

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**Comparative analysis
between the
constitutional processes
in Egypt and Tunisia
- lessons learnt -
Overview of the
constitutional situation
in Libya**

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

IN-DEPTH ANALYSIS

**COMPARATIVE ANALYSIS BETWEEN
THE CONSTITUTIONAL PROCESSES IN EGYPT AND TUNISIA
- LESSONS LEARNT -
OVERVIEW OF THE CONSTITUTIONAL SITUATION IN LIBYA**

Abstract

The 2014 Constitutions of Egypt and Tunisia, though enacted at the same time and as a consequence of very similar revolutionary forces, are different in style and content. Egypt has fallen back to the structures of the 1971 Constitution and will likely experience further restoration of the authoritarian presidentialism. The Armed Forces continue to play a dominant background role in the political and constitutional life of the country. Tunisia seems to have embraced a new constitutional paradigm that is based on a modern approach to human rights protection and a balanced institutional framework that provides for substantial checks and balances between the three branches of government.

The constitutional drafting process in Libya is overshadowed by a pronounced lack of security, the absence of functioning state institutions, societal fragmentation, and the uneven distribution of natural wealth. National reconciliation is a key precondition of successful political and constitutional transition but the process has to date been a very difficult one. There are indications, however, that stakeholders in Libya are trying to build consensus on important aspects of the process. The 1951 Constitution, based on a federal framework, offers the best conceptual framework for the recently elected Constituent Assembly. Unlike Egypt and Tunisia, Libya might opt for a parliamentary form of government rather than a semi-presidential system.

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INTRODUCTION — SCOPE OF THIS STUDY

Part One of this ad hoc study briefly analyses key elements of the recently enacted constitutions of Egypt and Tunisia. It focuses on the openness and inclusiveness of the process during the drafting, consultation and ratification stages, and offers an assessment of the institutional balance and guarantees for democratic values and fundamental rights and freedoms in both countries.

Part Two gives an overview of the current situation in Libya and presents likely options for a future permanent settlement in light of the country's constitutional history and contemporary political, ethnic and socio-economic realities. The recent experience of other systems in the region, where relevant, will also be considered.

Note should be made of the limited scope of this analysis, which is confined to a requested length of not more than 20 pages. A second caveat stems from the fluidity of the political situation in all three countries under review. Finally, account must be taken of the fact that the new constitutional settlements in Tunisia and Egypt were only enacted less than three months ago⁽¹⁾ and are not yet fully operational at the time of writing. These factors make it difficult to predict and compare accurately how particular provisions and broader constitutional approaches will be implemented in day-to-day political practice and develop in the future.

EXECUTIVE SUMMARY

The 2014 Constitutions of Egypt and Tunisia, though enacted at the same time and as a consequence of very similar revolutionary forces, could not be more different in style and content. Egypt has to a large extent fallen back to the structures of the 1971 Constitution and will likely experience further restoration of the authoritarian presidentialism that determined the fate of the country for so many decades. The Armed Forces continue to play a dominant background role in the political and constitutional life of the country. Tunisia seems to have embraced a new constitutional paradigm that is based on a modern approach to human rights protection and a balanced institutional framework that provides for substantial checks and balances between the three branches of government. The promotion of political pluralism and the peaceful rotation of power, declared aims in both countries, are a real possibility in Tunisia but not more than a distant target in Egypt.

The constitutional drafting process in Libya is overshadowed by a pronounced lack of security, the absence of functioning state institutions, societal fragmentation, and the uneven distribution of natural wealth. National reconciliation is a key precondition of successful political and constitutional transition but the process has to date been a very difficult one in this respect. There are indications, however, that stakeholders in Libya are trying to build consensus on important aspects of the process such as the composition of the drafting body and the time allocated for the exercise. The 1951 Constitution, which was based on a federal framework, offers the best conceptual framework for the recently elected Constituent Assembly. Unlike Egypt and Tunisia, Libya might opt for a parliamentary form of government rather than a semi-presidential system.

¹ 14/15 January 2014 (Egypt) and 26 January 2014 (Tunisia).

PART ONE — EGYPT AND TUNISIA

1. PROCESS

1.1 Egypt

The chronology of transition in Egypt is well known. The 2012 Constitution, approved in a referendum and signed into law by President Mohamed Morsi in December 2012, was suspended by the Supreme Council of the Armed Forces (SCAF) in July 2013 ⁽²⁾ and replaced by a Constitutional Declaration which set out the details of a process aimed at amending the 2012 Constitution and regulated the governance of the country during the interim period ⁽³⁾. Key steps of the drafting process included the formation of a Committee of Experts (the so-called C10) by Interim President Adly Mansour, which had the task of proposing amendments to the 2012 Constitution and was composed of six judges and four law professors from Cairo University ⁽⁴⁾. A Constitutional Committee of fifty members representing 'all categories of society and demographic diversities, especially parties, intellectuals, workers, peasants, members of trade unions and qualitative unions, national councils, al-Azhar, churches, the Armed Forces, the police, and public figures, including at least ten members from the youth and women' (the so-called C50) was subsequently invited to draft specific amendments to the 2012 Constitution in light of the recommendations made by the C10 ⁽⁵⁾. The members of the C50 were appointed by Interim President Mansour on 1 September 2013 ⁽⁶⁾. Accounts of the work of the C50 suggest that its younger members were marginalized in the deliberations. Women were underrepresented. The Armed Forces, though represented only by a single member, exerted considerable background influence on the whole drafting process. Public outreach, though envisaged in Article 2 of Decision 570 of 2013 and the C50's Rules of Procedure ⁽⁷⁾, was limited. The draft text was submitted to a referendum on 14/15 January 2014.

The new constitutional framework was negotiated and enacted in a very short period of time and under intense public scrutiny. Many local observers say that more generous deadlines would not have changed the outcome significantly; that technical experts could have written a new constitution in a matter of days; and that Egypt's future depends less on the details of a legal document than on the resolution of the country's deep religious, social, economic and political conflicts. This is to some extent true. The referendum in January 2014 was a vote on the so-called 'roadmap' determined by the Armed Forces, and with it the general political course of the country, rather than the finer points of a new constitutional settlement. Many Egyptians may not even have read the draft text that they were invited to accept or reject, and are hoping that the country will now finally return to a path of political stability and economic recovery regardless of the merits or shortcomings of the new constitutional arrangements that were voted into force by an overwhelming majority. 98.13 % of the voters supported the draft text presented to them. The turnout (38.59 %) was fairly low, however, despite intense institutional efforts in favour of the proposal. Critical positions were heard in public but generally drowned out by an overwhelming 'Yes' campaign that dominated the streets and public media.

² Statement of 4 July 2013.

³ Constitutional Declaration of 8 July 2013.

⁴ Article 28 Constitutional Declaration of 8 July 2013; Presidential Decision No. 489 of 21 July 2013.

⁵ Article 29 Constitutional Declaration of 8 July 2013.

⁶ Presidential Decision No. 570 of 1 September 2013.

⁷ Fifty-Member Committee, Committee President Decree 4 of 11 September 2013.

While the widespread focus on Realpolitik is understandable in light of the tense security situation and acute economic downturn that the country has suffered, this perspective underestimates the importance of what may have been Egypt's most compelling constitutional moment in decades and pays little attention to the transformative potential of a constitution that enjoys the support of the rule of law. More could have been done to enhance the enforcement of human rights and freedoms at this point, even under Egypt's current difficult political circumstances, and to foster both the development of a vibrant and inclusive political culture as well as more transparent and accountable government. The renewed exclusion of the Muslim Brotherhood and criminal prosecution of its leadership casts a deep shadow over the long-term prospects for a peaceful transition while conservative stakeholders such as the judiciary and the Armed Forces secured their very particular interests under the 2014 Constitution.

