mention of how the funds will be regulated. Further, Zakat may be performed according to different interpretations and different practices exist for calculations, the types of assets considered and eligibility, which Article 23 does not address. The article should operate as a guarantee of the proper use of Zakat, and not as a detailed obligation to reflect the fact that Zakat is an issue overwhelmingly dealt with at a legislative or policy level across the world.

~~***Zakat is essential to the society.***~~ ***The State shall oversee ~~it's~~ the payment of, and regulate the spending of Zakat to ensure transparency and guarantee its proper use ~~on legal disbursements in accordance with the provisions of Islamic Sharia~~.***

Article 24: Natural Wealth

Natural wealth belongs to the people on behalf of whom the State shall exercise sovereignty over. The State shall work towards its utilization, protection, development and investment ensuring public interest, prosperity and fair benefit to all areas.

i. Popular Consensus

When discussing the issue of control of natural resources during LFJL's Rehlat Watan constitutional tour, the majority of participants expressed the preference for natural wealth to be under national control. This was because of the desire to ensure a fair distribution of revenues across the country, rather than the resources gained being directed towards the capital and cities exclusively. Participants noted that the allocation of natural wealth resources between regions has historically been disproportionate, which has created interdependence between regions that must be addressed by legislation.

70% of communities surveyed expressed that the exploitation of natural resources had caused significant damage. This sentiment is not limited to communities that hold natural wealth, but also communities whose locations and property is harmed in the extraction of natural resources, for example by the running of pipelines through the region. Participants were clear that equitable distribution of natural resource wealth, which takes all damage arising from extraction into account is a necessity. Participants provided potential strategies, such as a portion of revenues invested in a fund for the future, to mitigate some of the damage faced by directly affected communities.

Another key point that is not addressed by Article 24 but was consistently raised by participants during Rehlat Watan in relation to natural resources is the need to provide

safeguards against corruption. In particular, participants sought measures to improve accountability, for example by enshrining transparency through the right to access to information. Guaranteeing the right to information places an obligation on the state to publish full records of its affairs and respond to requests made by the public for particular information. This is intended to reveal and discourage corruption. The information may then be used to challenge decisions of the public body in question, both locally and nationally. Explicit reference to accountability and transparency measures in this article help to ensure that no attempt to implement them can be declared unconstitutional.

ii. International Obligations

The International Covenant on Economic, Social and Cultural Rights 1966 (**ICESCR**) guarantees the right of all peoples to dispose of their natural wealth and resources freely. The African (Banjul) Charter on Human and Peoples' Rights 1981 provides that the right shall be exercised in the exclusive interest of the people, with compensation in the case of spoliation.[20] Further, all peoples have the right to a generally satisfactory environment favourable to their development.[21] Damage caused by natural resource extraction was a key concern of participants during the Rehlat Watan constitutional tour. Accordingly, article 24 must contain provision for equitable natural resource wealth distribution which accounts for environmental damage.

iii. Constitutional Standards

The constitutions of countries that are similarly rich in natural resources tend to provide for equitable distribution of revenues by laying the legislative foundations for their appropriate use. The constitutions of Iraq, Sudan and Iran contain specific references to their natural resources, and protection of the public's interest in those resources. The Constitution of Iraq makes broad provisions for the management of oil revenues, requiring the state to allocate them in a manner that ensures balanced development in areas of the country, with a specific percentage of revenue to be allocated to regions damaged by the previous regime. The constitution also requires the state to devise policies that will develop the oil and gas wealth to achieve the highest benefit to the Iraqi people.

The Constitution of Sudan contains a provision establishing a 'Future Generation Fund', which aims to balance the interests of the oil-producing regions, the Sudanese people as a whole, and the interests of future generations. Norway considers the future in Article 112 of its constitution, which provides that 'Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.' The inclusion of a similar provision in the constitutional draft is essential to meet the aspirations of the population in this regard.

[20] Article 21
[21] Article 24

LFJL notes that the work of Committee 8 will provide detailed recommendations for natural resource governance, which LJFJL has not reviewed as it is outside of its mandate. These provisions in Article 24 should be seen as key elements that Committee 8 must consider.

