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## **Searching for Justice in Post-Gaddafi Libya. A Socio-Legal Exploration of People's Concerns and Institutional Responses at Home and From Abroad**

Otto, J.M.; Carlisle, J.; Ibrahim, S.

### **Citation**

Otto, J. M., Carlisle, J., & Ibrahim, S. (2013). *Searching for Justice in Post-Gaddafi Libya. A Socio-Legal Exploration of People's Concerns and Institutional Responses at Home and From Abroad*. Leiden: Van Vollenhoven Institute, Leiden University. Retrieved from <https://hdl.handle.net/1887/21634>

Version: Not Applicable (or Unknown)

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**Note:** To cite this publication please use the final published version (if applicable).

# Searching for Justice in Post- Gaddafi Libya

Edited by **Jan Michiel Otto**  
**Jessica Carlisle**  
**Suliman Ibrahim**

A Socio-Legal Exploration  
of People's Concerns and  
Institutional Responses at  
Home and From Abroad





## Searching for Justice in Post-Gaddafi Libya



Report of the AJIDIL  
Research Project

# Searching for Justice in Post-Gaddafi Libya

A Socio-Legal Exploration  
of People's Concerns and  
Institutional Responses at  
Home and From Abroad

**Jan Michiel Otto**

**Jessica Carlisle**

**Suliman Ibrahim**

**Nasser Algeitta**

**Jazia Gebril**

**Amal Obeidi**

**Khalifa Shakreen**

**Mohammed El-Tobuli**

Published by  
Van Vollenhoven Institute,  
Leiden University



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# Foreword

*Searching for Justice in Post-Gaddafi Libya* is a significant research report, for Libya as well as for the international community. It is the first publication of a project on Access to Justice and Institutional Development in Libya (AJIDIL), which was established by scholars in legal and social sciences of our two universities. We gratefully acknowledge the partnership of The Hague Institute for Global Justice, which made this research possible.

We would like to express our sincere appreciation for the work done by the research group, and project leaders Prof Jan Michiel Otto, director of the Van Vollenhoven Institute for Law, Governance and Development, at Leiden University, Dr Fathi Ali, director of the Benghazi Centre for Research and Consulting, and Dr Suliman Ibrahim, dean of the Benghazi Law Faculty.

The AJIDIL research project is an innovative international academic project, which has daringly explored and crossed boundaries, overcoming the difficulties of a conflict-affected situation. Benghazi University has welcomed this project in particular since it exemplifies problem-oriented interdisciplinary research, and encourages the university to engage in debates on the justice sector, both domestically and on an international level. Leiden University appreciates the AJIDIL project as it provides an opportunity to share, deepen, and apply its rather unique research tradition in the field of law, governance, and development. It is with pleasure that we note the good partnership between the AJIDIL researchers, which has laid a solid foundation for further collaboration between our universities.

We are proud that this report was presented on 28 August 2013 in The Hague at the occasion of the celebration of the 100<sup>th</sup> anniversary of the Peace Palace.

**Carel Stolker**  
*President of Leiden University*



**Mohammed El-Tobuli**  
*President of Benghazi University*



# Preface

This project began when, in order to mark the 100<sup>th</sup> anniversary of the Peace Palace, the City of The Hague kindly contributed to a research project to be undertaken by The Hague Institute for Global Justice (The Hague Institute) about sustaining the rule of law and its institutions in fragile and conflict-affected states. The Hague Institute was established in 2011 as a think-and-do-tank on issues at the intersection of peace, security, and justice. The institute invited Leiden University's Van Vollenhoven Institute for Law, Governance, and Development (vvi/LU) to be its partner for this research project.

In November 2011 Libya was considered an important testing ground for new approaches to peace building and rule of law promotion. The country had, following events in Tunisia and Egypt, joined in the Arab uprising and overthrew its ruler, Muammar Gaddafi, with international support. Hence, it was suggested that the Van Vollenhoven Institute would consider focusing its research on Libya. The Hague Institute itself would conduct a comparative desk study of other fragile states as a foundation for a set of principles aiming to contribute to peaceful conflict prevention, and resolution and restoration of justice in post-conflict settings, known as The Hague Approach.