This is an unfortunate development given that Egypt's legal tradition would have provided a framework for more profound change. Constitutions are commonly viewed as the highest law of the land and enforced even against those who exercise executive or legislative authority. This is, to some extent, also true of Egypt. The Supreme Constitutional Court (SCC) has on a number of occasions invalidated laws and decisions of other institutions based on its interpretation of the 1971 and 2012 Constitutions⁽⁸⁾. These judgments, though often politically controversial, were respected and enforced by the other branches of government. There is no indication that this will not continue to be the case under the 2014 Constitution. Short of *revolutionary* regime change that no document is able to withstand, Egypt's tradition of constitutionalism thus suggests that the details of the 2014 Constitution *will* indeed matter both with respect to the lawful exercise of power and the resolution of political disputes. The rushed drafting process may have thus wasted an important opportunity to embrace a different constitutional paradigm and even created a number of serious *new* problems that will likely have to be addressed in the near future.

Another point worth emphasizing is that the 2014 Constitution was never designed to be a novel settlement. The task of the C50 was only to *amend* the *suspended* 2012 Constitution. As a result of this attempt to achieve constitutional continuity, and given the lack of time, opportunity, and perhaps interest to conduct a more fundamental review of alternative constitutional approaches, much of the substantive content of the 'new' settlement actually mirrors closely key provisions of Egypt's two previous constitutions. It is doubtful that deeper regime change can take place on this basis.

In response to such criticism, some observers, including members of the C50, have argued that the drafting process has not come to an end and that the 2014 Constitution can and soon will be further amended in order to further improve the system. This is, however, not likely to occur soon. The difficult and costly amendment process and the lack of a tradition in Egypt of continuous constitutional change suggest that the current text will remain unchanged for some time even if serious shortcomings emerge. The desire of many citizens for political stability and economic recovery and, more importantly, the interests of those stakeholders that were able to secure considerable influence under the 2014 Constitution are additional factors that render further reform an unlikely scenario in the near future.

1.2 Tunisia

Tunisia, by contrast, seems to have achieved a much more inclusive arrangement with the settlement that was voted into force on 27 January 2014. This outcome was by no means certain when the drafting process first took shape with Decree Law No. 14 of 2011, issued on 23 March 2011 as a provisional

⁸ See, for example, SCC Decision 37 of 19 May 1990, OJ 3 June 1990, SCC 4: 256-293 (on election law).

organizational statute ⁽⁹⁾, and the election of a National Constituent Assembly (NCA) in late 2011. Another set of interim constitutional arrangements was passed by the NCA after considerable controversy in December 2011 (the so-called 'Small Constitution') and complimented with NCA Rules of Procedure, which included provisions concerning the transparency and accessibility of the drafting process ⁽¹⁰⁾. For a long period of time, negotiations were overshadowed by the share of votes that the parties represented in the NCA had achieved in the March 2011 election. Political stakeholders equated electoral success with expected influence on the contours of the future settlement. The Joint Committee for Cooperation and Drafting, in particular, did not perform its envisaged mediating function and was thus an obstacle rather than a tool to overcome the political deadlock that emerged on many — often very detailed — issues. These difficulties were exacerbated by the lack of a broader vision for Tunisia's constitutional future and the limited technical drafting support that the NCA enjoyed throughout the process. New ideas or alternatives to entrenched positions could only gain traction through intense lobbying efforts by organizations and individuals outside the formal process, which was accessible to the media representatives but less open to civil society organizations. International experience was, however, taken into account despite these difficulties and had considerable impact on the system of human rights protection and minority rights in the Assembly of Representatives. Public outreach efforts by members of the NCA, though envisaged in the Rules of Procedure, were limited.

While Ennahda, the largest Islamist movement and main force in the ruling coalition government, made considerable concessions with respect to the role that Islam should play in law and society during the first phase of the process, it eventually took a coalition of trade unions ⁽¹¹⁾, the National Association of Lawyers, and the Tunisian League for the Defence of Human Rights (the so-called 'Quartet') to inject a spirit of compromise into the process and initiate a more fruitful dialogue between the parties starting in late September 2013. The demise of the Muslim Brotherhood in Egypt no doubt contributed to the decision of Ennahda to seek a compromise with the opposition and move the drafting process forward.

The new approach was based mainly on amendments to the NCA's procedural rules, including the establishment of a Consensus Committee, in which political parties were given equal weight regardless of their success in the 2012 elections, as well as a reshuffle of the interim government and a review of the country's future election law. The level playing field between conservative Islamist and more liberal and secular forces, combined with a climate of relative peace on the streets, eventually produced tangible results despite a number of smaller setbacks that continued to disrupt the process. The 2014 Constitution, sometimes described as the Constitution of the Second Republic, was voted into force with a strong majority of 200 out of 217 votes in the NCA.

2. INSTITUTIONAL BALANCE

2.1 Egypt

The C50 did not restore the institutional framework of the 1971 Constitution; there is, however, a marked shift back to stronger executive power vested mainly in the President of the Republic, who is directly elected by the people and will likely continue to enjoy overwhelming political influence given Egypt's history of authoritarian presidentialism.

The President exercises a number of substantial powers — though often in conjunction with the Cabinet or subject to approval by the House of Representatives. The President is, *inter alia*, Head of State

⁹ Decree Law No. 14 of 23 March 2011 relating to the Provisional Organization of the Public Authorities.

¹⁰ NCA By-Laws (*règlements*) of 20 January 2012.

¹¹ The Tunisian Union of Industry, Trade and Handicrafts and the Tunisian General Labor Union.

and head of the executive branch; may dismiss the Government if supported by the majority of the House of Representatives; presides over meetings of the Cabinet; jointly with the Cabinet determines and oversees the implementation of general state policy; represents Egypt in foreign relations; is Supreme Commander of the Armed Forces and (after consultation with the National Defence Council and approval by a two-thirds majority of the House of Representatives) declares war and sends the Armed Forces on international combat missions; may (after consultation with the Cabinet) ask the House of Representatives to approve a state of emergency; and may call for emergency sessions of the House of Representatives and issue decrees that enjoy the force of law in urgent matters if the House of Representatives is not in session. The President may also call for referenda, wields a veto power over legislation, and appoints 5 % of members of the House of Representatives. The Prime Minister and the Cabinet will have a lesser role to play unless the President is forced to choose a Prime Minister from the majority party or coalition in the House of Representatives. This can lead to a divided executive⁽¹²⁾. The President retains substantial influence even under these conditions, however, and nominates (in consultation with the Prime Minister) the Ministers of Defence, Interior, Foreign Affairs and Justice.

The House of Representatives is the dominant legislative body. Presidential decrees are limited to urgent measures and subject to potentially meaningful procedural limitations while regulations, issued by the Prime Minister, should only be issued to secure the implementation of laws. The House may in the future have to delineate more carefully the regulatory authority of the executive branch in its own legislation in order to actually achieve this institutional balance, which was already envisioned by the 1971 and 2012 Constitutions. More important for the status of the House, however, is the protection that it enjoys against dissolution by the President. While the substantive safeguards are weak and mirror the 1971 Constitution, dissolution will only be possible on the basis of a referendum. This approach retains the solution adopted by the 2012 Constitution. Another provision that strengthens the legislature is its power to withdraw confidence not only from the Prime Minister but also from the President. Such a recall is not without risks. To succeed, the decision of the House must be confirmed in a referendum. The House faces dissolution if the majority of voters sides with the President. Interestingly, the same is *not* true if the President tries to dissolve the House. Consent of the House, finally, is required for a number of other important decisions such as the ratification of international treaties, declarations of war and deployment of troops outside Egypt's borders, or the declaration of a state of emergency.

The judiciary is in a strong position under the 2014 Constitution. Judicial independence is emphasized throughout the text. The SCC, in particular, is well protected from the other branches of government given that it self-selects its members. Not even the size of the Court is determined by the 2014 Constitution. The SCC also enjoys an independent budget, which is subject to legislative scrutiny but will only feature as a single figure in the general state budget. These unusual arrangements reflect the influence judges were able to exert on the drafting process.

The Armed Forces are the fourth and decisive component of Egypt's contemporary institutional infrastructure. The Preamble emphatically highlights their importance. This is clearly an attempt to legitimize retrospectively the decisive but controversial role that the Armed Forces played in the fall of Mubarak and Mursi, and the considerable influence that they were able to retain under the 2014 Constitution.

