



Libya Local Governance and Stabilisation Programme ▪ برنامج دعم الحكم المحلي والاستقرار في ليبيا

# The situation of Decentralisation and Local Governance in Libya







Ministry of Foreign Affairs

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# 1. Introduction

Despite six years of experience, Libya is still living in a delicate and difficult transitional period beset by deep divisions and bitter conflicts. The country is still awaiting the ratification of a new constitution and the organisation of elections that are supposed to lead to the establishment of a democratic and pluralistic political and administrative system.

In the area of decentralisation and local governance, the subject of this report, and despite the issuance of a number of texts, there is still controversy between supporters of the federal system and supporters of the decentralised system within the framework of a unified State.

Moreover, through the provisions of the laws in force, especially Law No. 59 of 2012 and the draft of the last Constitution's Project of April 19th, 2016, the tendency seems to be more oriented towards an unified State based on decentralisation as described in the last Constitution's Project as "expanded" to be in the middle between centralism and federalism.

In this context, it should be recalled that building a local administration and governance organisation based on a balance between decentralisation and amended centralisation is one of the major pillars of building a balanced democratic system. The relationship between decentralisation and democracy is very close to the fact that the depth and rigidity of decentralisation is vital to the democracy and political stability of the political and administrative systems.

Decentralisation and the need for local democratic authorities support the process of democratic transition and highlight its results in a way that citizens feel it significantly in the context of their daily living and enhance their sense of citizenship. They strongly contribute to the legitimacy of democratic construction and ensure breaking with the system of tyranny and domination.

It should be noted that Libya has an important historical experience in the organisation of local administration, which dates back to the second half of the nineteenth century with the emergence of the regulations issued by the High Gate in 1867 before it witnesses since the mid-seventies the stage of excessive concentration of power.

The absence of freedoms, fair development, excessive centralisation and deepening oppression and injustice have been one of the most important demands of the forces that rose up against tyrannical rule in Libya in 2011. Decentralisation is one of the best frameworks for the concrete consolidation of democracy as the embodiment of the principle of democracy of proximity, citizenship and participation, the opposite of exclusion and exclusivity. It is also an ideal framework for equitable development policies linked to the real needs of citizens, the opposite of marginalisation.

As part of the endeavour to rebuild an administrative organisation in a new horizon based on democracy, quality and balance between the central administration and the local administration, Law No. 59 of 2012 on the Local Administration System and its Executive Regulation, as well as a large number of governmental and ministerial decisions, were issued in the last few years.

Law No. 59 of 2012 consists of 82 Articles divided into 08 chapters and supplemented by an Executive Regulation issued by a resolution of the Council of Ministers No. 130 of 2013 consisting of 133 Articles divided into 09 sections. This law was amended by Law No. 9 of 2013.

On the basis of this Law and its Executive Regulation, in spite of their shortcomings, more than 20 regulatory decisions were issued related to partial issues such as the organisation of cemeteries, markets, advertising, beaches, swimming pools, public transportation, taxis, public spaces, slaughterhouses, sewerage and construction permits.

The most important of these decisions is related to the organisational structure, the internal organisation of the municipality and its implementation.

**These decrees, mainly issued in 2013, 2014 and 2015, do not represent a major progress nor a profound change. They suffer from considerable fragility and weakness** resulting from political instability and governmental changes. The Resolution 111 of the Minister of Local Government cancelled the overwhelming majority of these decisions in 2015, but this cancellation has not been taken into consideration in many regions and continue to be in force until today.

Based on these various Laws and texts, this report focuses on the analysis and development of local decentralisation and governance in Libya since 2012, in the first part.

The second part will focus on the latest draft of the Constitution's Project, its important development and the substantial additions. Then, the report concludes with a set of recommendations.

## 2. Evolution of the legislative and regulatory framework since 2012

It is necessary first to recall the most important additions and weaknesses of Law No. 59 of 2012 and its Executive Regulation, then to the most important aspects of the decisions issued on their basis since 2013.

### 2.1 Decentralised Communities

Law No. 59 of 2012 indicates two types of decentralised administrative units: provinces and municipalities that "enjoy legal personality and independent financial status". It adds that the legislator can create other types of local units unless otherwise stipulated in the country's Constitution.

These groups enjoy the legal personality that distinguishes between them and the State, and enjoy a system of decentralisation, i.e. the administrative and financial management independence.

Because they form administrative units with legal personality and management independence, the people in charge of the affairs of these local communities are their elected representatives (members of the provincial and municipal councils, as well as the governor and the Mayor of the municipality) who are supposed to be subject to the supervision of the State (the oversight of the supervisory authority concerns the relationship between State representatives and decentralised administrative authorities; the opposite of the presidential authority exercised by a subordinate president within the same public authority).

In this regard, however, there is a serious confusion over the autonomy of local communities between the Supervisory Authority, linked to decentralisation, and the presidential power, which is one of the most important pillars of administrative centralisation.

It is sufficient to note, for example, that Article 23 of the Local Administration System Law provides that the Governor in his relationship with the municipalities has "the right to issue ... instructions ... enforceable".

The right to direct instructions is at the core of the exercise of presidential power and would void the independence of local communities from all content. These local communities also have their own agents, administrative bodies and their own funds. They also have a special budget. Each community has a name and a specific geographic area in which its inhabitants reside.

In this regard, Article 4 of the Law stipulates that: (a) The establishment of provinces, and the geographical scope, headquarters, designation, incorporation and abolition thereof shall be determined by law. (b) The establishment of municipalities and branches thereof, and the geographical scope, headquarters, designation, incorporation and abolition thereof shall be determined by a Cabinet decree at the proposal of the Minister.

It can be noted that the appointment of the province's headquarters or its designation, for example, does not require the legislator to intervene by a law, but it is enough to issue a ministerial decision on this concern.

