

The Coalition of Libyan Human Rights Organisations calls for greater protection of vulnerable groups¹ in the future constitution

The Coalition of Libyan Human Rights Organisations (**the Coalition**) wishes to highlight the following 10 human rights concerns in the February constitutional draft:

1. Electoral representation:

The February 2016 draft's articles 78 and 86 on the formation of the House of Representatives and Senate do not specify the number of seats or their distribution. It is left to the Election Law to determine how "the standard population with consideration for the geographical criterion" will be taken into account and interpret how representation "similar to the election of a constituent body" should be implemented. Whilst a 25% quota is proposed for women in article 205, meaning that the Electoral Law would be bound to implement this minimum standard, no comparative measure is made to ensure the representation of other overlooked groups.

These are questions of utmost importance given the need to strike an equitable balance for representation of the populations of the three regions and communities at a national level. Minority communities report disenfranchisement as a result of politicised boundary drawing and the discriminatory distribution of electoral seats that has left them without meaningful representation. As a state party to the International Covenant on Civil and Political Rights 1966 (ICCPR), Libya must ensure that the right to political participation is enjoyed by all its people without discrimination on grounds of race, language, national origin or other status, including to take part in the conduct of public affairs, directly or through freely chosen representatives. The future constitution offers the opportunity to enshrine effective political representation for all of Libya's communities and groups at the highest level of its legal order. In doing so, the constitution would ensure that future implementing legislation would necessarily have to give effect to the protective constitutional principles, and any legislation that violated such protections would be found unconstitutional.

The Coalition believes that those responsible for drafting the constitution must work to build consensus on these fundamental issues in order to create an inclusive constitutional document.

2. The enforceability of rights:

A number of provisions are not drafted in a manner which would create enforceable state obligations. Instead, they are drafted in the language of "policy directives", meaning that they might be interpreted as guidelines or suggestions. This approach is concerning when applied to the enshrinement of human rights guarantees, as many create state obligations to act in a specific fashion in order to be appropriately protected. For example, in the chapter on rights and liberties the right to be free from torture is partially recognised within article 41 on human dignity: "The State

¹ Vulnerable groups are those who are at risk of being marginalised or having their human rights violated, and as such, are in need of particular protection. In Libya, groups that are at risk from discrimination or having their rights curtailed include women, internally displaced persons, ethnic and cultural minorities, stateless persons, disabled persons, religious minorities and political minorities.

commits itself to protecting human dignity, and preventing all types of violence, torture and enforced disappearance". This commitment, however, is insufficient language and as a result does not create an absolute prohibition of the crime of torture or establish a clearly enforceable obligation on behalf of the state to take positive steps to eliminate acts of torture. As a result, if adopted in this form, the constitutional protection of the right to be free from torture would fall far below Libya's international obligations under the United Nations Convention against Torture (UNCAT) and could be interpreted to imply that torture can be justified or is permissible in some circumstances.

Another example of weak drafting can be found in article 34, which sets out that the state "shall create the appropriate environment to develop children and youth, provide ways to increase their capacities, and support their effective role in national life...". Rather than framing the measures as enforceable rights of children and the youth that require affirmative action by the state to implement them, article 34 provides this much weaker statement of policy.

3. International law is subordinate to the constitution:

Article 17 states that Libya's international obligations are to be "superior to the law and inferior to the Constitution", and shall be enforced without violating the constitutional provisions. This position represents a departure from Libya's international treaty obligations which must be implemented into its domestic legal order.² International law sets up a framework based on states as the principal actors in the international legal system. It defines the states' legal responsibilities in their conduct with each other, *within state's boundaries*, and *in their treatment of individuals*. When a state ratifies a treaty, it expresses its willingness to undertake the legal rights and obligations contained in the treaty and "consents to be bound" by the treaty.³

Libya has ratified many international treaties that offer important protections for human rights yet often these protections are insufficiently realised implemented nationally and discriminatory domestic legislation remains in force.⁴ The February constitutional draft repeats this error by offering very little in the way of additional protections and undermining international standards in others. Stating that international law is subordinate to the constitution sets the dangerous precedent that Libya does not consider itself bound to implement its international obligations.