The Minister of Defence, Commander-in-Chief, is appointed from the ranks of the officer corps and will need SCAF approval during the first eight years following enactment of the 2014 Constitution. This is remarkable given the Preamble's commitment to *civil* government and the fact that SCAF exercises an

¹² Similar to French *cohabitation*.

influential constitutional role but is itself *not* regulated by the 2014 Constitution ⁽¹³⁾. This suggests that the Supreme Command intends to retain its extra-constitutional status under the new regime.

The budget of the Armed Forces is determined by the National Defence Council, which is a predominantly executive body and part of the Armed Forces. Military spending will be included in the general state budget as a single figure. The House of Representatives, though involved in this procedure through the Speaker as well as the Chairpersons of the Committee for Planning and Budgeting and the Committee for Defence and National Security, will probably not be in a position to debate military expenditure in any meaningful way.

The Military Court, finally, has considerable and highly questionable jurisdiction over civilians and enjoys exclusive jurisdiction with respect to all crimes involving the Armed Forces or the General Intelligence Service allegedly committed in the line of duty. This means that the Armed Forces themselves control all challenges to the legality of actions taken by military and intelligence personnel.

Egypt's new institutional framework, in summary, can be characterized as a semi-presidential system in which the President exercises considerable powers and will under ordinary circumstances dominate the executive branch, but in which the House of Representatives retains meaningful influence. The exercise of this authority — and with it the achievement of some form of institutional balance between the executive and legislative branches of government — will depend on the development of an open and critical political culture in the House. The system is nevertheless unbalanced given the extraordinary influence and independence of the judicial branch and, more importantly, the largely extra-constitutional status of the Armed Forces. One of the greatest opportunities for more meaningful and yet gradual regime change may have been missed with respect to the rights of minority parties in the legislature, which are not set out in any detail. This is one of the most important differences between Egypt and the new regime in Tunisia.

Local administration has attracted little attention in discussions of the 2014 Constitution. The existing system of municipal administration is set to remain in place for a transitional period of not more than five years. The text does not contain much detail, however, about the system that shall replace current structures given that most of these provisions will require extensive regulation by law. The 2014 Constitution *does* express a commitment *in principle* to transferring administrative, financial and economic resources from the centre to local administrative units. This is supposed to be accompanied with more local autonomy in the management of public facilities. The vision is one of administrative decentralization rather than devolution of power from a highly centralized state to politically more autonomous local units. The competencies of local councils remain very limited. They shall, *inter alia*, be able to follow up on the implementation of development plans and scrutinize the performance of executive authorities but will not exercise legislative functions. Local democracy will exist more in form than in substance, which is disappointing both with respect to the demands of the revolutionaries and the prospects for improved delivery of public services on the local level.

2.2 Tunisia

The system established with the 2014 Constitution is again a semi-presidential form of government. The institutional balance between the legislative and executive branches as well as the relationship between the President of the Republic and the Prime Minister ⁽¹⁴⁾ are very different from the arrangements in Egypt, however, as are important details in the balance between majority and opposition parties or coalitions in the legislature. The newly formed Constitutional Court is involved in a

¹³ As opposed to the Supreme Police Council, its functional counterpart.

¹⁴ Also referred to as Head of Government.

number of key decisions beyond the core area of judicial review and set to become a key factor in the political life of Tunisia. The military, by contrast, does not enjoy a special status under the 2014 Constitution.

The President of the Republic is directly elected by the people in a two-round majoritarian system, which requires an absolute majority of the votes cast in the first round and a simple majority in the run-off between the two most successful candidates should no candidate cross this threshold. The President officially represents Tunisia and determines, after consultation with the Prime Minister, general state policy in the areas of defence, foreign relations and national security. The President may, inter alia, dissolve the Assembly of Representatives in the cases specifically identified in the 2014 Constitution (and not at his or her ⁽¹⁵⁾ own discretion), chairs the National Security Council, is Commander-in-Chief of the Armed Forces, declares war and establishes peace (upon approval of a three-fifths majority of the members of the Assembly), ratifies international treaties, holds a power of pardon, and can take (unspecified) measures required in emergency situations. The President also makes a number of senior executive appointments within the Presidential Office, appoints senior military and diplomatic personnel as well as key positions related to national security (in consultation with the Prime Minister), and appoints the Governor of the Central Bank (which requires majority support in the Assembly of Representatives). The President may introduce draft legislation in the Assembly of Representatives and exercises (in agreement with the Head of Government and subject to subsequent ratification by the Assembly of Representatives) limited decree powers. The President may also put draft laws relating to the ratification of treaties, rights and freedoms, or personal status that were passed by the Assembly of Representatives to a referendum by the people, challenge the constitutionality of draft legislation, and veto draft legislation by returning bills to the Assembly of Representatives for further deliberation. The Assembly can pass bills returned by the President with an absolute majority of its members in the case of draft ordinary laws or a three-fifths majority of its members in the case of draft organic laws. The Assembly of Representatives can impeach the President for grave violations of the 2014 Constitution with a two-thirds majority of its members. The motion must be supported by a simple majority of its members and requires confirmation by a two-thirds majority of the members of the Constitutional Court.

The Prime Minister is Head of Government and determines, together with the President, general state policies. He or she is responsible for the execution of these policies and chairs the Council of Ministers. The Prime Minister is also responsible for the organization and proper running of ministries, secretaries of state, and public institutions, enterprises and administrative departments. The Prime Minister generally leads public administration and concludes international agreements of a more technical nature. As a whole, the Government ensures the enforcement of laws. The Prime Minister exercises general decree powers and may introduce draft legislation in the Assembly of Representatives.

The Prime Minister is responsible to the Assembly of Representatives. The President must invite the leader of the party or coalition which won the largest number of seats in the Assembly of Representatives to form a government. The designated candidate will only have to consult with the President in respect of the Ministers for Foreign Affairs and Defence. If a government that enjoys the confidence of the Assembly of Representatives is not formed within a maximum of two months, the President will consult with all parties, coalitions and parliamentary groups with the aim of identifying a candidate who enjoys majority support. If these consultations fail, the President may dissolve the Assembly and call for a general election after four months. Once a government is formed, it may be subject to a motion of confidence. The motion only passes if an absolute majority of the members of the

¹⁵ The language of the 2014 Constitution suggests that women can be elected President or Prime Minister.

Assembly of Representatives designates an alternative candidate for the position. This approach resembles the German constructive vote of no-confidence⁽¹⁶⁾ and secures the continuity of the executive. It may lead to difficulties if a majority of members in the Assembly of Representatives loses confidence in the Government but fails to agree on a new Prime Minister. The President can step in and force either the creation of a new Government with majority support or the dissolution of the Assembly of Representatives after a period of thirty days.

The Assembly of Representatives is the most important legislative authority under the 2014 Constitution. Four aspects are worth emphasis in institutional terms. The Assembly is, first, protected from ad-hoc dissolution as long as it is able to put forward a Prime Minister who enjoys the support of the absolute majority of its members. The Assembly is, second, able to exert political control over the Prime Minister and his or her Cabinet at all times through the possibility of a constructive motion of no-confidence. The President may also be impeached but this requires a specific violation of his or her constitutional obligations and approval by the Constitutional Court. The Assembly is, third, decisive for the relationship between the President and the Prime Minister, who can only be dismissed by a vote of no-confidence. Finally, the 2014 Constitution places considerable emphasis on the role of the parliamentary opposition, which is regarded an essential component of the legislative branch and given key committee positions⁽¹⁷⁾. The opposition also enjoys the right to establish and head a committee of inquiry each year and can actively engage in the legislative process given that bills require the support of only ten members of the Assembly.

The judiciary enjoys considerable independence and influence under the 2014 Constitution. The Constitutional Court, in particular, is given a key role through the power of abstract judicial review, its involvement in the impeachment of the President, and the review of measures taken by the President to avert imminent danger under Article 80. The Court is composed of 12 members, of which three-quarters must be legal experts with at least 20 years of experience. The three branches of government (President, Assembly of Representatives and the Supreme Judicial Council) each appoint four members of the Court for a single term of nine years. The Supreme Judicial Council also performs a role akin to a law commission in other legal systems (Article 114).