Although the provinces and municipalities are local communities with legal personality and autonomy, they remain administrative institutions: unlike united or federal states, they have no Constitution, no legislative authority, and no Courts that decide disputes on their behalf. Local communities have only an administrative body to manage local affairs. The administration of local communities is governed by the Constitution, Laws and Executive Regulation of the State. Decentralisation is a form of administrative and territorial regulation within the framework of a unified State.

However, the administrative nature of the local communities does not negate the political dimension of territorial decentralisation, which is reflected in the elections organised to choose the representatives of these communities. The elections of provincial and municipal councils are dedicated to local democracy and these communities can manage their local affairs through their elected representatives.

### 2.2 Framing and support structures

Under the mentioned law, decentralised communities are supported and improved by two special structures, the High Council for Local Administration and the Supreme Council for Regional Planning.

The High Council of Local Administration is an advisory body whose role is limited to expressing opinions

and making recommendations to the competent authorities (Article 73 of the Executive Regulation). The Council is headed by the Minister of Local Government, its governors' members and the mayor of the municipalities (Article 42 of the Law). Anyone who sees the President of the Council as useful in his presence as ministers for example, but without the right to vote (Article 68 of the Regulations), may be invited to the meetings of the Council.

According to Article 42 mentioned in paragraph 2, "The Council shall examine all matters related to the constituents of the local administration system in terms of support and development". But the most important of these functions is to give opinion in the plans and programs related to economic regions and referred to it by the Supreme Council for Regional Planning (Article 72 of the Executive Regulation), as well as the friendly intervention to resolve disputes that may occur between provinces and municipalities (Article 71 of the Executive Regulation).

The opinion of the Council and its recommendations shall be issued by a majority of those present, but when the votes are equal, the President vote will be adopted, i.e. the Minister of Local Government (Article 73 of the Executive Regulation.) This Article and the following one shall be referred to "decisions" issued by the Council.

However, it is clear that all the provisions concerning the Council shows that the latter is an advisory body, expressing just opinions. Such thing allows the minister to influence some local affairs that may be sensitive and related to the independence of local communities, such as the distribution of functions between the provinces and municipalities and defining their geographical scope, identifying their headquarters and appointing it for the Council of Ministers to initiate the creation of municipalities before provinces".

However, these problems will be postponed. This Council has not yet been established. It should be noted in this context that Law No. 9 of 2013 took into consideration the absence of provinces and added a new Article to Law No. 59 of 2012 under No. 80 bis that States that "until the issuance of a law on the provinces temporarily devolves the provincial council's functions and powers to the Municipal council and the mayor of the municipality." Article 12, paragraph (c), concerning the ratification of the budget of the province, paragraph (b) of Article (13), concerning the establishment of universities, colleges and higher institutes, where these functions were assigned to the Presidency of the Council of Ministers.

It is clear that this amendment took into account the difficulties, controversies and tribal and regional tendencies that hinder the establishment of the provinces, the choice of their headquarters and postpone the establishment of the provinces for an unknown time.

On the other hand, it should be noted that the final draft of the Constitution removes the mayors from the membership of the High Council of Local Administration, which means that in the absence of the establishment of provinces and the removal of mayors this council will not be formed and will not function in the near term. It remains dependent on the unification of the entire territory of the country under the authority of one government and a unified parliament.

The Supreme Council for Regional Planning consists of the total of regional planning councils in the economic regions. It seems that the concept of the economic region, which includes one or more provinces, is linked to the idea of creating a geographical framework that enables the development and implementation of economic policies with geographic area, population, size and sufficient resources to be effective and capable of achieving development and raising the challenges of competition.

The Supreme Council consists of, a part the concerned governors and the municipal mayors, experts. The Presidency of the Supreme Council for Regional Planning shall be annually alternated between the governors of the region's provinces (Article 45 of the Local Administration System Law). The council is mainly in charge of the coordination between the provincial plans and following up the implementation of the plans and submitting recommendations to the High Council of Local Administration (Article 46 of the Local Administration System Law).

This council also remained **a gelatinous structure without consecration on the ground**. It requires in-depth and multidisciplinary studies covering the economic, social and cultural aspects so that they will be established on solid and appropriate foundations for the development of policies that have sufficient harmony, effectiveness and sustainability.

The Ministry of Local Government, in coordination with a number of other concerned ministries like the ministries of economy, finance and social affairs, can tender such studies in targeting specialised studies and expertise firms with high functions in economy, planning, spatial planning and planning, urbanism, sociology, and administrative and legal sciences in order to determine the appropriate economic, social, and cultural fields.

These two structures, insofar as they are assistance structures, also represent a fertile framework for central

authority intervention and its control of the strategic choices of local communities. It is therefore advisable to review their compositions and make their elected chairpersons from their members so to ensure sufficient independence for them.

In the same context, the Council of Ministers issued the Resolution No. 133 concerning the decision of the Ministry of Local Government, which shows **the continued interference of the central authority in local affairs and the confusion between the presidential authority and the oversight of the supervisory authority.**

### 2.3 Internal organisation of local administration components

It can be said that one of the most important developments known by the decentralised organisation since 2012 is the issuance of decisions concerning the internal organisation of municipalities.

Through Law No. 59 and its Executive Regulation, the internal organisation of the municipality and the province is characterised by its simplicity. At the territorial level, the province does not contain internal divisions. As well as tentatively for municipalities. But only tentatively, because the municipalities "may include a number of municipal branches" (Article 24.c of the Local Administration System Law).

The municipal branch is a department of the municipality's departments headed by the head of a municipal branch appointed by a decision of the municipal council (Article 38 of the Local Administration System Law). Article 36 of the same law States that: "The municipal branch is affiliated with the municipal office and is subject to the authority thereof for guidance and direct supervision". The municipal branch is responsible for the provision of municipal services to localities "within the jurisdiction thereof." (Article 36 of the Local Administration System Law) by establishing local service offices within the jurisdiction thereof (Article 37 of the Local Administration System Law).