In further talks with the City of The Hague and The Hague Institute, the proposal was refined as follows: could the Van Vollenhoven Institute develop a research project, in the forthcoming year (2012/2013), on and in Libya, as a fragile state, which would be relevant both to Libya as well as to further “knowledge-based” rule of law assistance. It was made clear that the research should be as domestically grounded and participatory as possible.

The vvi/LU, in its quest for a partner in Libya, sought collaboration with the Benghazi Centre for Research and Consulting of Benghazi University (BRCC/BU). Following successful exploratory talks in Benghazi in February 2012, the vvi and BRCC jointly decided to carry out such a research project. They named it “Access to Justice and Institutional Development in Libya,” abbreviated as AJIDIL, a word which remotely connotes the Arabic term *‘adil*, meaning “just” (*‘adala* means “justice”). Under the leadership of BRCC director Dr Fathi Ali, Dr Suliman Ibrahim of the Benghazi Law Faculty, and Prof Jan Michiel Otto, director of the vvi, a small interdisciplinary and inter-university “AJIDIL research group” was formed in Libya (see Annex IV). Dr Jessica Carlisle joined the vvi to carry out and support the field research in Libya.

During the first half of 2012 the preparation of our project continued. After the February visit of the vvi director to Benghazi, in May a delegation of four Libyan academics came to Leiden. More visits and meetings in both countries were to follow (see Annex IV).

The AJIDIL research group used the second half of 2012 to further discuss the research project, delineate the themes, discuss literature and develop a conceptual framework. Several sub-projects were started and the researchers began doing their first field interviews in Libya.

In the first half of 2013 most of the AJIDIL project's actual research work was carried out. Initial research findings were discussed, reports of various sub-projects were prepared, and on 27 and 28 March a joint expert meeting was conducted by the The Hague Institute and the Van Vollenhoven Institute, with participation of the AJIDIL research group. From April to July, finally, this report was prepared.

This report reflects the reality that the AJIDIL project has now passed its initial stages. While some exploratory case studies have been completed, the data collected for other parts of the project are still subject to analysis. Preparations for a major survey are well under way. The AJIDIL project group has already agreed to continue their research into 2014 and an agreement for future academic cooperation between BRCC/BU and vvi/LU has been concluded. The partners acknowledge with appreciation that the The Hague Institute has established the foundation for this collaborative enterprise.

**Jan Michiel Otto**

*Director of the Van Vollen-  
hoven Institute*

**Suliman Ibrahim**

*Dean of the Benghazi  
Law Faculty*

Leiden/Benghazi, 9 July 2013

# Acknowledgements

This report is the product of a collaborative effort, involving dedicated individuals in different countries. All deserve our sincere thanks for their contributions to our project and to this report.

We recognise in particular the initiators and sponsors of this research project, the City of The Hague, through Mayor Jozias van Aartsen, City Secretary Annet Bertram and head of the International Affairs Office, Astrid Bronswijk, and the leadership of The Hague Institute for Global Justice, initially under the direction of Willem van Genugten, and managed by Anton Nijssen, and since January 2013 under the direction of Abiodun Williams.

The support of the Dutch embassy in Tripoli, through Michel Deelen and ambassadors Gerard Steeghs, Robbert Gabriëlse and Ton Lansink, was impressive. We also appreciate the kind support of Libyan ambassador Ahmed El-Tabouli in The Hague.

The United Nations Support Mission in Libya, through Ahmed Ghanem and Marieke Wierda, has been most helpful to us.

We thank the numerous Dutch, Libyan, and British academics and practitioners who shared their experiences with us. The meetings both in Libya and the Netherlands with the leadership of the Higher Institute for the Judiciary, Director Ali Bakar, Deputy Kamal el Bahri, the Training Department Head Faraj al-Mahmoudi, and Justice Hussain al-Yasiri, were highly appreciated.