Decentralization, finally, is recognized as an important structural feature of the Tunisian state. The principle is juxtaposed with the unity of the state in Article 14, which indicates some measure of discomfort with the allocation of responsibility to lower tiers of government, but is further elaborated in Title 7 of the 2014 Constitution. Solidarity, regional development, and limited self-government through participatory democracy and open governance seem to be the key purposes of decentralization. The exact contours of decentralization remain similarly vague as in Egypt, however, and local authorities will only exercise powers and resources as defined by law.

3. DEMOCRACY AND HUMAN RIGHTS PROTECTION

3.1 Egypt

The C50 were concerned about the protection of civil rights and liberties. The addition of many provisions to Parts II, III and IV of the 2014 Constitution, the allocation of fixed percentages of the GNP in the state budget in an effort to shore up important socio-economic entitlements, the requirement that laws regulating rights and freedoms be passed by a two-thirds majority of the House of Representatives, the special emphasis placed on the duty of police authorities to respect human rights

¹⁶ Konstruktives Misstrauensvotum.

¹⁷ Chairperson of the Finance Committee and rapporteur of the External Relations Committee.

and fundamental freedoms, and the absolute bar on constitutional amendments that reduce the level of protection for citizens suggest that human rights occupied some space in the deliberations of the Committee. Senior members have also indicated that many existing laws will have to be amended or repealed entirely so as to meet the requirements of the 2014 Constitution.

Effective protection of human rights does not, however, depend solely on the sheer length of a bill of rights in a constitution, and there is a real risk that some of the new ideas that were introduced in the text may not withstand the considerable economic and political pressures that will inevitably build once they are put to the test in practice. The lack of important general provisions that promote the development of an effective regime of human rights protection — in particular the absence of robust and workable application, interpretation and limitation clauses — and serious concerns with respect to the protection of rights and freedoms during states of emergency and in military trials of civilians raise considerable doubts about the level of protection that will emerge once the 2014 Constitution becomes fully operational. Other missed opportunities to improve human rights protection include the failure to establish a strong constitutional framework for the National Council of Human Rights, the lack of more direct individual access to the SCC in cases of alleged human rights violations, and the absence of a clear statement that rights and freedoms bind all legislative, executive and judicial institutions⁽¹⁸⁾ as directly applicable legal standards. Finally, and despite the long list of rights and freedoms, there are still important gaps in the protection of citizens. These include the right to life, the right to administrative justice, and a provision that clearly sets out the conditions under which citizens lose the enjoyment of their civil and political rights.

An interesting rule which was suggested at a late stage of the drafting process is the requirement that laws which regulate rights and freedoms be passed by two-thirds of the members of the legislature. This is a very strong procedural safeguard for rights and freedoms and, as such, commendable. There is, however, a very real risk that differences of opinion both with respect to the technical details of a particular law *and* questions related to the protection of rights and freedoms will make it very difficult to pass laws under this rule. This may have a profound impact on the dynamics of Egypt's fledgling democracy. Legislative deadlock is a possibility — as is the risk that bills suggested by the executive branch will simply receive rubber stamp approval by the legislature.

The C50 also made an attempt to bolster the status of international human rights law in the 2014 Constitution. Article 93, again one of the new provisions, declares that the state shall be bound by international human rights agreements, covenants and conventions ratified by the country. These instruments have the force of law. This is a welcome development despite the fact that the 2014 Constitution stops short of recognizing the supremacy of international law over national law.

The protection of human rights protection in states of emergency remains problematic. Article 154 allows the President, after consultation with the Cabinet, to declare a state of emergency for a specified period of time that may not exceed three months. The House of Representatives will have to approve this decision within seven days by a majority of its members; a single extension of not more than three months is possible but will require a two-thirds majority. This higher threshold for an extension replaces the need for a referendum under the 2012 Constitution, which would have been very difficult or even impossible to conduct under the conditions of a genuine state of emergency. More importantly, Article 154 will in most cases secure the involvement of the legislature and limit the duration of a confirmed state of emergency to a maximum of six months. The provision thus compares favourably with the 1971 Constitution. Despite these improvements, serious concerns remain with respect to the reasons for

¹⁸ Including local authorities, the police, the Armed Forces, and every court of law.

declaring a state of emergency (none are specified in the text) and the status of rights and freedoms once a state of emergency is in effect. These matters are left to regulation by ordinary law.

In the weeks before the January Referendum, proponents of the 2014 Constitution strongly emphasized the great number of very generous socio-economic rights in the document. This desire to address difficult living conditions and wider societal needs in the text is laudable and very much in line with constitutional traditions in this part of the world. These entitlements and other specific obligations of the state will, however, create considerable financial pressures for the budget if invoked or provided in practice.

The most ambitious provisions are Articles 18, 19, 21 and 22, which dedicate shares of the GNP to health care (at least 3 %), education (at least 4 %), university education (at least 2 %) and scientific research (at least 1 %) ⁽¹⁹⁾. Past experience with constitutional entitlements in these policy areas, which has been patchy at best, explains why the C50 tried to tie the efforts of the executive to a fixed minimum share of the budget in the hope that more money might lead to better delivery of key services. The practical effects of these provisions may, however, turn out to be limited given the lack of enforcement mechanisms.

Rights and freedoms that help protect the democratic process and foster accountable government are of particular importance in any constitution. Freedom of association, the right to form, join, and participate in the activities of political parties, freedom of assembly, freedom of expression, and freedom of the press and media are generally considered relevant in this context. They are critical for Egypt if the country is to fulfil the Preamble's promises of political pluralism, the peaceful rotation of power, and the completion of a modern democratic state. The way in which the 2014 Constitution guarantees these rights and freedoms raises a number of important issues that in part question the very essence of the human rights doctrine inherent in the document.

Non-governmental associations and foundations can be formed freely but authorities must be notified and may ban them by court order under conditions not specified in the 2014 Constitution.

The right to form political parties is subject to even more limitations than freedom of association. The notification requirement is open to further regulation by law while political activities that involve religion, discrimination based on gender or origin, sectarian distinctions and specific geographic locations are banned — as are parties that violate democratic principles, are secretive, or of a military or paramilitary nature. The 2012 Constitution, by contrast, treated political parties in the same way as associations and foundations.

Freedom of assembly has attracted much debate in Egypt in wake of the controversial Protest Law that was enacted prior to the January Referendum ⁽²⁰⁾. The 2014 Constitution grants citizens the right to organize public meetings, marches, demonstrations and other forms of protests as long as they are peaceful and unarmed. Prior notification, as regulated by law, is required. Absolute protection is granted to peaceful private assemblies, which can be held without prior notification and enjoy express protection from any surveillance by security or intelligence agencies. This language itself provides sufficient protection for freedom of assembly but much will depend on the way the right is regulated by legislation. The absence of a robust limitation clause will make it difficult to strike a reasonable balance between the right to voice opinions publicly and the legitimate aim of the state to maintain order and protect the interests of third parties.

¹⁹ Article 238 defers achievement of the full quota in these areas to 2016/2017.

²⁰ Presidential Decree — Law No. 107 of 2013.

While freedom of expression is couched in fairly liberal terms in Article 65, substantial limitations appear with respect to artistic, literary and intellectual works as well as newspapers, television and radio broadcast stations, online newspapers, and other media outlets. Much will depend here on the way that terms like *incitement of violence*, *discrimination between citizens*, and *violations of personal honor* will be interpreted and applied in practice. Considerable limitations could be imposed by the Supreme Council for the Regulation of the Media, which shall guarantee and protect freedom of the press and media but is also given authority to monitor the legality of press and media funding, and to develop controls and criteria necessary to ensure compliance with professional and ethical standards as well as national security needs. These wide powers will be defined by law — again opening the door to extensive legislative regulation.

Religious issues weighed heavily in criticisms of the 2012 Constitution. The C50 responded to these calls by removing the consultative role of al-Azhar in the interpretation of legislation pertaining to Islamic Shari'a, references to Quran, Sunna, feqh, and authoritative doctrinal sources of the Sunni community, and the use of principle sources of Shari'a as a controlling element in the interpretation and exercise of rights and freedoms. This decisive shift back to the pre-2012 regime is underscored by the Preamble, which affirms the principles of Shari'a as the main source of legislation but places the interpretation of these principles firmly in the hands of the — secular — SCC. The influence of Islamic thinking on the constitutional framework has thus been effectively curtailed.