This formula seems especially suitable for the major municipalities and is similar to the municipal constituencies in the Tunisian municipal organisation as regulated by the current municipalities Basic Law and is provided in the draft of the future Communities Code.

In Law No. 59 and its Executive Regulation, the institutional organisation of the municipality and the province is characterised by very general features and based on the principle that deliberation in local affairs is collective, while the implementation of the decisions resulting from deliberations must be attributed to one person. On this basis, the main structures of the municipality and the province are in one side a deliberation structure: municipal council or provincial council, and on the other side the individual executive authority: the mayor of the municipality or the governor.

In this context, Article 7 of the Local Administration System Law stipulates "Each province and municipality shall have a council that is formed in accordance with the provisions of this law. Such Council shall bear the name of the region thereof and shall have its headquarters in the capital thereof".

The province council and the municipal council consist of elected members by direct secret ballot, including members of municipalities in the province council. Article 11 of Law No. 59 of 2012 stipulates that the provincial council consists of "Members of municipalities located in the province, to be elected by direct secret ballot".

A contradiction can be observed between the formulation of this Article and Article 31 of the Executive Regulation, which stipulates that the composition of the council includes the mayors of the municipalities in the province. In all cases, the mayors also were elected by direct secret ballot as municipal councillors. However, the formulation of the two texts needs to be uniform and avoid ambiguity or conflict.

In terms of the number of councillors, it is better to rise or fall on the basis of a number of criteria and be compatible with a number of data in addition to the number of its inhabitants, foremost the size of the unit with a minimum number of 7.

The Local Administration System Law, as well as the Executive Regulation, stipulates that "with at least one member for women and one member from revolutionaries with special needs" (Article 11.a as for the provincial councils and Article 26.a as for the municipal councils of the Local Administration System Law (See also Art 30 and 31 of the Executive Regulation)).

This provision may raise the question of its compatibility with the principle of equality of all citizens before the law. A principle enshrined in the constitutions of all States, including Libya. However, the jurisprudence of today's constitutional courts has accepted such a kind of "positive discrimination" aimed supporting women or groups that have made enormous sacrifices for the homeland to enable them to participate effectively in the political life.



The term of provincial and municipal Councils shall be four years (Article 9 of the Local Administration System Law and Article 41 of the Executive Regulation), a reasonable period for which the elected Council is able to implement its program on which the campaign was based. However, the Provincial Council or Municipal Council may be dissolved before the end of their terms (Article 9 of the Local Administration System Law).

What is noticed, however, is that **the law does not provide for cases in which the dissolution of the Council can be resorted to, nor on the procedures or guarantees that must be accompanied by the resolution of the dissolution**, i.e. the justification of such resolution. Therefore, the system of dissolving local councils in Libyan law **does not guarantee local freedoms and does not respect the status of municipalities and provinces as decentralised local groups**.

Council members shall work on a full-time basis. (Article 9 of the Local Administration System Law). This is a choice that seems to be right at least temporary in a context characterised by the absence of tradition and constitution in a climate of crisis and instability. In accordance with the principle of full-time basis, the Executive Regulation in Article 107 provides for the disbursement of financial transactions for their benefit. Which is necessary so as the membership of municipal councils and provincial councils not to become monopoly for the rich people.

Article 107 also provides that the financial treatment of members of such councils shall be determined by a decision of the Council of Ministers. However, since financial treatment is considered a guarantee of the independence of the concerned member, **itis recommended that law identify it**.

In addition to the Law of 2012 and 2013, decisions concerning the organisational structure and the internal organisation of the municipality were issued as follows:

- Decisions of the Minister of Local Government No. 165, No. 233 of 2014 of 15/4/2014 and No. 448 of 2014 of 26 August 2014 on the organisational structure of the municipality.
- Resolution No. 116 of 2015 on the unified regulation of municipalities amended in the same year on two occasions by decrees 201 and 202, which is highlighted in line with the lack of clear visions and perceptions.

Contrary to what is stated in the law, the organisational structure of the municipality through these decisions is characterised by a large number of administrative bodies, the complexity of their structure and their heaviness, and this means heavy bureaucracy, procedures and complex paths.

In accordance with Decree No. 448 of 2014, the Mayor of the Municipality is directly assigned to 24 offices. The Mayor indirectly supervises the Shura Council and the Deputy of the municipality supervises six (6) Departments.

This huge number of structures represents a source of gravity, procedural complications and slow decision-making that **needs to be alleviated and merged and the number of departments attached to the Mayor to be reduced and attached to the Deputy, so that he can take care of major and strategic issues**.

On the other side, Resolution No. 116 of 2015 of 27 May 2015 on the unified organisation of municipalities and their amendments is characterised by the lack of unity of the organisation and its division into four models based on a quantitative demographic criterion of population. This criterion is important but not sufficient and requires additional criteria related to the economic, cultural and other aspects, and therefore a multi-criteria classification. Such thing requires the completion of accurate and multidisciplinary studies so that the constitution from the beginning be based on realistic and thoughtful basics.

In general, the **slow pace of completion of the institutional constitution of local communities** remains to the weak administrative stability in the Ministry of Local Government, the dispersion of efforts among several governments in a short time, and the absence of a strategic vision resulting in large part from a reality characterised by political and deep security crises and uncompleted general local administration components such as the delayed constitution of the provinces and the failure to form the High Council of Local Administration and the Supreme council for Regional Planning.

## **2.4 Organisation and distribution of functions between the various local administrations categories**

The general principles governing the distribution of powers at the local level are essentially provided for in Articles 6, 12 and 17 of the Local Administration System Law.

The first principle concerns the absence of a general power for local administration units. This option seems realistic in the current Libyan context and the difficulties and limitations of the financial and human

resources of municipalities and provinces. It is also consistent with the international and comparative approach in recent years to abandon what is known as the general power of decentralised groups or units.