Natural wealth belongs to the people on behalf of whom the State shall exercise sovereignty in their exclusive interest ~~over~~. The State shall work towards its utilization, protection, development and investment, including for future generations, ensuring public interest, accountability, transparency, prosperity and fair benefit to all areas, including those that do not possess natural resource wealth and those damaged in any way by natural resource extraction.

Article 26: Environment

Protection, safety and development of environment shall be an obligation on the State and all people residing therein.

i. Popular Consensus

The inclusion of guarantees for the protection of the environment represents a positive step. During LFJL's Rehlat Watan constitutional tour participants highlighted that environmental damage, especially pollution, was a key concern and that steps needed to be taken to counter the damage, as well as protect against further damage. People in Bayyada, Jalu and Tripoli highlighted the cost of lack of environmental protection in their towns. In Ghadames the protection of its historic and touristic sites from pollution was emphasised. The need for increased environmental protection was commonly reiterated in areas affected by natural resource production. Recommendations in the work of other committees provide for many of the key issues raised by participants. Committee 6 on rights and freedoms provides for environmental sanitation and compensation for pollution damage. Committee 8 also provides for a proportion of natural resource revenues to be placed in a fund to counter the environmental damage caused by their extraction, for the benefit of the population of the future as well as today. The current recommendation must not conflict with the more expansive provisions elsewhere in the draft constitutional recommendations.

ii. International Obligations

As a party to the ICESCR, Libya is obliged to improve all aspects of environmental and industrial hygiene as part of its commitment to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[22] The African (Banjul) Charter on Human and Peoples' Rights 1981 guarantees 'the right to a general satisfactory environment favourable to their [all peoples'] development'. As well as ensuring that the constitution enshrines detailed provisions meeting these obligations, the CDA must look to international best practice on this issue, as discussed below.

iii. Constitutional Standards

Many constitutions contain create obligations on the state and rights for citizens that extend to the conservation and preservation of the environment, often for the benefit of future

[22] International Covenant on Economic, Social and Cultural Rights 1966 Article 12(b)

generations. The Constitution of Kenya protects the right to live in a clean and healthy environment, including for the environment to be protected for the benefit of present and future generations through legislative and other measures.[23] It also creates extensive obligations on the part of the state, including sustainable practices and equitable distribution of revenues, to ensure that this right is realised.[24] France added a Charter for the Environment to its constitution in 2004 which sets out a right to live in a balanced environment and a set of duties for protecting the environment from damage, such as the duty of all people to foresee and avoid or, failing that, to limit causing damage to the environment.[25]

Another important constitutional provision that natural resource-rich countries commonly include is specific provision for the management of natural resources that protects the environment for future generations. In the Constitution of Sudan, detailed provisions are made for the management by the state of petroleum and gas resources to protect the environment on behalf of the Sudanese people as a whole and the interests of future generations.[26]

LFJL notes that the work of Committee 8 will provide detailed recommendations for environmental protections, which LJFJL has not reviewed. The provisions in Article 26 should be seen as key elements that Committee 8 must consider.

Protection, safety and development of environment shall be an obligation on the State ~~and all people residing therein~~ for the benefit of all people including future generations. In particular, the State will enact measures to mitigate the effects of natural resource extraction on the environment.

Section III: Social and Cultural Cornerstones

Article 27 – *Language*

The first proposal is submitted by the majority (except for members of components) stating the following:

Article ( )
Official Language
The Arabic language – language of the Holy Quran- shall be the official language of the State.

Article ( )
National Languages
Arabic, Amazighi, Tuaregi, Tebu, Hosa, Ghadamsi and other languages spoken by part of the Libyan people and considered part of its cultural and social legacy shall be national

[23] Chapter 4, Part 2, Article 42
[24] Chapter 5, Part 2, Article 69
[25] Constitution of France, Charter for the Environment, Article 3
[26] Constitution of Sudan 2005 Articles 190 and 192

languages. The State shall commit to giving attention and teaching thereof and shall work towards perceiving these languages by all Libyans as part of their collective heritage.

The second proposal is submitted by the components and states the following:

Article ( )
1. Arabic shall remain the official language of the State.
2. Tawerghi, Tebu and Amazighi shall also be official languages being a joint legacy for all Libyans. The official nature of Tawerghi, Tebu and Amazighi languages shall be activated in stages and according to a mechanism defined under a regulating law in that regard to be approved during the first parliamentary session. The provisions of this law shall ensure integration of Tawerghi, Tebu and Amazighi languages in the educational structure and other fields of public life to enable future fulfilment of function as official languages.