Article 204, which subjects civilians to the jurisdiction of the Military Court for crimes that constitute a direct assault against military facilities or camps of the Armed Forces, military zones (including designated border areas), equipment, vehicles, weapons, ammunition, documents, military secrets, public funds, military factories, military service, or officers and personnel of the Armed Forces acting in their official capacity, continues to be the single most criticized provision of the 2014 Constitution. Member of the C50 defended Article 204 as an attempt to impose constitutional limits on the powers of the legislator to regulate the jurisdiction of the Military Court over civilians. Abolishing this jurisdiction altogether was quite obviously not a viable option under the circumstances ⁽²¹⁾. Past experience in Egypt suggests, however, that basic due process rights are not respected in military trials of civilians, that the independence and impartiality of the military justice system is questionable, and that detained and accused civilians have been subjected to very serious human rights violations, including physical and sexual abuse, while in the custody of the Armed Forces.

3.2 Tunisia

Provisions dealing with the protection of rights and freedoms in Tunisia are mainly found in Titles 1 ⁽²²⁾ and 2 ⁽²³⁾ of the 2014 Constitution as well as the Preamble, which enjoys the same status as the main text. The eligibility to vote and the eligibility for candidacy are addressed both in Article 34 and in Title 3 (Legislative Authority). The language used in these parts of the new constitutional settlement is strikingly succinct and akin to the approach found in international human rights conventions or western constitutions like those of the United States and Germany. This approach will give the Tunisian judiciary, and in particular the Constitutional Court, a key role in the future interpretation and application of rights and freedoms.

As in Egypt, the drafters in Tunisia chose not to expressly state that fundamental rights bind the exercise of power by all public authorities. Article 49, arguably one of the most important provisions of the new

²¹ This became apparent in several conversations of the author with members of the C50 in January 2014.

²² General Principles: Articles 1 to 20.

²³ Rights and Freedoms: Articles 21 to 49.

settlement, does however express the notion that the legislative branch is not only bound by special *procedures* but must also respect *substantive* limits when enacting laws that impact on rights and freedoms. This is a substantial difference to the approach that most countries in the region take to human rights protection. Like its counterparts in Iraq and Egypt, the 2014 Constitution thus accepts as a starting point that modern states must be able to limit the rights and freedoms of their citizens in multiple ways but places considerable emphasis on the conditions under which this may occur. This makes the Tunisian approach quite unique in this part of the world.

While earlier drafts still relied heavily on internal limitation clauses in each provision, allowing the legislator to limit entitlements by law, these have largely fallen away in the final text of the 2014 Constitution and were replaced by a single (general) limitation clause. Article 49 states that limitations can be imposed on the exercise of rights and freedoms as long as they are established by law and do not affect the essence of an entitlement. More importantly, the provision stipulates that limitations may only be put in place for reasons that are necessary in a civil and democratic state and with the aim of protecting the rights of others or to safeguard public order, national defence, public health or public morals. Finally, the 2014 Constitution also requires that there be a proportionate balance between the envisaged restriction and the objective pursued by the state. Constitutional amendments that undermine rights and freedoms are prohibited.

The introduction of a balancing test that invites the legislator and, if challenged, the courts to weigh the importance of the public aim pursued through legislation against the effect that a measure may have on the rights and freedoms of citizens aligns Tunisia with international standards of human rights protection. Much will, of course, depend on the application of Article 49 in practice. The text of the 2014 Constitution does, however, provide important guidance for legislators and judges, and will hopefully be applied to administrative decisions as well. Article 15, which requires, *inter alia*, that public authorities act in conformity with the rules of transparency, integrity, efficiency and accountability, could provide a point of entry for considerations involving the principle of proportionality. Article 49 may also provide some measure of protection against undue restrictions of rights and freedoms in states of emergency. The 2014 Constitution allows the President to take any measures necessary to safeguard the nation's institutions, provide security, or ensure the independence of the country in the event of imminent danger but does not specify what (if any) effect this authorization will have on the exercise of rights and freedoms. As in Egypt, the 2014 Constitution does not identify non-derogable rights and freedoms.

The 2014 Constitution also contains a number of positive entitlements such as the right to health and social assistance, the right to education, the right to work, the right to culture, the right to water, or the right to a healthy and balanced environment. These entitlements are generally guaranteed without qualifications. Given the limited availability of resources, these provisions could prove problematic if future governments in Tunisia fail to provide adequate public services or sufficient job opportunities. The shorter list of key entitlements nevertheless compares favourably with the elaborate constitutional promises found in the new Egyptian arrangements, which are going to be very difficult to fulfil.

Article 20 addresses the status of duly approved and ratified international agreements, which enjoy a higher status than ordinary legislation but remain inferior to the 2014 Constitution. This solution may require a fairly comprehensive review of existing Tunisian legislation in light of the country's international human rights obligations. The Constitutional Court does not have an express mandate to test national laws against international treaties but this jurisdiction should be read into Article 120 in order to provide meaningful protection under Article 15.

Provisions protecting rights and freedoms can be amended according to the ordinary procedure set out in Articles 143 and 144. This will involve scrutiny by the Constitutional Court, support by two-thirds of

the members of the Assembly of Representatives, and approval by an absolute majority of the votes cast in a referendum. The Constitutional Court will have a key role in this process given that Article 49 prohibits amendments that undermine the rights and freedoms guaranteed by the 2014 Constitution.

Chapter 2, finally, contains a list of 28 provisions that offer substantial protection for most civil, political, social, economic and cultural rights. These include the protection of equality of, inter alia, men and women (Article 21), the right to life (article 22), privacy (Article 24), rights of accused and detained (Articles 27 to 30), freedom of opinion, expression, media and publication (Article 31), the right to access information held by the state (Article 32), the right to establish political parties, unions and associations (Article 35), the right to peaceful assembly (Article 37), and women's rights (Article 46). Freedom of belief, conscience and religious practice is established in Article 6. The provisions are couched in broad and largely unqualified terms, which can be explained by Tunisia's reliance on a modern limitation clause. A number of overlapping and — in part — contradictory articles were removed or adapted as the text evolved. Single provisions such as the right to work or the protection of property could have been phrased differently and, arguably, improved while some important background issues such as the application of rights and freedoms in the private sphere and approaches to the interpretation of constitutional entitlements were not addressed in the text.

The most important shortfall of the new framework may be decision not to grant citizens an unambiguous right to challenge the constitutionality of legislation and court decisions in the Constitutional Court. Draft laws, including suggested amendments to the 2014 Constitution, must be referred to the Court at the request of the President of the Republic, the Prime Minister, or thirty members of the Assembly of Representatives. The President can also request the Court to review the constitutionality of international treaties before ratification. Constitutional amendments, finally, must always be cleared by the Court. These three forms of abstract judicial review are complemented by a reference procedure which allows lower courts to refer to the Constitutional Court challenges to the constitutionality of legislation raised by litigants in the course of pending cases. The details of this procedure will be established by law. These rules mirror the French approach to judicial review but stop short of giving citizens standing in cases where a law is constitutional but its interpretation or application in a lower court judgment is challenged on constitutional grounds ⁽²⁴⁾. The 2014 Constitution nevertheless offers the most coherent and modern approach to human rights protection found in the region today.

4. CONCLUSIONS

The 2014 Constitutions of Egypt and Tunisia, though enacted at the same time and as a consequence of very similar revolutionary forces that have changed the political landscape throughout the Arab region, could not be more different in style and content. Egypt has to a large extent fallen back to the structures of the 1971 Constitution and will likely experience further restoration of the authoritarian presidentialism that determined the fate of the country for so many decades. Tunisia, on the other hand, seems to have embraced a new constitutional paradigm that is based on a modern approach to human rights protection and an institutional framework that treats the legislature, the Presidency, the Prime Minister and his or her Cabinet, and the judiciary as the four corners of a fairly balanced structure. The promotion of political pluralism and the peaceful rotation of power, declared aims in both countries, are a real possibility in Tunisia but not more than a distant target in Egypt.