The second principle is related to the comprehensiveness of the power of the local administration units. In accordance with Article 6.1 above, it states “establish and manage all public utilities within their scope”, including “all functions entrusted to ministries by the laws and regulations in force” except “those related to national or special utilities”.

There is no doubt that the last utilities are the utilities of sovereignty such as defence, security and justice, which can only be exercised in the name of the State in a unified State as Libya.

As for this second principle, it seems possible to **overlap the functions of the different units of the local administration**, which may result in the subordination of a decentralised local group to another decentralised local group. This may affect the independence of the group that will become subordinate, and thus violating the logic and principles of decentralisation territory. This option seems very ambitious and will create strong municipal autonomy, but it is unrealistic in the near term in a context characterised by weak financial and human resources of the municipalities.

#### 2.4.1 Lack of diversity in the methods of public utilities management

**The Law did not address the methods of decentralised public utilities management and remained silent on the possibility of delegated and contractual management.** For its part, the subsequent texts did not clarify this issue. Decree No. 437 of 2014 on the regulation of public markets, for example, stated only the direct management of markets in Articles 2, 6 and 7. However, this silence can be seen as a mere omission and a quick drafting of texts that has led to some kind of legal vacuum.

In addressing public municipal facilities, Article 25 of the Local Administration System Law stipulates that “The municipality shall establish and manage within its jurisdiction, whether personally or through an intermediary, the institutions that it deems able to execute the functions thereof ...” This Article refers to the methods of public utilities management that are also established by municipalities or provinces. Local groups, like the State, can first manage their own public utilities, relying on their own human and financial resources.

However, these groups may not have adequate resources to self-manage all their public utilities, so they resort to the delegated management of public utilities. The delegation can be unilateral by means of unilateral decisions issued by the municipality or the province, or contractually by means of concluding contracts with parties wishing to exploit the local public utilities. So that the municipality or the province, as the conceding party, shall delegate the administration of the public utility which it has established, for a specified period, to a third party, the concessionaire, for a fee to be extracted by the latter from the users of the utility.

In other words, the local community does not initially have to pay any amounts to the concessionaire (as opposed to what is done in tenders or public purchases). However, this principle does not prevent the so-called “financial solidarity” between the local community and the concessionaire, if, for example, the municipality or the province wishes to pressure the value of the consideration to be paid by the user.

In this case, the concerned local unit must bear the difference between the actual cost of service and the actual payment made by the user until the financial balance of the contract of concession is met and the concessionaire can continue to dispose of the local public utility under acceptable conditions. If the concessionaire is often a private entity (e.g., a trading company), but nothing prevents to be a public entity such as a public institution or even a local unit.

The required concessionaire company or public institution may be created by the concerned local unit, as allowed by the Local Administration System Law (Article 12.h of this law provides for the competence of the Province Council to establish investment companies) or at least not to prevent it.

In the context of the contract of concession, the construction of the initial necessary buildings and equipment for the exploitation of the local public utility shall be carried out by the concessionaire who pays the incurred expenses by such works, while the necessary equipment for the operation of the public utility should be transferred to the conceding party at the end of the contract.

This is an important feature of the delegated management in public utilities. However, the local unit, the conceding party, shall commit to ensure that the duration of the contract will enable the concessionaire to recover his expenses with a reasonable margin of profit. However, the delegation of the public utility does not mean abandoning it because the local unit, the conceding party, has the right, but the duty to follow up the implementation of the obligations of the concessionaire resulting from the contract, especially the

extent of respect for the major principles governing the operation of public utilities such as the continuity and the equality, within the framework of the conceding party oversight.

In addition to the contract of concession, local units can manage local public utilities under partnership contracts (Articles 92 and 93 of the Executive Regulation), either with private investors or even with other local units. In this context, the Local Administration System Law encourages the partnership between the local units. Article 12 of this law stipulates that the provincial council can decide to “Conduct joint projects with other provinces or with other local units or legal entities in the province”.

Article 27.11 of the same law stipulates that the municipal council can “Propose partnerships with other municipalities in the province to establish or manage other business or utilities.” The partnership between local units or between the latter and the private ones is not only contractual, but can also be an institutional partnership embodied in the establishment of public institutions or joint companies.

#### 2.4.2 The ambiguity of disciplinary jurisdiction

One of the traditional public utilities that is practiced by local councils is the administrative disciplinary, which is aimed at maintaining public order. For provincial councils, Article 12.d of the Local Administration System Law stipulates that the Council shall “issue recommendations on plans and proposals related to local peace and order”. As for municipal councils, **there is no explicit stipulation on their competence in the area of municipal administrative discipline.**

However, the Executive Regulation has mentioned the Municipal Guard (Article 77) and public health and hygiene interventions (Article 80), all of which are administrative. This is implicitly confirmed by several decisions of various successive local government ministers, such as Decision No. 448 of 2014 on the organisational structure of the municipality where Article 34 assigns to the Municipal Guard Office broad administrative and disciplinary powers, as well as decisions No. 446 of 2014 on construction permits (Articles 25 and 36) (Articles 8, 10 and 11).

But the provisions remained ambiguous and Law No. 59 did not assign this power to the Mayor of the municipality. Is it logical for the Municipal Council to exercise it by proposing “municipal regulations” (Article 27.3 of the Local Administration System Law) or is it the competence of the competent centralised authority?

#### 2.4.3 The ambiguity of decentralised structures in the field of urban planning

Article 82 of the Executive Regulation issued in 2013 stipulates the competence of municipalities : “Municipalities shall be in charge of implementing the provisions of urban planning laws and regulations for cities and villages, organising buildings, dividing lands, classifying regions, in addition to overseeing and controlling building and construction activity.”

This is in itself an important development in comparison to the provisions of Law No. 3 of 2001 on urban planning, which was devoted to strong centralisation in the field. This is a law whose various provisions contradict the new texts, and are nullified because of the principle that the following law prevails over the previous law and repeals its contradictory provisions of the new Law.