The Coalition urges those responsible for drafting the constitution to adopt an express guarantee that no legislation in violation of international law, principles of democracy or the rights and freedoms enshrined in the constitution may be enacted.

² Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004): "Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith."

³ https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_1_english.pdf

⁴ For example, freedom of expression and of the press is subject to arbitrary restrictions that are open to abuse; sexual equality has not been realised in practice; political minorities are internally displaced and subject to reprisal attacks; ethnic and cultural minorities are deprived of language rights and access to citizenship; and the law offers 'protections' of the rights of persons with disabilities that are themselves open to discriminatory application.

4. The indefinite relationship between religion and the state:

Sharia is indicated in Article 8 as “the source of legislation in accordance with the recognised doctrines and interpretations without being bound to a particular jurisprudential opinion on discretionary matters.” Further, the provisions of the February 2016 constitutional draft are to be interpreted and bound in accordance to this understanding.

Article 8 is currently ambiguous in which recognised doctrines and interpretations of Sharia need to be applied and does not clarify which body will be tasked with the interpretation of Sharia for legislative purposes. Without further clarification, there is a danger that the task of identifying the recognised doctrines and interpretations will fall to the unelected Council of Senior Scholars (**the Council**) established in article 172 of the February 2016 draft. This would place the Council in an extremely influential position that would breach and severely undermine the separation of powers the constitution otherwise strives to achieve. Further, this would undermine the otherwise stated intention of their role in the February 2016 draft, which is understood to provide non-legally binding advice and opinions within defined circumstances and subject matters. It is vital that human rights protections afforded by the constitution offer inalienable protections to all within Libya and that these are definitively provided. At present, article 8 may be abused for political purposes.

Religious minorities have been under threat in Libya, with Sufi shrines, historic libraries and historic graves demolished since 2011. Members of other minority religions have also expressed that they do not feel safe to practice their religions openly.⁵ The February 2016 draft does not currently safeguard the freedom to practice one’s belief.

5. Sexual equality:

Article 9 states that male and female citizens are equal before the law, but other constitutional articles undermine and contradict this sentiment. Article 58 in the rights and liberties chapter, for instance, states that women are men's "sisters"; this is ambiguous and it is not clear what the intended meaning of this provision is, but it could serve to undermine article 9’s statement of equality. Further, article 12 provides that nationality only passes from Libyan fathers, and not from Libyan mothers, although article 13(1) does state that children of Libyan women will be "preferred" for obtaining naturalised citizenship.

The Convention on the Elimination of all forms of Discrimination against Women (**CEDAW**), to which Libya is a party, is clear that “discrimination against women” is any distinction, exclusion or restriction made on the basis of sex aimed at impairing their enjoyment of human rights and fundamental freedoms. CEDAW article 9(2) also states expressly that “States parties shall grant women equal rights with men with respect to the nationality of their children.” Article 12 of the constitutional draft therefore can be considered to create an unacceptable distinction between men

⁵ <https://www.libyaherald.com/2015/12/22/sufi-shrine-in-central-tripoli-destroyed/>;
<https://www.hrw.org/news/2012/08/31/libya-stop-attacks-sufi-sites>;
<http://www.libyanjustice.org/downloads/Publications/destoori-report-eng.pdf> page 48.

and women and impairs women's enjoyment of their right to pass nationality, in violation of Libya's international obligations.

Other discriminatory provisions include article 33 which provides that the state shall "seek to reconcile the obligations of the woman and her work" in relation to women's role within the family. This provision is ambiguous and could potentially allow for illegitimate state restrictions that limit the role of women outside of the family. In order to protect equality, article 33 must be refined to ensure that it does not confine either men or women to specific roles outside of their choosing.