This is a consequence of numerous local factors, including the influence of the military sector in Egypt and the more balanced political landscape in Tunisia, but can also be attributed to the structure of the

²⁴ Constitutional complaint or *Verfassungsbeschwerde*.

constitutional drafting process itself. This process was streamlined, tightly managed, and driven by a relatively small number of key individuals in Egypt, and messy, at times chaotic, but largely inclusive and self-regulating in Tunisia. The abrupt end of Muslim Brotherhood rule in Egypt may thereby have been an important catalyst for the positive outcome of the process in Tunisia by impressing on Islamist stakeholders the importance of a largely negotiated constitutional settlement. The constitutional future of both countries is difficult to predict, however, as the novel solutions (often based on legal transplants) may fail in Tunisia and the many moderate and progressive forces in Egypt continue to work towards gradual regime change.

A number of lessons can be drawn from developments in Egypt and Tunisia.

Both countries aimed for very short drafting deadlines which were difficult to meet in practice. Systems in transition need time. Libya and other countries in the region should allocate many months — and possibly a year or more — to the drafting of new constitutional settlements. The drafting of the 1951 Constitution in Libya, discussed in some detail below, took around 25 months.

Both countries set aside very little time or resources to consult comparative expertise. International best practice did inform the process in Tunisia, albeit through informal channels, while both the C10 and C50 Committees in Egypt relied only on the knowledge of their own (Egyptian) members. A similar pattern is also emerging in Libya, where the so-called February Committee — created earlier this year to develop an alternative path for the drafting process in case the designated Constituent Assembly fails to present a result within four months ⁽²⁵⁾ — stressed that it was making its recommendations without resorting to foreign ideas. While constitutional settlements must come from within the relevant process and reflect local values, experience, and aspirations, this reluctance of systems in the region to take into consideration (and then adopt, modify or disregard) foreign experience is unfortunate. Every effort should be made to convince stakeholders in Libya of the positive effect that comparative experience can have on the process of drafting a new constitutional order. Ideally, such expertise would be channelled through a designated (sub-)committee of the drafting body or a panel of local constitutional experts that interfaces with foreign consultants.

Perhaps the most relevant lesson that emerges from the Tunisian experience is the importance of compromise. Successful negotiation of a new constitution demands that all stakeholders be willing to seek common ground and consider alternatives to their own preferred positions and the possibility of trade-offs along the way. The result achieved in Tunis on 26 January 2014 would not have been possible without the mediation of civil society organizations and — procedurally — the creation of a special committee that was tasked specifically with the facilitation of compromise and gave all parties equal representation regardless of electoral support. There are signs that stakeholders in Libya may be more willing to seek mutually acceptable outcomes from the outset. Several changes to the drafting process, discussed below, suggest that this may be the case.

Two further aspects of the drafting processes in Egypt and Tunisia should be highlighted. There was, first, very limited public outreach in either case. While negotiations (and evolving draft provisions) were covered by the media in both countries, there was little opportunity for members of the general public or civil society organizations to give substantive input to either drafting process. Lack of time and opportunity for structured interaction were the main obstacles, it seems, that prevented a broader and more inclusive discussion of available constitutional options. The difficult security situation and the limited number of functioning national media organizations suggest that Libya will be facing very similar challenges in the upcoming drafting exercise.

²⁵ Allocated to it by the (amended) Constitutional Declaration of 2011.

Finally, there is a distinct reluctance in the Arab world to amend single provisions of a text once constitutions are enacted; to say that constitutions are either completely repealed or not changed at all for long periods of time is not much of an exaggeration. This reduces the practical relevance of amendment procedures and safeguards, and — more importantly — tends to create a gap between the text of a constitution and constitutional reality. An extreme example is Iraq, where key provisions of the 2005 Constitution that specifically call for important implementation measures or even further review and, possibly, amendment of the text itself have been left dormant for several years ⁽²⁶⁾. There are promising signs that Libya may develop a different culture in this respect and avoid the pitfalls of what could be called 'ornamental' constitutionalism. The Constitutional Declaration, in force since August 2011, has already been amended several times in order to reflect gradual changes in the constitutional roadmap made necessary by the demands of various stakeholders with respect to the democratic legitimacy of the process, a more federal composition of the Constituent Assembly (the drafting body), and more generous timeframes. Further amendments, designed to address a possible failure of the Constituent Assembly to complete its work within four months, were recently approved by the General National Congress (GNC), which currently functions as an interim legislature. This emerging pattern of gradual amendments suggests that the (albeit interim) constitutional framework is taken seriously and — more importantly — that legislators might in the future keep the highest law of the land in line with new constitutional insights and political developments. This would be particularly helpful in the first years of the incoming regime given that some measure of fine tuning is often necessary after the enactment of a completely new constitutional text.

²⁶ See Articles 65, 106 and 142 of the 2005 Constitution of Iraq.

PART TWO — LIBYA

5. CURRENT SITUATION

5.1 Background factors

The current situation in Libya is quite distinct from the conditions that both Egypt and Tunisia were facing at the outset of their respective transition processes. This analysis will highlight only briefly some key background factors given the fairly large number of reports that have over the past two years discussed in some detail the highly unstable security situation, the striking absence of functioning state institutions, the deep ethnic, tribal and political cleavages that divide the country's fairly small (albeit rapidly growing) population, and the uneven geographical distribution of Libya's considerable oil and gas resources. These four elements — lack of security, the absence of state institutions, societal fragmentation, and the uneven distribution of natural wealth — create a challenging environment for any process of constitutional development.

The security situation has not improved since the end of the military effort to remove Muammar al-Qaddafi from power. Local militias continue to operate beyond the reach of central authorities in Tripoli and control large parts of the country including strategic oil ports on the Mediterranean coastline. Militia disarmament and the establishment of a monopoly on the legitimate use of force by the state remain inherently political tasks that are made more difficult by the vast geographic dimensions of the country, its limited transportation infrastructure and communication networks, the proliferation of arms after the disintegration of al-Qaddafi's forces, and the poor state of central security institutions. Any future settlement will thus require both a sustained effort to establish an efficient central military and police apparatus *and* peaceful involvement in constitutional, political, economic, and societal reconstruction by a substantial majority of the many local militias that currently exercise *de facto* authority over their own parcels of Libyan territory.

More than four decades of institutional deconstruction have left Libya not only without much of a legislative or administrative state apparatus but have also had a profound impact on civil society. Political parties, trade unions, NGOs or professional press and media outlets exist only on a very basic level. In light of these circumstances, it is remarkable that the elections to the GNC ⁽²⁷⁾ on 7 July 2012 were relatively well organized and considered free and fair by international observers.

The overthrow of al-Qaddafi produced a culture of division between successful revolutionary towns and tribes and those suspected of having supported the regime both in past decades and the more recent military struggle. Matters are made more difficult by the fact that al-Qaddafi actively fostered tribal conflicts over many years in order to secure his own rule. A sustained process of national reconciliation and transitional justice is thus generally regarded as an essential prerequisite for a peaceful transition process and the successful reconstruction of a constitutional state in Libya. This process should focus on crimes committed by members of the former al-Qaddafi regime but also include key events such as the confiscation of homes and property under Law No. 4 of 1978 and address the deeper roots of historical rivalries such as the conflict between Misrata and Bani Walid. Much will also depend on how Libyans decide to treat individuals who served in some capacity under al-Qaddafi. The current approach, enacted by the GNC on 5 May 2013 ⁽²⁸⁾, imposes a 10-year ban from public life on all those who held high-ranking positions under the former regime from 1969 to 2011. While effective on one level, this solution may exacerbate tribalism and regionalism, ultimately endangering the process of

²⁷ Discussed in more detail below.

²⁸ Law No. 13 of 2013.

reconciliation, and further undermine the effectiveness of remaining — limited — government structures such as the judiciary. The continued enforcement of Law 13 of 2013 may thus have to be reviewed and, possibly, combined with a strategy to rehabilitate and reintegrate into Libyan society the majority of individuals that played lesser roles in the al-Qaddafi regime.