We are also grateful to Jeff Tan (Aga Khan University, London) for joining and contributing to our October 2012 research meeting, and to Claudia Gazzini (International Crisis Group, Tripoli) for joining and contributing to our March 2013 research meeting. With regard to the preparation of a national survey, Marijke Malsch provided us with useful advice and pertinent questions. We also thank Wasif Shadid for providing advice on methodology at an early stage.

We feel privileged that our complex and somewhat unpredictable project was co-managed by Fathi Ali, director of the BRCC and Dennis Janssen, General Secretary of the vvi with great care and collegiality.

It has been a real pleasure for us to work closely together with our colleagues, the other AJDIL researchers, namely Nasser Alghaitta, Fathi Ali, Jessica Carlisle, Jazia Gebriil, Amal Obeidi, Khalifa Shakreen, Fathi Ageila and Mohammed El-Tobuli. Most have contributed to this report, while others are preparing future publications.

Our special thanks go to Jessica Carlisle who as vvi's field researcher has not only set up and carried out her own research but also, often behind the scenes, provided numerous careful comments and editorial support to the work of all of her colleagues. Nasser Algehatta kindly joined us in the final review of chapters, and helped out with fact-checking.

We thank our colleagues at vvi for various kinds of support. Luca Pes read all chapters in their near final stage and gave many valuable comments. Bruno Braak was of continuous help, compiling media reports, and supporting both research and editing of some chapters. Kari van Weeren and Kora Bentvelsen went out of their way to fix all travels, meetings, visa, hotel bookings, lost iPhones, and other headaches. They deserve a deep *shukran*.

A special word of thanks goes to Igor Cherstich, who kindly accompanied Jan Michiel Otto on his first trip to Libya and with his command of Arabic, Libyan dialect and ways of life provided great help in various ways. Our appreciation also goes out to Frederick Brown, a writer and friend of the Otto family, for carefully reviewing the language of Jan Michiel's chapters.

As editors we are happy to acknowledge the skill and hard work of our assistant editor Hannah Mason, whose capacity to streamline the language of diverse authors turned a pile of raw versions into a clear and, we hope, readable report. We thank Hannah, who is also a nimble manager, kindly for coordinating the work of a dozen others to meet an unmovable deadline.

We also express our thanks to the staff of The Hague Institute, Jill Coster van Voorhout, Anna Gouwenberg, and Mohammed el-Katiri who kindly coordinated and supported our project, and, Zainab al-Touraihi who, alternating between The Hague Institute and vvi, was of special help to our efforts to get an overview of how different donors contribute to the justice sector in Libya.

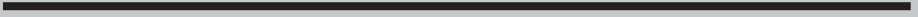
Finally, we are grateful to Lex Peeters of De Kreeft for the thoughtful graphic design of this report.

**Jan Michiel Otto and Suliman Ibrahim**

# Map of Libya



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# 1 Introduction

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*Jan Michiel Otto*

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## 1.1 Research in Libya: the Setting

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This first chapter will explain how the AJIDIL research group has interpreted the initial request mentioned in the Preface. After an introduction of the setting and the research questions, the chapter will briefly discuss the theme of access to justice. Subsequently, it will introduce the six case studies, which constitute a major part of this project.

The choice of Libya as field location for a socio-legal research project was certainly a challenging one, for several reasons. From the outside Libya was considered an insecure, fragile state and thus a hard and risky place to do field research; besides, in the past decades international scholars had hardly been able to study Libya, so there was little by way of a knowledge base in the international, English literature, and outside of Libya not much was known either about the domestic knowledge base or about the research capacity in Libya for this type of socio-legal research.

The security situation would have its impact our subsequent research project. In the event we had to cancel, we did indeed cancel fieldwork plans, certain trips and meetings, which caused considerable uncertainties and delays. Throughout the duration of the project, Western governments including that of the Netherlands advised strongly against travel to Libya, especially to Benghazi. The AJIDIL team was nevertheless able on the basis of its own assessments to overcome these challenges, and could work steadily towards fulfilling the aims of the research, both in Benghazi and in Tripoli. For the time being, the vvi researchers have been mainly confined to working in these cities.