Constitutional recognition of different languages is one of the key controversies that the CDA must resolve. Language is a central element to the expression of identity, and the right to speak and to use one's own language is essential to human dignity. Historically, minority languages in Libya have been supressed, which has lead to their decline. The language rights of minority groups are therefore controversial – demonstrated by CDA's inability to agree on a recommendation regulating this point.

i. Popular Consensus

Official languages are languages that are required to be used by government for administrative purposes. National languages are recognised as an important part of heritage but without the requirement for governmental or administrative use. In the first proposal, submitted by the majority, only Arabic is stated as an official language with minority languages given national status. The second proposal would see all stated languages given official status, although Arabic would be the primary official language.

Minority communities in Libya are clear that the constitution should go further than recognising their languages as national languages – this was a recurring finding during LFJL's Rehlat Watan constitutional tour. Although it is important for the state to commit to promoting indigenous languages as a part of national identity, the ability of minority communities to use their languages administratively at a local level and in education is an important part of *their* identity. Many recent constitutions provide for more than one official language, including Iraq, which recognises Arabic and Kurdish, and South Africa which has 11 official languages.

Because minority languages have been repressed historically, many are in decline or face possible extinction. Although the first proposal recognises a number of national languages, the provision for the state to 'work towards perceiving these languages by all Libyans as part of their collective heritage' is very weak and does not convey a duty on the state to ensure the protection and promotion of minority languages. In addition to promoting minority languages as a key part of Libya's heritage, the languages themselves must also be taught.

One of the key points for minority communities is to be permitted to use their languages in the education system of regions where they constitute density of population. During LFJL's Rehlat Watan constitutional tour, Tebu participants were clear that using their language for official purposes such as education will greatly strengthen their efforts to maintain their cultural identity. This was echoed by members of the Amazigh and Tuareg communities in relation to their respective languages.

The second proposal goes further to guarantee that the state enacts positive measures towards the protection and promotion of minority languages '*in the educational structure and other fields of public life* providing that:

> "…[minority]*languages shall be activated in stages and according to a mechanism defined under a regulating law in that regard to be approved during the first parliamentary session.*"

This provision is positive because it obligates the state to implement the measures for protection and promotion, and does not make this obligation conditional on the state's capacity to do so. Nevertheless, the requirement that the mechanism for implementation must be defined during the first parliamentary session is burdensome; requiring this instead to take place within a reasonable timeframe would mean that the obligation is not open-ended and can be enforced without being over prescriptive.

It is also notable that Article 33 of Chapter 1 on education does not make any reference to allowing teaching in minority languages in areas in which they constitute density of population.

ii. International Obligations

Libya has not signed the UNESCO Convention against Discrimination in Education 1960 which recognises the right of members of national minorities to carry out their own educational activities. However, the constitutional draft should adopt this approach as it represents international best practice. Discrimination on the basis of language is prohibited in the Universal Declaration of Human Rights 1948 (Article 2 (1)), the UNESCO Constitution 1945 (Article 1), and the International Covenant on Civil and Political Rights 1966 (**ICCPR)** (Article 2), all to which Libya is a party. The ICCPR also provides that:

> *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*[27]

Article 26 of the ICCPR has been held by the Human Rights Committee to be violated where minority language speakers were prevented from using their language for administrative

[27] Article 27

purposes.[28] Article 26 therefore guarantees the use of minority languages for administration and education. If the constitution only specifies Arabic as the official language and does not make express guarantees protecting minority language use for administrative and educational purposes, Libya risks breaching its international obligations in this regard.

Further, the United Nations General Assembly's Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992, states that:

> *"States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue."*[29]

Although the Declaration is not binding, it contains a series of principles and rights that are based on human rights standards enshrined in other binding international instruments, and was adopted by consensus which represents a strong commitment by states to its implementation.

iii. Constitutional Standards

The Iraqi constitution provides for use of both Arabic and Kurdish simultaneously throughout the country, and also for the use of the '*Turkomen and Syriac languages as the two other official languages in the administrative units in which they constitute density of population*'.[30] The Afghan Constitution also specifies that minority languages will have official status in regions where they are spoken by the majority.