However, the issue of allocation of powers between the central administration and the local administration in the field of urban planning and urban governance in general is not clear either in the Local Administration System Law or in its Executive Regulation. However, in consulting Article 83 of the Executive Regulation, it appears that the making a city plan is the power of the municipality and its municipal council.

This Article States, that in the framework of the implementation of affordable housing projects: “The administrative unit of the province shall communicate with the municipality in whose jurisdiction the project falls to include the general site of the project in the city plan and complete the procedures of allocating the land to the site after their approval by the urban planning department”.

This represents a contradiction with the provisions of Ministerial Decree No. 446 of 2014 concerning construction permits, in which the municipality has exclusively the power to grant or reject permits.

#### 2.4.4 Resources

Despite the lack of municipalities and provinces of fiscal authority and its monopoly by the central authority, the municipalities’ own resources appear relatively important. In addition to its multiplicity, as stipulated in Article 51 of the Local Administration System Law (fees collected for municipal services, rents of real

estate leased by the municipality, proceeds from public markets, slaughterhouses, bathrooms and public transportation operated by the municipality), the value of sales of goods confiscated by the municipal guard ...), the municipal council propose the " imposition, modification, exemption and abolition of fees of a municipal character, and determine the collection process thereof and collect the same." (Article 27.7 of the Local Administration System Law).

It is a very important mandate that would enshrine the independence of municipalities. Article 52 of the law provides that "The Executive Regulation of the law principle shall determine the rules concerning the types of fees, earnings and royalties of a municipal character, the cases and basis of imposition thereof, the rules of complaints in this regard and the conditions of relief thereof".

In reference to the Executive Regulation, it does not indicate anything of the provisions of Article 52 of the Law, but merely States that " A regulation stipulating the rules that pertain to the types of fees, returns, and royalties of municipal character, as well as their levying guidelines, complaint rules, and reduction conditions shall be issued by a decision of the minister in coordination with the minister of Finance." (Article 103 of the Executive Regulation).

These autonomous resources confirm several subsequent ministerial decisions, such as Decree No. 437 of 2014 concerning the regulation of markets and decisions related to municipal slaughterhouses, cemeteries and water and sanitation utilities issued in 2014.

In addition to the indigenous resources, the budget of local units consists of resources transferred from the State. According to Article 49.a. and 49.b of the Local Administration System Law, the province shall maintain a percentage the gross central taxes levied in the province, together with the percentage of the State-owned undeveloped lands located within the province.

The municipality has a share of the tax revenues and central fees allocated to the province, where "The provincial council shall distribute to municipal councils that fall under its jurisdiction a portion of its resources ... as may be determined by the Council, depending on the needs and circumstances of each municipality." (Art 49, last paragraph of the Local Administration System Law).

On the other hand, the provinces and municipalities receive the central government's support and subsidies (Articles 51.o of the Local Administration System Law), which is distributed according to Article 57 of the Local Administration System Law, the High Council of Local Administration.

With regard to real estate resources, the Local Administration System Law and its Regulation did not provide clear Articles for this type of resources. However, there may be hints and references here and there.

For example, Article 49 (d) of the Local Administration System Law provides the " Revenues of the province and the utilities thereof...". Article 16.d of the Executive Regulation States: "In accordance with the approved plan, every municipality shall allocate a part of its total area to establish the State-owned municipal facilities that may not be disposed of by transfer of property or easement for any entity...".

#### 2.4.5 Relations between the local administration and the central authority

The process of reconstitution of the Libyan State on the basis of democracy requires the establishment of an administrative system based on a balance between the central authority and local government structures and authorities, in a way that establishes a compromise between the need to respect local and regional diversity and specificities on one side, and to preserve the unity of the State and protect the national interests, on the other side. This represents the essence of co-existence and integration between centralisation and decentralisation of the administration within a unified and decentralised State.

This assumes a clear parallel in the administrative organisation between the deconcentrated or centralised administrations that represent the extension of the central authority, on the one hand, and the decentralised administrations of the legal personality and the principle of freedom of management, on the other hand, without mixing these two types of Departments.

It also assumes relations based on the hierarchical oversight between the central administration and its territorial extensions and its external Departments on the one hand, and subsequent oversight supervisory relations confined to the aspects of respect for legal legality, thus establishing a balance between independence and unity. Moreover, it helps to build a balanced and harmonious territory organisation.

The study of the legislative and regulatory texts issued since 2012 related to the local administration system in Libya reveals the **integration and confusion between the State's administration at local level and the decentralised authorities**. This has been reflected in the relationship's organisation between the central authority and the local administrations characterised by a limited independence from the

first and the exercise of central authority for strong oversight dominated by the characteristics by the presidential authority and lacks the characteristics of the oversight of the supervisory authority in its field and mechanisms.

#### 2.4.6 Mix between hierarchical oversight and the oversight of the supervisory authority

Despite the absence of explicit administrative focus and decentralisation, the new Libyan legal framework is enshrined in the Local Governance Law and its Executive Regulation of 2012, as outlined above, and presents the following options: the establishment of a unified State based on decentralisation and interrelationship between the deconcentrated administration and decentralised administration. This is implicit, but clearly, by naming the law itself, which is generally related to the organisation of the local administration as a whole and thus includes all components of local administration, whether they are deconcentrated or decentralised.

It also highlights the option of establishing a unified State based on decentralisation and the interrelationship between deconcentrated and decentralised administration through Article 1 of the Law: "shall be applicable to all local administration units across the State".

However, the lack of explicit reference to the adoption of the organisation's methods of the deconcentrated and decentralised system leads to misty and a kind of confusion under the name of the non-accuracy of the public local administration nomination. This situation requires the issuance of explanatory circulars that define the concepts and clarify the functions that fall within both frameworks. A detailed and simplified manual can be recommended for this purpose.