From an international academic perspective, Libya is an under-researched country. At least until 2011 not many foreign scholars had been able to do any serious work on law, governance and society in Libya. The few, well-known exceptions include Hüsken (2009), Joffé and Paoletti (2011), Layish (2006), Pargeter (2008), St John (2011), and Vandewalle (2006). During Gaddafi's rule (1969-2011) Libya seemed rather isolated from the rest of the world: ideologically, politically, and scientifically.

In reality, at Libyan universities, there are many scholars who have done their PhD research abroad. Legal scholars have often been to Egypt and France, the “centres of radiation,” to use this comparative law terminology, from where much of Libya’s law was imported during the early 1950s. Some legal scholars have done their PhDs in the UK. For Master and Doctoral degrees in the social sciences Libyan academics have often studied in the UK, the USA, or Egypt. Some of those scholars have also occasionally published in English. An institute like the BRCC/BU has a considerable amount of experience with policy-oriented multidisciplinary research (see 12.6).

Since the Arab Spring, the annual rankings of fragile states by the international magazine *Foreign Policy* have included Libya and Egypt. Fragility in Libya has been manifested in serious and continuing violence, major conflicts and social cleavages, strongly perceived injustices, and weakness of state institutions who were supposed to respond to these problems.

After the armed struggle between revolutionaries and Gaddafi forces came to a formal end in October 2011, many groups decided to remain armed, allegedly to exert pressure on the government so that it would “fulfil the promises of the revolution.” Many bigger and smaller incidents – laying siege to parliament and ministries; seizing oilfields and airports; the killing of US ambassador Stevens and three other staff in Benghazi; bomb attacks; assassinations, kidnappings, imprisonments and torture – have demonstrated that the new government has not yet been able to regain the monopoly on the legitimate use of violence.

Injustices are strongly felt by groups who had fallen victim to the Gaddafi regime, as well as groups – often those regarded as Gaddafi loyalists – who were treated badly during the uprising. In response, the Libyan government, with the assistance of the United Nations Support Mission in Libya, have developed policies and law for transitional justice. This includes an Integrity Commission, which in 2012 began to vet people occupying or nominated for higher positions in state institutions. In May 2013 a highly contested Political Isolation Law was enacted for the same purpose.

Under Gaddafi most state institutions in Libya had been neglected. They were tasked with carrying out policies inspired by Green Book ideology, a unique mix of Arab socialism of the 1960s, elements of religion and domestic culture, various other ideologies, Gaddafi’s personal thought, and totalitarian indoctrination. Much of the economy was nationalised and bureaucratised. Administrative practices and procedures are still known to be cumbersome, and marked by nepotism. So, the public administration, the

police, and the army which the new Libya has inherited from Gaddafi are to be reconstructed.

Since the 17<sup>th</sup> February Revolution<sup>1</sup> Libya's fragility has been a cause of concern for both its national government and the international community. It has also been for the tens of thousands of justice seekers across Libya, who on a daily basis are trying to resolve their serious problems and to find satisfactory solutions to their grievances.

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## 1.2 Research Questions

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The AJDIL group found that to be practically relevant, the research had in the first place to address the real life problems of people in Libya.<sup>2</sup> Thus the research group opted for a socio-legal perspective in which people's justice-related concerns, and their searches for justice take centre stage. Such searches for justice may or may not lead them to the realms of law and state institutions. Given the weaknesses of the state, non-state norms and justice, provided by tribal and religious authorities or revolutionary groups, could also be relevant.

These assumptions led to the following initial research questions.

1. Which are major justice-related concerns that Libyan people are facing today, after 42 years of Gaddafi's rule?
2. What are the strategies and practices by which Libyan justice seekers try to solve their potentially legal problems?
3. How do the legal and administrative institutions of the Libyan state respond, and are those responses deemed satisfactory?
4. What are the roles of non-state norms and mechanisms, notably of a religious and customary nature, in processes of justice seeking in Libya?
5. How is Libya's justice system affected by wider governance issues?

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1 The uprising against Gaddafi began in Benghazi with a Day of Rage, a big demonstration against the regime, planned on Thursday 17 February 2011. It was the anniversary of demonstrations that had been held on 17 February 2006, during which the police had fired and killed 11 demonstrators.