Arabic, Tamazight and Tebu languages shall have official language status. In administrative units where members of the Amazigh and Tebu communities constitute density of population, the state must provide for all official interactions and resources to take place in Tamazight or Tebu, including regarding education.

Article 28 – Family

1. The family formed by legal marriage between a man and a woman is the cornerstone of society being based on religion, ethics and patriotism [nationalism]. Its care and protection from all that is contrary to Islam and public morals shall be guaranteed by the State to ensure its coherence and stability. The State shall encourage marriage and shall develop all possible means to facilitate it.
2. The State shall ensure maternity and child care and shall also ensure harmonization between duties of the woman towards her family and work.
3. The State shall ensure social welfare and education for children of unknown descent ensuring their integration in society.

i. Popular Consensus

[28] Diergaardt v Namibia
[29] Article 4(3)
[30] Constitution of Iraq 2005 Article 4 (4)

The provision in subsection (1) that the family's "…care and protection from all that is contrary to Islam…" shall be guaranteed by the state raises concerns highlighted to LFJL by participants during Rehlat Watan. Although opinion was divided among participants over the extent to which the role of religion should be regulated in the constitution, many participants stated that they believe that religion is a private matter between the individual and God. This suggests that many participants would not consider enshrining the role of religion in relation to family life at the constitutional level to be appropriate.

Female participants in particular raised concerns over the recent use of religious fatwas to curtail their freedoms, such as in relation to travel and marriage. Linking family with religion in a vague manner, in particular, 'the harmonization between duties of the woman towards her family and work' may result in further inequality between men and women. This article must be refined to clarify, firstly, that women and men both have duties to work and to family, and secondly that the state is seeking to assist families to balance family and work, as opposed to confining either men or women to a specific role.

ii. International Obligations

Libya is obliged to protect the sanctity of family life as part of its commitments under the ICCPR, Article 23. Article 23 recognises the right of fully consenting men and women of marriageable age to marry and found a family. 'Family' has been clarified by the Human Rights Committee to encompass extended family, and should not be limited to the family which exists between a husband and wife.[31] Therefore, Article 28 should be amended to encompass a broader conception of family, and to specify that marriage may only take place between freely consenting adults.

Article 23(4) of the ICCPR and Article 16 of CEDAW are also relevant to this article. Both require states parties, of which Libya is one, to ensure equality in all matters relating to marriage. CEDAW also requires the elimination of discrimination against women as part of family relations, including in respect of rights and responsibilities in marriage and as parents. The provision in Article 28(2) ensuring maternity and child care is potentially very positive, however the 'harmonization between duties of the woman towards her family and work' is ambiguous, and could potentially restrict the role of women outside of the family. In line with CEDAW Article 16, Article 28 must be clarified to ensure that it guarantees equality of the rights and responsibilities of the male and female spouses.

The fact that the draft recommendation on this point links the protection of family to the values of religion, ethics and patriotism is problematic. It is unclear what the effect of '*Its care and protection from all that is contrary to Islam…'* might mean. Different schools of Islamic thought exist, meaning that what is 'contrary to Islam' is ambiguous and subject to

[31] Human Rights Committee, *General Comment 23 (The Family) Protection of the Fanily, the Right to Marriage and Equality of the Spouses,* 27 July 1990

interpretation, as set out above in relation to Articles 6 and 8. It is also unclear what affect 'ethics and patriotism [nationalism]' are intended to have in this article. Patriotism is a vague concept raising concerns similar to 'contrary to Islam'. It may allow politicised interpretation, a possibility that could leave marginalised groups particularly vulnerable during times of emergency. This ambiguity could potentially leave Article 28 open to abuse and intrusion into the rights to private and family life. Further, this recommendation could require non-Muslims to comply with Islamic values and customs. This could conflict with Libya's international obligations relating to freedom of religion such as those arising from the ICCPR. The ICCPR has been interpreted to prevent a majority religion being exercised in a way that may restrict the rights and freedoms of minority religions[32]. Without providing clear protections for religious minorities this provision might interfere with their religious freedom to have an alternative religion, or, indeed, not to have a religion at all.