#### 2.4.7 Relationship with the central authorities

This relationship is characterised by limited autonomy, confusion between deconcentration and decentralisation and, consequently, between supervision and presidential control, with some contradictions.

According to Article 76, the administrative activities of provinces and municipalities shall be subject to the control of the Audit Office and all transparency bodies. However, a comprehensive reading of Law No. 59 and its Executive Regulation show that they are subject to presidential authority from the Ministry for the provinces and from the Provinces for the municipalities, in accordance with Article 6 of the Law: "Local administration units shall, within the limits of public policy and the general plans of the State, establish and manage all public utilities within their scope, and shall oversee the employees thereof based on the general directives of the Ministry of Local Government."

Within their powers, these units shall also assume all the functions of the ministries under the applicable laws and regulations, except for national utilities or of a special nature, in which a decision of the Council of Ministers has been issued.

This was confirmed by the Executive Regulation in Articles 4 and 5, where the latter states that "The competences of local administration units shall be limited to the implementation of the State's public policies of local character."

The governor, for example, is characterised by functional duplication. As the representative of the State in the province" shall oversee the implementation of the public policy of the State" (Article 14.a of the Local Administration System Law). Such duplication is presented on his powers to "handle the general oversight of national utilities in the province and all the business of ministries whose functions are not transferred to local units ... by providing comments and proposing necessary solutions with respect to production and good performance."

In addition, as the governor represents the State in the province, Art 17 of the Local Administration System Law states "All the ministers of ministries whose functions have not been transferred to local units may delegate some of their functions to the Governor."

One of the most important functions of the governor as the representative of the State, who oversees the municipalities, the law gave him the power of "Endorsement or objection to the decisions of municipal councils..." (Article 23.3 of the Local Administration System Law).

The Governor, in his capacity as the representative of the State, exercises another power, no less important than monitoring and overseeing, namely the administrative oversight. In this area, Article 14.J of the Local Administration System Law stipulates that it is the prerogative of the Governor to "preserve security, ethics, and public values in the province within the framework of the policy of the Minister of Interior..."

Article 15 of the Law provides for the "special powers of the Governor", which the legislator has approved

for the Governor in his capacity as the representative of the State. The phrase “private” may indicate that there is no interference of the provincial council on it. With reference to the fact that the law was not always clear when dealing with the governor, in determining its status as representative of the State or the province.

This matter is important as it defines the governor’s responsibilities and legal status in his relationship to the province council, which he can censure, or in relation to ministers, especially the minister of local governance (Article 16 of the Local Administration System Law).

The ambiguity is also evident in relation to municipalities and their relationship to the central authorities, which the law defines as “the unit of the local administration executive system” (Article 24).

The authority of the Municipal Council is also confined to many areas in the implementation of legislation and instructions and not its issuance and proposal nor the ratification or taking decision by himself (e.g. Article 27 of the law and Articles 81, 82 and 83 of the regulation in the field of urban planning).

**On the financial level**, despite the adoption of the two Texts for a number of transferred indigenous resources to the provinces (Article 49 of the Law) as well as to the municipalities (Articles 51 and the next of the law), the independence was limited at the tax level (Article 51.a of the law for the provinces and Article 103 of the Executive Regulation).

At for the operational and developmental budgets, they are included within the Ministry of Local Government (Articles 55, 56 and 66 of the Law), as well as for the municipalities that do not define their own budgets and are included in the budgets of the governorates. This financial organisation is closer to the deconcentrated financing of informal structures than to the budgets of decentralised groups.

Municipalities do not set their own budgets, but are included in the budgets of the provinces. This financial organisation is closer to financing the deconcentrated structures than to the budgets of decentralised local authorities.

However, the necessary distinction between deconcentration or amended centralisation and decentralisation requires the organisation of relations between the central authority and local government departments in a different manner according to the deconcentrated or decentralised nature of local administrations.

**In the human resources level**, independence appears to be better, and in principle it establishes a territorial public function (Article 68 of the law) and if it currently appears to be composed of local staff and agents of the central authority acting under the chairmanship of the governor (Art 71, 72 and 73 of the Law).

All these data suggest a relationship with the central authority based on strong subordination and dependence, not on independence, on the superiority of the logic of deconcentration, and the control of the centre on the logic of decentralisation and the required freedom of conduct and management.

**It is possible to reduce this confusion in the current situation and to support the independence of the municipalities by adopting decisions to delegate the competences from the centre to the municipalities, as the delegation of powers is an exception usually applied in the relationship between the central authority and the local units and enable the powers to be temporarily transferred. It lighten the burden on the centre and prepare the floor for a real decentralisation until the development of the law and the promulgation of the Constitution.**

### 3. New Draft Constitution: Important Horizons

The draft Libyan Constitution of April 19<sup>th</sup>, 2016 has been looking to establish administrative decentralisation within the framework of the unity of the State, as one of the most important principles of good democratic governance. Decentralisation is the ideal framework for local democracy and for inclusive and balanced development.

Through which strategies for social and economic development, legalisation of resources and local capacities, stability and consolidation of democracy are formulated, with the aim of raising the level of services and strengthening the status of local units in the economy. The decentralisation system, on which the local government system was designed in the draft Constitution, was based on a formula that included all its elements. The draft of the Project outlined the sixth chapter of the draft Law on local governance. This Chapter contains 11 Articles from Articles 154 to 164.

The study of the Libyan Constitution Draft Project of April 19<sup>th</sup>, 2016 highlights an important development in the vision and clarity of the choices, and includes provisions that rise to the highest level of the contemporary Constitutions.

This is highlighted at four main levels:

- Identification of decentralisation levels and types of decentralised administrative units
- The distribution of powers among the different categories of local administrations
- Financial and human resources of local administration
- Relations between the local administration and the central authority
- Local democracy

### 3.1 Structure of the decentralised administration

Article 154, named Decentralisation, stipulates the establishment of a broad decentralisation within the framework of the unity of the State, in which Article 154 states: "Local governance shall be based on the principle of expanded decentralisation. The State shall commit to supporting it within the unity of the State."