6. Discriminatory nationality and citizenship provisions:

Articles 12, 13, 14 and 206 regulate nationality and the process for naturalisation. These articles in their current form repeat and enshrine the historic use of these mechanisms to discriminate against women, minorities and foreign residents:

- Article 12 states that Libyan nationality will only pass from a Libyan father, thereby violating the constitution's own provision for gender equality in article 9 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.⁶

Further, article 12 states that laws passed "in accordance" with the 1951 Constitution, or in accordance with a law in force, will be considered as conferring citizenship. When read with article 206(4), which provides that "all decisions granting nationality issued as of 15/2/2011 in violation of the Nationality Law which was in force at the time of issuing them, shall be annulled" it is unclear which conferrals of nationality will be deemed legitimate, and therefore unclear who will be considered a national. If certain laws passed on nationality are not deemed in accordance with the 1951 Constitution or with the Nationality Law, 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.⁷

- Article 13 requires 15 years of residence before naturalisation may take place. When read with Article 14, which allows citizenship to be revoked for 10 years after naturalisation, Article 13 creates a 25-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 applied arbitrarily to legitimise discrimination based on ethnic, cultural or

⁶ CEDAW article 9(2); 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' (article 66); the Iraqi Constitution mirrors this provision (article 18(2)).

⁷ Article 8(1).

political factors. The lengthy naturalisation process⁸ and vague conditions of Article 13 propagate the historic difficulty that minority communities have faced in obtaining citizenship.

- Article 14 may also be applied to revoke the nationality of naturalised citizens or nationals by birth. Revoking nationality in this fashion may render the individual stateless, which many constitutions of other countries expressly prevent. Revocation in the case of naturalised citizens may only be exercised in strictly defined circumstances, on which Article 14 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.

Articles 12, 13, 14 and 206 must be revised to ensure that they do not limit access to nationality and naturalised citizenship on discriminatory grounds. A Libyan should be everyone born to a Libyan father or a Libyan mother, or who was born in Libya, or who has lived in Libya regularly for 10 years, or obtained Libyan nationality later on in accordance with a law in force. Revocation should be addressed at the legislative level in line with modern constitutional standards.

7. There is no provision prohibiting discrimination:

The 2011 Constitutional Declaration protects equality between all Libyans and prohibits “distinction on the grounds of religion, belief, language, wealth, gender, kinship, political opinions, social status, or tribal, regional or familial adherence” in article 6. The February 2016 constitutional draft is a step backwards in this respect, as it makes only a very general statement of equality in articles 9 and 21, and no provision prohibiting such discrimination, and notably fails to protect against discrimination on the basis of ethnicity, religion, political opinion or culture.

Discrimination against Libya’s vulnerable groups remains commonplace due to existing legislative frameworks and the failure to implement protective provisions. In light of legal provisions in force that condone and enshrine discrimination, for example in relation to political minorities,⁹ persons with disabilities,¹⁰ and women,¹¹ a comprehensive clause guarding against discrimination is urgently needed.

⁸ 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.

⁹ For example, Law 1 of 2014 because the law defines “missing” as only those who fought *with* the 17 February Uprising, which indirectly disqualifies anyone associated with the Gaddafi administration, including the Tawergha; Decree 5 of 2014 prevents television and radio stations from broadcasting views “hostile to the February 17 Revolution”

¹⁰ For example, Law 4 of 2013 differentiates between persons who are disabled as a result of participation in the uprising, and those who are disabled for other reasons, thereby creating different classes of disability; Law No. 5 of 1987 provides that persons with disabilities should be provided with a “suitable job” but does not define this, therefore creating an ambiguity that has allowed it to be used as a means of discrimination.

¹¹ Inequality in respect of the personal status of women and men has long been enshrined legally. Citizenship passes from a Libyan man to his children but not from a Libyan woman. This means that the child of a Libyan man and a non-Libyan woman will gain Libyan citizenship but not a child born to a Libyan woman married to a non-Libyan man. Legal personal status inequality also extends to marital responsibilities, inheritance and polygamy.

Article 9 must be revised to state expressly the right to equality and non-discrimination between all Libyans, in line with Libya's obligations arising under ICCPR articles 2 and 3. The right to equality must be afforded to all people and not only to citizens and to prohibit discrimination of any kind on grounds including religion, political opinion, disability, age, race, colour, language, culture, sex or ethnicity national or social origin, property, birth or other status explicitly.