iii. Constitutional Standards

Constitutional references to the state's protection of the family tend to be benign, stating the importance of family as the basis of society. Examples of this style of formulation include the constitutions of Tunisia, Algeria and Morocco. Tunisia, for example, states simply that 'The family is the nucleus of society and the state shall protect it.'[33] Turkey includes equality between spouses in its formulation.[34] Although some constitutions, such as those of Egypt and Kuwait, do equate family with religion, morals and patriotism, Article 28 is formulated more expansively, leading to the concerns outlined above regarding its ambiguity, especially related to the equality of women and the freedom of both Muslims and non-Muslims being restricted through 'protection from all that is contrary to Islam'. Protection of all that is contrary to 'public morals' is also very ambiguous and could easily be used to allow the state to encroach on the universal rights to private and family life.

Article 28 must be drawn with the intention of enshrining the widest possible protections for family life in line with Libya's obligations as a party to the ICCPR. If its ambiguous elements in subsections (1) and (2) are removed, as detailed below, then its expansiveness will benefit families, particularly women. The equal roles that both partners have between family and work must be stated. Constitutions such as Kenya and Zimbabwe make provision for matrimonial equality.[35]For example, the Constitution of Kenya states that: 'Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.'[36]

1. The family ~~formed by legal marriage between a man and a woman~~ is the cornerstone of society ~~being based on religion, ethics and patriotism [nationalism]~~. Its care and protection ~~from all that is contrary to Islam and public morals~~ shall be guaranteed by the State ~~to ensure its coherence and stability.~~ The State shall encourage marriage and shall develop all possible means to facilitate it.

[32] ICCPR General Comment 22
[33] Constitution of Tunisia 2014 Article 7
[34] Constitution of Turkey 1982 (rev 2011) Article 41
[35] Constitution of Kenya 2010 Article 45(3); Constitution of Zimbabwe 2013 Article 26(c)
[36] Constitution of Kenya 2010 Article 45(3)

Marriage may only be entered into by freely consenting adults and parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
2. The State shall ensure maternity and child care and shall also ensure that women and men may balance their ~~harmonization between~~ duties ~~of the woman~~ towards their ~~her~~ family and work.
3. The State shall ensure social welfare and education for children of unknown descent ensuring their integration in society.

Article 34 – Health

1. The State shall develop policies to upgrade the level of health services and combat and prevent epidemic diseases according to internationally accepted standards.
2. The State shall commit itself to improving the situations of physicians, pharmacists, nurses and assistant medical staff.
3. Abstinence from providing various forms of treatment to each and every individual in cases of emergency or danger to life shall be prohibited.
4. The State shall commit itself to allocating a percentage of national income for government expenditure on health sector in order to sustain global quality standards as determined by law.

i. Popular Consensus

Access to healthcare was a key concern of participants during LFJL's Rehlat Watan constitutional tour. As a party to the ICESCR, Libya has recognised '*the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'* and is obliged to take steps to achieve the full realisation of this right.[37]

The key issue highlighted to LFJL during its Rehlat Watan constitutional tour related to health was the inequality of healthcare provision between regions, and especially in the case of rural or remote areas. The Rehlat Watan team heard from participants who emphasised the real cost of the lack of health care provision in some areas which causes patients to have to undertake extremely long journeys to reach health services. The delays in accessing treatment frequently lead to worse outcomes for otherwise routine procedures. Participants highlighted the need for a national health policy to distribute resources more evenly between areas and communities to ensure accessibility to all, while ensuring that local needs are reflected. Participants with disabilities emphasised, in particular, that unequal provision of health care affects them disproportionately, and that their right to equal health care must be guaranteed to protect their human dignity.

ii. International Obligations

[37] Article 12

As well as the general right to the highest attainable standard of healthcare, the ICESCR also sets out the key areas for the full realisation of this right, including in relation to:

- Infant mortality and the health development of the child;
- Prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
- Creation of conditions which would assure all persons medical service and medical attention in the event of sickness.

Difficulty accessing maternal and antenatal care services was another key concern of participants during Rehlat Watan, with participants in Zwara, Tobruck and Kufra highlighting this as a particular issue. CEDAW requires Libya to eliminate discrimination against women in the field of health care[38], including access to health care in connection with pregnancy and with particular attention to rural areas[39]. As such, in addition to guaranteeing equal provision of healthcare throughout the country, the constitution needs to guarantee maternal and antenatal services.