It is a good option, avoiding the risk of disintegration, which could be led by federalism and void the risks of a return of centralisation and stimulated decentralisation and its emphasis on the expanded form of decentralisation to be established.

Article 155 provides two levels of decentralised groups: provinces and municipalities with various criteria of division (demographic, geographic, social, security, economic, historical and developmental), and it leaves the floor open to the possibility of creating other units if the public interest requires, which is a positive flexible factor.

The project also provides the establishment of Advisory Council of Local Government composed of governors and whose functions are divided into three categories: consultative, coordinating and conciliatory (Article 164)

Article 156 of the draft's Constitution has approved the enjoyment by the Local Government Units of legal personality, as one of the most important features of the decentralised system. However, there is a congruence between the recognition of local self-interests managed locally and ensuring the legal personality to the legal entities so that they can manage their affairs independently from the central authorities as they have financial responsibility, functional organisation and legal capacity within their powers.

#### 3.1.1 Organisation of functions

Functionally, Article 156 devotes the principles of autonomy and free management, which are at the heart of decentralisation and considered to be among the foundations and standards internationally recognised in democratic systems. Public law experts consider that merely acknowledging the constitutionality of this universal principle is a great success and a bold step towards establishing a solid local democracy.

Decentralised territorial units are the most appropriate framework for expressing local autonomy and the solid nucleus of democratic training at the local level, as well as representing the vital interests of those living in close proximity.

At the level of prerogatives, the draft project is devoted to three categories of powers, namely the subjective powers, transferred powers from the central authority and common powers. In order to distribute these powers, especially the common powers, the Project establishes the principle of subsidiarity and the provinces can be delegated by the regulatory authority.

The **self-prerogatives** in the community shall be vested in a specific field which it can carry out within the limits of its resources and within its own territory, especially planning, programming, execution, management, maintenance, creation of necessary utilities and equipment for the provision of proximity services such as the distribution of potable water, electricity, public lighting, urban transportation, sanitation, cleaning of streets and public squares, collection of household waste, hygiene, creation and maintenance of collective markets and creation and maintenance of natural parks within the territorial area of the community.

The **transferred prerogatives** are the prerogatives originally vested in the law to the central authority. This authority may decide to abandon its practice and transfer it to a local group, i.e., the closest and the best authority able to exercise it in accordance with the principle of subsidiarity. The transfer of these prerogatives shall be accompanied by the transfer of the necessary financial, human and material resources to practice it.

The transferred prerogatives from the State, for example, may include the areas of protection and restoration of historical and archaeological monuments, preservation of natural sites and the creation and maintenance of small and medium-sized water equipment and utilities.

It is well known that the **common prerogatives** include the ones that are found to be effective only if they are carried out jointly, such as the development of the local economy, the revival of employment and the necessary work to revive and encourage private investments, in particular the completion of infrastructure and equipment, and contribute to the establishment of areas for economic activities, cultural complexes, collective libraries, museums, art and music institutes, stadiums and sport complexes.

The **principle of subsidiarity** means that the prerogative shall be exercised initially by the lower and closer level to the citizen, since the higher level does not intervene except when necessary. Here, the principle of proportionality is established, in which the degree of intervention is determined when deemed necessary. Both principles are linked to the implementation of prerogatives.

### 3.2 Resources

In order to ensure effective and sustainable decentralisation, the Project Draft of the Constitution sought to strengthen the resources of the decentralised units and provided two categories of central and autonomous resources. In this regard, Article 159 of the draft states that "Governorates and municipalities shall have centralised resources appropriate for discharging their duties, along with self-generated resources" such as duties, remedies, and taxes of local nature, as well as returns on their investments, grants and wills.

The Project linked the transfer of competences by transferring the necessary and sufficient financial resources. Article 159 stipulates that each transferable competence of local government units from the central authority shall be accompanied by appropriate financial resources.

### 3.3 Relationships between the local administration and the central authority

The principle of free management requires the autonomy of Local Government Units from the central authority, structurally and functionally, through the capacity to initiate decision-making. In this context, the Libyan Draft Constitution of April 19<sup>th</sup>, 2016, in its Article 160 concerning the pre or subsequent oversight, only approved the subsequent oversight regarding the legitimacy of the respective functioning of decentralised units.

In Article 161, however, it devotes serious and heavy interference from central authority to decentralised local government units. While it is emphasised that the intervention of the central executive authority in local affairs is aimed at ensuring continuity in the performance of services, ensuring their quality and compliance with national standards, this does not negate the fact that it represents inaccurate and dangerous regulation as for the formulation of the intervention of the central authority in local affairs.

### Local democracy

The Draft clearly enshrines local democracy in its representative form by referring to the election of the provincial and municipal councils. Article 157 States that "Provinces and municipal councils shall be selected directly by free universal suffrage and secret ballot."

However, it seems to be more dedicated to the establishment of participatory democracy. Meanwhile, Article 163, entitled Local Participation, may implicitly enshrine a minimum of participatory democracy: "Local government units shall adopt the necessary measures to ensure participation of the citizens and civil society organisations in the preparation of local development programs and shall follow up their implementation". However, this contribution is constrained by "controls defined by the law".



## 4. Recommendations

### 4.1 Concerning the draft Constitution

In general, it can be said that the last Project represents a good formula that may need to precise some provisions and concepts and review the title of the section itself that goes beyond decentralisation. The term local government is very broad and includes initially the decentralised units but also the external departments of the central administration.

The title of Article 161 concerning the intervention of the central authority appears to be a chastity, is not conform to the section on decentralisation, and enshrines the principle of free management.

It is recommended to review these points and review the formulation of Article 161 to reduce ambiguity and to be more accurate.