Natural resources, finally, are distributed very unevenly across Libya. Oil and gas production is currently concentrated in the eastern parts of the country and, to a lesser extent, along the Tunisian border. Income from the hydrocarbon industry makes up most of the Libya's wealth. The former regime focused investments in economic development and social infrastructure projects predominantly on the north-western parts of the country, which has led to much resentment in underprivileged areas — especially in the eastern region of Cyrenaica — and fostered calls for a federalized system of government or even secession. Recent events surrounding the unauthorized export of oil from the port of Es-Sider, which led to a successful vote of no-confidence in former Prime Minister Ali Zeidan and clashes between forces of the central government and local rebel leaders along the coast, highlight both the critical importance of oil and gas revenue and the very real possibility that Libya could disintegrate.

5.2 Constitutional development since the fall of al-Qaddafi

Constitutional developments since the fall of the al-Qaddafi regime began with the formation of the unelected wartime National Transitional Council (NTC) in Benghazi on 27 February 2011. The NTC was the institutional platform for the rebel movement and aimed at providing political and military leadership, basic security and municipal services, and support for Libyans living abroad. The NTC also drafted the key constitutional document which determines both the current institutional infrastructure of Libya and sets out the further process of transition. The Constitutional Charter for the Transitional Phase (Constitutional Declaration), enacted on 3 August 2011, functions as an interim constitutional settlement. Article 30 of the Charter envisages the election and formation of the GNC as an interim legislature with the power to designate a Prime Minister, confirm the members of a transitional government, and (initially) choose a constitutive body to draft a new constitution (Constituent Assembly).

The TNC was dissolved with the election of the General National Congress on 7 July 2012. Seats for the GNC were distributed nationally on the basis of population numbers, which gave districts in Tripolitania (western Libya) 100 seats, districts in Cyrenaica (eastern Libya) 60 seats, and districts in Fezzan (southern Libya) 40 seats. The three parts of the country account for roughly 60, 30 and 10 per cent of the population respectively. Just prior to its dissolution, the NTC amended the Constitutional Declaration and determined that the Constituent Assembly would be directly elected by the people, rather than appointed by the GNC, and that Tripolitania, Cyrenaica and Fezzan would each be represented by 20 members. This formula goes back to the 60-member commission that was formed to prepare the (post-independence) 1951 Constitution. The Assembly was also allocated more time to prepare the draft (120 instead of 60 days) and given authority to submit the text to a referendum by a two-thirds-plus-1 majority of its members⁽²⁹⁾. Initially, the text would have had to be cleared by the GNC before being put to a vote by the people. This decision to change the drafting procedure was made in response to sustained criticism that a body appointed by the GNC could marginalize the smaller populations of the eastern and southern regions during the process. Representation of women and ethnic groups was secured in Law 17 of 2013, which reserved 10 % of the seats for women and two seats each for the Tebu, Touareg and Amazigh minorities.

²⁹ Constitutional Amendment No. 1-2012.

Elections to the Constituent Assembly took place in February 2014. Results for 47 of the 60 seats were announced in early March 2014. The remaining seats remain vacant due to a boycott by the Tebu and Amazigh as well as threats of violence that prevented voting to take place in a number of electoral districts. Overall voter turnout was very low.

The GNC has instructed the members of the Constituent Assembly to convene for an inaugural — and purely symbolic — meeting on 14 April 2014 and invited the National High Commission on Elections to determine a date for an election to fill its 13 still vacant seats. There are encouraging signs that the Tebu and Amazigh minorities might drop their opposition, participate in the elections, and join the drafting process given that the GNC has accepted — in principle — that any decisions concerning minority rights should require consensus. This move still falls short, however, of demands that the Constituent Assembly decide questions regarding the name and identity of the future state, its flag, its national anthem, and the status of languages with a two-thirds majority of its members *and* the approval of the relevant minority representatives.

It is not clear at this point of the process whether the Constituent Assembly will actually complete its task within the allocated four months. The tensions and delays caused by the boycott of the Tebu and Amazigh prompted the creation of the so-called February Committee, composed of six representatives of the GNC and nine independent members, which was asked to develop an alternative roadmap for the drafting of the new constitutional settlement. The February Committee proposed to extend the transitional phase by 18 months should the Constituent Assembly declare by early May 2014 that it would not be able to present a draft text by July 2014 ⁽³⁰⁾. The February Committee also presented a number of substantive amendments to the Constitutional Declaration. These include the substitution of the GNC by an interim Council of Representatives ⁽³¹⁾ as well as the direct election of a President ⁽³²⁾. Other notable provisions include a commitment to decentralization on the basis of governorates and municipalities ⁽³³⁾ and a duty of the army to respect the constitutional order ⁽³⁴⁾. These suggestions were approved by the GNC, the direct election of the President being the one important exception. The rejection of this proposal indicates that there is substantial opposition to the creation of a presidential or semi-presidential system of government in Libya. The GNC also passed a new law regulating elections to the Council of Representatives. This law replaces the party list system with 200 individually elected representatives and increases the number of seats reserved for women to 30. The very detailed list of amendments to the Constitutional Declaration and the new election law make it very likely that the drafting process will indeed be extended.

6. CONSTITUTIONAL OPTIONS

6.1 Preliminary observations

Charting the constitutional future of Libya will be a difficult task. As in other countries in the region, confining the process to a period of four months complicates matters. Experience from Iraq and Egypt suggests that more time is needed to negotiate the details of a workable settlement under the challenging security conditions outlined above. There is a strong possibility that the Constituent Assembly will actually be given as much as 18 months to complete its task, which would be a welcome development.

³⁰ Article 5 of the amendments suggested by the February Committee.

³¹ Article 1 of the amendments suggested by the February Committee.

³² Article 32 of the amendments suggested by the February Committee.

³³ Article 52 of the amendments suggested by the February Committee.

³⁴ Article 53 of the amendments suggested by the February Committee.

More importantly, the decision to rely on an elected body, albeit composed of an equal share of representatives from the three historic regions of Libya, and to enter into the drafting process without a set of generally accepted fundamental principles with respect to the nature of the future Libyan state, can pose a challenge for the Constituent Assembly. It is not yet clear how representative the body really is in terms of key stakeholders who wield considerable destructive potential in the guise of militia-controlled territory across the country and may not accept a settlement even if confirmed by referendum. Note should also be made of the fact that — unlike Iraq — there is no requirement for separate regional majority support of the text in the referendum. The draft presented to the people can pass with the support of a two-thirds majority of the voters regardless of their geographical location, which means that distinct parts of the country with smaller populations may be outvoted.

Finally, the Constituent Assembly will not be able to draw on much recent local constitutional experience given that the rule of al-Qaddafi was characterized by a continuous constitutional deconstruction of the Libyan state. The 1951 Constitution, which created the United Kingdom of Libya as a hereditary monarchy with a federal structure and partly representative form of government, was stripped of its federal components in 1963 and completely abolished in 1969 in the wake of the military coup that brought al-Qaddafi to power. Neither al-Qaddafi's 1969 Constitutional Proclamation, which established the Revolutionary Command Council as the supreme authority of the Libyan Arab Republic, nor his infamous Green Book, which constituted the ideological and organizational foundation for the Great Socialist People's Libyan Arab Jamahiriya in 1977, provides much guidance for the reconstruction of a modern Libyan state. The 2011 Constitutional Declaration itself, finally, sets out a basic system of government and establishes a number of fundamental rights and freedoms, including judicial guarantees, but was not intended to provide more than the most essential transitional arrangements for a limited period of time. Of these documents, and despite the fact that it dates back to a very different era and is tainted by the gradual establishment of a system of benign despotism and the erosion of many rights and freedoms, it is the 1951 Constitution that may offer the best template for the work of the Constituent Assembly.

6.2 Institutional choices

Perhaps the most important choice that Libya is facing today is whether to opt for a unitary system or attempt to develop a federal form of government. The historical — though not current administrative — division of the country into three distinct regions (Tripolitania, Cyrenaica and Fezzan) and the powerful role that tribalism traditionally plays in Libyan society suggest that a federal structure might be best suited to address calls for more regional and local autonomy in a number of policy areas. A federal or strongly decentralized approach would, however, have to be carefully balanced against the risk of Libya's national disintegration.