2 For an informative overview of concerns of the Libyan people in the aftermath of the uprising against Gaddafi see Hilsum (2012).

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## 1.3 Access to Justice: International Practices and Academic Research

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### 1.3.1 A new trend

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The research group's focus on access to justice also fits in with the recent concerns of policy-makers and practitioners. International assistance programmes in the area of rule of law and justice have rapidly expanded since the early 1990s (see 12.1). After an initial emphasis on projects for drafting legislation, the focus shifted to capacity building and strengthening of legal institutions. This meant in practice that many ministries of justice, courts and public prosecution authorities and their staff were trained and advised with the assistance of colleagues and consultants from abroad. In the early 2000s critical voices increasingly claimed that the programmes' focus on the providers of justice had in fact neglected "the demand side," and that if justice was ever to prevail in the recipient countries, much more work had to be done on improving access to justice and legal empowerment of the poor (Golub 2003).

Hence, from the mid-2000s, social scientists were approached to join rule of law projects initiated by international donors, which hitherto had mainly been staffed by lawyers. Donors developed an interest in collaborating with legal anthropologists and other socio-legal researchers. Good examples are found in the World Bank's Justice for the Poor programmes and the UNDP Programme on Legal Empowerment and Assistance of the Disadvantaged (LEAD) in Indonesia, which in 2006 established collaboration with vvi to carry out joint research on access to justice. This collaboration resulted in a series of case studies published in 2010 (Bedner and Vel 2010). These case studies and the concepts and methodology used were a useful point of reference at the outset of the AJIDIL project. For a definition of access to justice which served as a point of departure of these case studies, see box 1.

## BOX 1

According to Bedner and Vel (2010), access to justice exists if:

- people, notably poor and disadvantaged,
- suffering from injustices,
- have the ability,
- to make their grievances be listened to,
- and to obtain proper treatment of their grievances,
- by state or non-state institutions,
- leading to redress of those injustices,
- on the basis of rules or principles of state law, religious law or customary law,
- in accordance with the rule of law.

The theoretical basis for both the Indonesia studies and for the AJIDIL project research goes back to the seminal work on transformation of disputes by Felstiner et al. (1980-81). This article, which systematically looks at disputes from a justice seeker's perspective, stems from a sociology of law tradition originating in the USA. The AJIDIL project also builds on a parallel academic development in which jurists and legal anthropologists doing research in Africa and Asia developed detailed descriptions and solid analyses of customary practices of dispute settlement, notably on property rights.

Other sources of conceptual inspiration include studies of women's rights and courts in Arab states (Welchman 2007; Carlisle 2007a, 2007b, 2008). In the adjacent domain of studies of Sharia and national law, AJIDIL could draw upon Libyan research on Sharia and fiqh-based legal reasoning (Ibrahim 2008) as well as comparative research on the position of Sharia in national legal systems (Otto 2010).

As far as the Libyan legal system is concerned, the Libyan AJIDIL team members had access to a wide range of legal sources and literature in Arabic. PhD theses on Libyan law are also frequently written in French, but we could rarely find PhD theses on Libyan law in English. The PhD thesis of Alghaitta (2011) on human rights and criminal justice, in English, provided the author with a solid basis for undertaking one of the case studies (see Chapter 6).

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## 1.4 Case Studies

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### 1.4.1 Two types of case studies

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Adopting an access to justice perspective helped to keep AJIDIL's feet on the ground. Our research questions guaranteed that domestic social and legal realities would guide the researchers rather than abstract assumptions. It was decided to first tackle the questions by carrying out a number of separate case studies, of two types. The first type would follow particular justice seekers who were seeking remedies for a particular injustice inflicted upon them. The second type would start on the other side, namely exploring the role of a particular legal institution.

Some case studies were to be conducted in Tripoli in Libya's western region, and the others in Benghazi in the eastern region. The findings of these case studies would give us our first qualitative insights into whether and how on the ground justice can be achieved or not. The findings would also lead us to topics and questions for other case studies. The selection of cases was done by the AJIDIL team, primarily on the basis of what Libyan researchers felt was found most relevant to Libyan society.