It is also recommended that the principles and vision enshrined in the draft Constitution of April 19<sup>th</sup> 2016 **to be implemented gradually in the context of the activity of the Ministry of Local Government, the organisation of workshops and seminars in order to introduce, simplify and disseminate these principles within the limits of the current legal and institutional framework.**

### 4.2 Concerning Law No. 59 of 2012 and the Implementing of the Executive Regulation and subsequent Decrees

The study of the various legislative and organisational texts in force highlights **several shortcomings in the legal framework of decentralisation and local governance** and make it not up to the international standards of democratic systems in this area.

One of the most important weaknesses is the blurring and non-distinction between the amended centralisation and decentralisation and, accordingly, between the administration, which is an extension of the central authority and the decentralised administration. It is also a tendency to establish duplications at the provincial and municipal levels that will necessarily support centralisation at the expense of decentralisation and local democracy.

This blurring of vision and perception is deepened by the failure to devote the most important principles of decentralisation such as the principle of free management, financial independence, the distinction between the chained presidential oversight and the supervisory authority oversight, and the identification of their respective mechanisms, also reflected on the distribution of functions.

**Therefore, it is necessary to:**

- **Review the law in order to clearly distinguish between decentralised administration and central administration and its extension at the local level.**
- **The issuance of decrees and explanatory circulars for each of decentralisation and its requirements and the structures that represent the extension of the central authority and their respective characteristics and functions and relations with each other. This can be done immediately while waiting the review or compensation of Law No. 59 of 2012.**
- **Decisions can be taken to delegate the powers of the ministers in each area of competence for the decentralised local government units, which are the municipalities today, to reduce the centralisation and instilling the roots of the culture of decentralisation and sharing of powers.**

The texts give a strong impression of confusion and continued oversight and control of local affairs by the central authority.

The establishment of an organisation based on coexistence and balance between centralisation, decentralisation and the integration of decentralised and deconcentrated local governance structures is the best solution. It is able to weaken the calls for federalism and lose its justifications, while establishing a moderate democracy that reconciles between maintaining and strengthening the unity of the State, respect the specificities and the variety that distinguish the community. This is the orientation that characterises the final draft of the project's Constitution, which stands out as an important advance towards the establishment of a genuine and solid decentralisation.

Based on the mentioned above in relation to the legal system related to the local administration in Libya, the following general recommendations and proposals can be made:

- Support the Constitution in its latest draft after some rectifications for the provisions contained in the amendment of existing texts, including:
- Explicit dedication to the principle of decentralisation within the unity of the State.
- Raise some ambiguity and confusion in concepts and define accurately the basic concepts such as decentralisation and amended centralisation, presidential oversight and the oversight of the supervisory authority and mechanisms of each practice by issuing explanatory circulars, detailed manuals and simplified procedures.
- Clarify the relationship between modified centralised management and decentralised management in order to avoid overlapping and blurring and to establish the State's administration structures in parallel with decentralised management structures to ensure good coordination and complementarity by issuing explanatory circulars and detailed and simplified procedures.
- The necessity of abandoning the dual functionalities of the governor, because it does not serve the independence of the province, by creating two separate authorities, one representing the State in the province and the other representing the province as a local community.
- Gradual introduction of the principle of subsidiarity to avoid competition in functions between municipalities and provinces. This principle requires the return of competence to the local community that is more capable and closer to the citizen, namely the local community. The central authority does not intervene unless its intervention is more effective and beneficial to the citizens. This can be done by issuing ministers' decisions to delegate a number of functions to municipalities. Delegation is a common legal mechanism for the temporary and partial redistribution of functions.
- More clarification and accuracy as for the terms and procedures of dissolving the local councils and providing them with the necessary guarantees such as justifying the resolution of the dissolution and determining the cases that may justify this resolution. This is possible by means of explanatory decisions and circulars. Such texts complement the Law and do not conflict with it.
- The need to abandon the confidentiality of deliberations because it is contrary to the requirements of local democracy and the provisions of most of today's comparative legislation on participatory democracy, transparency and open governance.
- There is confusion, fragmentation and lack of clarity regarding the assets of local government units, and this deficiency can be overcome by a governmental decision.
- Issuing a decision and directing a circular that would further regulate and diversify the methods of management of municipal public utilities, in particular explicitly recommending the possibility of acting contractual delegation management in these utilities by establishing conceding contracts for the public utilities or partnership contracts with the private sector. This does not contradict law 59 and can be clarified and encouraged by ministerial decision.
- The issuance of a ministerial decision clarifying the competence of municipalities in the urban field because the issue of the distribution of competences between the central administration and the local administration, in the field of urban planning in particular, is unclear neither in the Local Administration System Law nor in its Executive Regulation, and neither in the rest of the subsequent relevant decisions where the centre is in control. Therefore, the issuance of a decision in the purpose comes to fill a vacuum without contradicting the texts in progress.
- Strengthening the internal resources of the local communities by issuing ministerial decisions related to local tax and non-tax resources and circulars encouraging municipalities to improve their own resources.
- Review the relationship between the central administration and the provinces and municipalities in order to lighten control and clarify its mechanisms. This could be done by ministerial decisions that does not contradict with the spirit of the law and explanatory circulars in the same direction.
- The provisions of previous laws that are inconsistent with Law No. 59, such as those related to the reconstruction and the municipal guard, are hereby repealed as a precedent. According to the accepted fundamental legal rule, the subsequent law necessarily repeals explicitly or implicitly, in whole or in part, the previous and conflicting laws and regulations. Which means the repeal of the provisions of the previous legislation and the continuation of working with the other Articles of previous legislation that do not contradict with the new law.

It is also recommended in preparing, formulating or reviewing the various texts referred to the mentioned above by adopting a participatory approach and consultation with the members of the municipalities, their councils and their respective employees in their respective fields of competence.



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