8. Protections for vulnerable groups have been weakened:

The rights and liberties provisions have been weakened considerably since the December 2014 draft, especially for vulnerable groups.

The revised women's rights article has removed explicit reference to the right to paid maternity leave and protection of arbitrary dismissal based on maternity; the prohibition of forced marriage; and the prohibition of all forms of violence against women. The December 2014 draft also provided more detailed protections for the rights of persons with disabilities. For example, there is now no provision stating that their needs would be specified in the design of the education system and that they should not be required to be educated in a separate system unless necessary. Rights of the child, youth, and elderly are also weakened, or not included in the language of enforceable rights. There is also no protection offered to ensure the rights of religious minorities anywhere within the draft. As Article 8 provides that the religion of the state is Islam, and does not recognise other religions or contain safeguards that could prevent its abuse, legislation could easily be enacted that would breach Libya's international obligation for freedom of religion.

The Coalition calls on those responsible for drafting the constitution to establish elaborative protections that address the prevalent concerns faced by vulnerable groups on the highest possible footing. Enshrining comprehensive protections for vulnerable groups ensures that existing weak or discriminatory legislation will be brought into compliance; future legalisation giving effect to the provisions cannot later be found unconstitutional; and sends a clear message that human rights protections are afforded to all Libyans, not only the majority.

9. The role of certain independent institutions has been weakened, some have been removed and some are still missing:

The National Human Rights Council may no longer "challenge constitutionality of legislations related to human rights and public liberties", nor bring cases to challenge procedure or public/private institutions where they may contradict the future constitution or human rights provisions as provided for in the December 2014 recommendations. These amendments significantly weaken the ability of the National Human Rights Council to monitor and improve the human rights situation in Libya.

Also of concern is the removal of the provision for a Broadcasting Authority and amendment of provisions for the National Media Council. Article 174 now states simply that "The law shall regulate bodies for... the Media and Press... [and] shall determine their composition, competences, labour system, and guarantees of their independence and neutrality...". Media self-regulation is urgently needed to promote genuine media pluralism and media and press independence; informed and representative debate; and to work to end hate speech, media polarisation and self-censorship. The amendments to the draft constitutional provisions may have unforeseen consequences on freedom

of media in Libya. We strongly recommend that the constitution is amended to provide for independent bodies free from political, economic or other undue influence to regulate the media and broadcasting in accordance with the Camden Principles on Freedom of Expression and Equality. These bodies must work to end hate speech and media polarisation by promoting an informed and representative debate in order for the media to fulfil its role of ensuring accountability and transparency.

The constitution must establish truly independent institutions, including a gender and equality commission and a commission for transitional justice, that are in a position to protect and enhance human rights meaningfully.

10. A “special amnesty” is now provided for:

In the December 2014 recommendations, amnesties for human rights violations were specifically prohibited as part of the transitional justice measures. In the February 2016 draft, article 197(5) provides that the state “shall be committed to... criminally prosecute all those who had a role in human rights violations and corruption crimes” however article 118 provides that a “special amnesty” shall be granted and it is unclear to which crimes the amnesty may apply. Although crimes involving public funds (article 25), crimes against humanity, war crimes and genocide (article 45) are not pardonable, the Coalition is extremely concerned that other human rights violations, including crimes involving torture and other cruel, inhuman or degrading treatment, may be covered.

Bringing an end to the impunity with which human rights violations have been, and continue to be, perpetrated with is one of the most urgent and enduring tasks for the Libyan state given the prevalence of violations.¹² Those responsible for drafting the constitution must ensure that there can be no amnesty or pardon for human rights violations of any kind, and that such crimes are not subject to the statute of limitations. This must apply to crimes that took place at any time, not limited to the transitional period.

¹² United Nations Support Mission in Libya and the Office of the High Commissioner for Human Rights, “Report on the human rights situation in Libya”, November 2015, pages 1 and 31; Human Rights Watch, “The Endless Wait: Long-Term Arbitrary Detentions in Western Libya”, December 2015.