Libya has signed by not yet ratified the Convention on the Rights of Persons with Disabilities 2006. The Convention on the Rights of Persons with Disabilities states the importance of accessibility to health in enabling persons with disabilities to enjoy all human rights and fundamental freedoms fully. Libya should enshrine guarantees of access to healthcare for persons with disabilities accordingly, as this represents international best practice on the issue.

iii. Constitutional Standards

As recognition of economic and social rights has grown, more detailed provisions on the right to healthcare have become commonplace. The Constitution of Kenya specifically safeguards access to healthcare in respect of particular groups including children, minorities and marginalised groups.[40] Egypt enshrines the right to healthcare and makes it a crime to deny treatments in emergency or life-threatening situations. Further, Egypt commits to spending a minimum of 3% of GDP on health, and to 'maintain and support health facilities that provide health services to the people, and work on enhancing their efficiency and their fair geographical distribution'[41].

1. The State guarantees to provide free public health services, including reproductive healthcare, to all people, and work on enhancing their efficiency and fair geographical distribution between the regions.

~~1.~~ 2. The State shall develop policies to upgrade the level of health services and combat and prevent epidemic diseases according to internationally accepted standards.

~~2.~~ 3. The State shall commit itself to improving the situations of physicians, pharmacists, nurses and assistant medical staff.

[38] Article 12
[39] Article 14
[40] Constitution of Kenya 2010 Article 53(1)(c); 56(e)
[41] Article 18

~~3.~~ 4. Abstinence from providing various forms of treatment to each and every individual in cases of emergency or danger to life shall be prohibited.
5. The State commits itself to provide equal access to healthcare for persons with disabilities.
~~4.~~6. The State shall commit itself to allocating a percentage of national income for government expenditure on health sector in order to sustain global quality standards as determined by law.

Article 38 – Endowments

Charitable endowment shall be inviolable. They shall only be disposed of by an authorization from the competent court in the best interest of the endowment and within limits as permitted by the provisions of the Islamic Sharia.
The State shall oversee, run the affairs, invest and monitor endowments to ensure development, achievement of goals and legal objectives thereof within the limits of law.

i. Popular Consensus

Endowments [Awqaf] were not topics addressed by LFJL during its Rehlat Watan constitutional tour.

ii. International Obligations

The African (Banjul) Charter on Human and Peoples' Rights 1981 enshrines the right of all peoples to dispose of their wealth and natural resources freely. As with Zakat, it is therefore important that this article cannot be interpreted as meaning that endowments [Awqaf] are obligatory, otherwise Article 38's stipulation that disposal of endowments must be within the limits permitted by Islamic Sharia could negatively prejudice this right for Libya's non-Muslim religious minorities. The ICESCR and the ICCPR require states to ensure that all people may freely pursue their economic development without discrimination, including on grounds of religion.

iii. Constitutional Standards

Constitutional provisions regulating charitable endowments [Awqaf] are extremely rare. One example is the Constitution of Egypt which provides that the state will encourage the charitable endowment system and ensure the independence of sponsored institutions, but that its affairs will be regulated at law.[42] The Constitution of Iraq protects differences between the different religious schools in relation to the management of Awqaf. The overwhelming majority of constitutions, however, make no mention of Awqaf - leaving the matter to be dealt with at the secondary level of legislation. If the CDA does want to make provision for charitable Awqaf, the focus must be on ensuring oversight and transparency to guarantee that the funds are spent for the purpose in which they are intended. The Yemeni Constitution is a suitable model for protection and development:

[42] Article 90

Endowment properties are inviolable. Those who control them are obliged to improve and develop their resources and spend them in a way that secures the accomplishment of their objectives and legal aims.[43]

Charitable endowment shall be inviolable. They shall only be disposed of by an authorization from the competent court in the best interest of the endowment and within limits as permitted by the provisions of the Maliki and Abadi schools of Islam.
To ensure independence, transparency and accountability for the use of charitable endowments the State shall oversee, run the affairs, invest and monitor endowments to ensure development, achievement of goals and legal objectives thereof within the limits of law.

[43] Constitution of Yemen 1991 (Rev 2001) Article 22