Federalism does not have much appeal in the Arab world, however, and the constitutional settlements recently enacted in Egypt and Tunisia showcase the fact that a weak form of administrative decentralization is the only type of local government that countries in the immediate vicinity of Libya are willing to accept — and mainly for cosmetic reasons given the pressures for democratization that the so-called Arab Spring has unleashed across the region. Iraq, which identifies itself as a federal system in the 2005 Constitution, is no different — though the sustained failure of the central government in Baghdad to provide security and essential public services for citizens in the 15 governorates outside the Kurdish region, which is controlled by the Kurdish Regional Government, seems to have pushed the country towards more federal arrangements over the past two years.

Other considerations that impact heavily on the choice between a centralized system and a more federal structure in Libya include the absence of functioning state institutions even at the central level,

the challenges created by the uneven geographic distribution of oil and gas resources ⁽³⁵⁾, the different population size of the three regions, the very real risk that a strongly decentralized or even federal form of government could increase the potential for corruption, and the possibility that federalism might facilitate the complete disintegration of the country. The first of these factors seems to weigh heavily. It is at present difficult to imagine how lower tiers of government in Libya would be able to provide even the most basic public services, take responsibility for large infrastructure projects, stimulate local or regional economies, or exercise legislative authority even in limited policy areas. The risk of corruption may also increase considerably with the devolution of central authority to regional or municipal units.

The success or failure of a federal system depends in large part on its specific institutional design, however, and considerable differences exist in the way that leading federations distribute legislative, executive and judicial authority, address regional imbalances of wealth and allocate voting power to constituent units of differing population size. The 2005 Constitution of Iraq, for example, broadly followed the federal model of the United States of America, which is not surprising but may have been a mistake given the very different socio-economic conditions, administrative structures and legal traditions in both countries. A different type of federalism (perhaps along the lines of the German model) or a stronger form of decentralization (perhaps akin to post-apartheid South Africa) may have produced better results. Libyans should make a very considered choice if they decide to go down a federal path.

It is also worth noting that many Libyans look back to the federal United Kingdom of Libya, established by the so-called Independence Constitution of 1951, as a model for the future. This trend is apparent in the design of the Constituent Assembly, which deliberately emulates the composition of the main negotiating body at the time, and the choice of Al-Bayda, a town east of Benghazi that hosted the drafting process in 1951, as its seat.

A closer look at the 1951 Constitution reveals a document of considerable sophistication that could very well provide a framework for the Constituent Assembly to build on. This is, of course, not to suggest that the country should return to a hereditary monarchy. A number of provisions that determine the powers of the King and his relationship to the Prime Minister are, however, reminiscent of very similar arrangements in the contemporary semi-presidential systems of Egypt and Tunisia; the rights and freedoms contained in Chapter II reflect the content and style of the 2014 Constitution of Tunisia; and many of the technical provisions relating to, *inter alia*, the composition of the legislature and the status of its members, the independence of the judiciary, or the general budget could be adopted without too much change. Other parts of the Independence Constitution would require considerable amendment. These include the application, interpretation and limitation of rights and freedoms; the legislative process in a bicameral legislature; and the structure and powers of the highest courts.

The greatest surprise held by the 1951 Constitution, however, is its approach to federalism. Parallels to the German Basic Law of 1949 are quite striking. The central level exercised legislative and executive authority over a large number of items set out in catalogue form (Article 36) ⁽³⁶⁾. These were supplemented by a long list of joint powers (Article 38), which fell under the *legislative* authority of the Federal Government but were *implemented* by the three provinces under federal supervision. All residual matters were left to the provinces (Article 39). The legislature was bicameral and consisted of a Senate and a House of Representatives. The King appointed one half of the members of the Senate while the other half was elected by the legislative councils of the provinces. Support of both chambers was required to pass federal legislation. Tax revenue was distributed between the federal level (receipts

³⁵ Which continues to trouble Iraq so many years after the enactment of the 2005 Constitution.

³⁶ Other specific exclusive powers of the federal level can be found throughout the 1951 Constitution.

from taxes and fees relating to matters which were within the exclusive competence of the Federal Government under Article 36) and the provinces (receipts from all other areas). The 1951 Constitution also contained a mechanism for the vertical equalization of revenue, which was designed to safeguard the ability of provinces to discharge their functions and guarantee to them constant economic progress (Article 174). Provinces were given the authority to enact their own organic laws subject to the provisions of the 1951 Constitution (Article 177). Provincial governors had a dual function. They were appointed and dismissed by the King, represented the Monarchy within the province, and supervised the implementation of the 1951 Constitution and federal laws (Articles 180 and 181). All other functions of governors were determined by the organic laws of the provinces (Article 184). Amendments affecting the federal form of government, finally, required approval by all provincial legislative councils (Article 199).

This federal structure is very different from the model found in the 2005 Constitution of Iraq in that it allocates considerable authority to the centre. It also requires a great amount of efficient provincial administration in order to execute federal law while acknowledging that the exercise of administrative authority, in itself, contributes to a federal system of checks and balances⁽³⁷⁾. It is also striking that the 1951 Constitution accepts the legislative authority of lower tiers of government, directly involves the provinces in federal legislation via the Senate, and provides a constitutional framework for the allocation of tax revenue. These features are completely absent in the decentralized forms of local government that were recently established in Egypt and Tunisia.

The unusual federal framework of the 1951 Constitution can probably be explained with the input of international experts who were directly involved in the drafting exercise. One should not forget, however, that these elements only survived for 12 years and were removed in 1963. The institutional infrastructure as well as the balance between the legislative and executive powers of the centre and provinces may nevertheless provide a way forward for contemporary Libya if key stakeholders can be convinced of its virtues. Those in favour of a unitary state might thus criticize the marked influence that provinces would have on federal law-making, the allocation of residual legislative and executive authority to the provinces, or their fairly high level of financial autonomy, while those in favour of stronger provincial autonomy would no doubt take issue with the considerable legislative powers of the centre. These points of criticism could likely be overcome by recalibrating the details of the system — for example with respect to the policy areas assigned to the centre — and complementing it with a more sophisticated bicameral legislative process that creates a different balance of power between the two chambers.

The 2014 Constitution of Tunisia would provide a sound template both for the protection of rights and freedoms and a fairly balanced relationship between a president, a prime minister and cabinet, and the legislature. A permanent shift to a parliamentary democracy is also a very likely possibility given the structure of the Constitutional Declaration, which currently makes the Interim Government directly responsible to the GNC⁽³⁸⁾. The recent controversy surrounding the direct election of an interim President suggests that there is considerable support for this approach, which would put Libya at odds with the presidential or semi-presidential systems of government in the region. The amendments to the Constitutional Declaration, which would allow the President to delay but not veto legislation⁽³⁹⁾ and force him to resign from office should an attempt to dissolve the Council of Representatives by

³⁷ As is the case in Germany (*Exekutivföderalismus*).

³⁸ Article 30.

³⁹ Article 19 of the amendments suggested by the February Committee.

referendum fail ⁽⁴⁰⁾ indicate that the balance of power between the executive and legislative branches of government would, in any case, more likely be tilted in favour of the latter.

The management of Libya's oil and gas resources, finally, will be a critical factor in the work of the Constituent Assembly. Experience from Iraq suggests that the equitable distribution of income from the hydrocarbon industry poses a considerable challenge that can impact on wider constitutional decisions such as the choice between a federal structure and a unitary form of government. The 1951 Constitution, written at a time when oil and gas revenue still played a lesser role in Libya, may provide a good starting point given that the central level was obliged to allocate annually to the provinces from its revenue sufficient funds to enable them to discharge their constitutional obligations and generate economic growth. A special commission composed of members from the centre and the provinces could be given the task of administering such an equalization mechanism ⁽⁴¹⁾.

⁴⁰ Article 31 of the amendments suggested by the February Committee.

⁴¹ See Article 106 of the 2005 Constitution of Iraq.

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