We have used the term "case study" in a loose way. We intended to collect cases of justice seeking, following the actions and encounters of a particular justice seeker trying to find a remedy to a perceived injustice. During the course of the research, it was decided that a "case" could also be concerned with a group, even a large group, of justice seekers.

This focus on "cases" distinguishes our approach from the typical legal treatise analysing legislation and or case law in a distinct area of law, such as constitutional law or commercial law. It also distinguishes our approach from the quantitative survey type of social science research.

### 1.4.2 Case studies focusing on legal institutions

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The first three of the resulting case studies focus on the work of legal institutions. The first case discusses the people's lawyers (see Chapter 5), a branch of the judicial system providing free legal representation to litigants in court.<sup>3</sup> The people's lawyers elicit both strong support and vocal detrac-

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3 Formally, the term "people's lawyers" was recently replaced with "public lawyers," according to Law 14/2013.

tion in Libya. Criticism concentrates on their perceived lack of independence and incompetence, while proponents emphasise their indispensable role in the judicial system, notably the assistance they provide to the underprivileged. If a future policy regarding this institution is to be knowledge based, the bases of these entrenched arguments should be analysed.

The second case study makes defence lawyers in criminal trials its object of study (see Chapter 6). Apart from the constraints of criminal justice due to the volatile security situation (see 2.3.1) there are also structural concerns about the operation of the criminal process. These concerns include the imbalance of power between police and prosecution on the one hand, and suspect and defence lawyers on the other. The study focuses notably on the obstacles these lawyers encounter during their involvement in criminal trials. It highlights the strengths and weaknesses of the criminal justice system when dealing with “ordinary” cases affecting communities, such as theft, assault, or imputable traffic offences.

The third case study on legal institutions is a description of a day in a family court of first instance in Tripoli (see Chapter 7). The family circuit has perhaps been the part of the Libyan courts that has been least affected by the transition in terms of their activity. These courts have remained busy throughout the post-revolutionary period as a forum in which domestic and social tensions are played out. They are consequently sites in which some basic rights and obligations of women and men – to marry, within marriage and after divorce – are adjudicated and negotiated. The capacity of the legal system to address family court litigants’ claims is therefore crucial to issues of gender justice.

#### 1.4.3 Case studies focusing on justice seekers’ perspectives

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The two following case studies discuss how justice seekers have responded to injustices done to them during the Gaddafi regime. Both reflect their sense of exclusion from the judicial system before the revolution as well as in its aftermath.

The after-effects of Law 4/1978, which expropriated and redistributed large amounts of property during the height of Gaddafi’s socialist policies of nationalisation, have been an enormous challenge to the National Transitional Council (NTC) and subsequent national government (see Chapter 8). Former property owners have been attempting to regain ownership of their lost property for decades and in fact the Gaddafi regime already made some concessions to their grievances. The success of the revolution has improved the chances of having these grievances heard.



Nevertheless, it is a source of frustration to former owners that having their claims followed through is proving difficult. Many of them are still waiting for property to be returned.

The fifth case study discusses another group of claimants, namely men who were unlawfully detained in the 1980s on suspicion of being political opponents of the Gaddafi regime (see Chapter 9). All of these men were subjected to cruel and degrading treatment – including torture and a lack of medical care – during periods of imprisonment lasting from four to eleven years. The Gaddafi regime to some extent acknowledged its policy of unlawful detentions and attempted to mollify claimants by offering some financial compensation, albeit with no official admission of responsibility. Since the revolution these claimants have been pressing for full acknowledgement of their experiences and, in some cases, higher compensation. However, as events have moved on under the transitional and subsequent democratic government, they have had difficulty having their renewed claims recognised.

The sixth and final case study is an exploration of justice seeking by the families of the victims of the Abu Salim massacre of 1996 (see Chapter 10). This event in which an estimated 1,286 prisoners were gunned down, has become powerfully symbolic of the atrocities of the Gaddafi regime, and justice seeking for these victims triggered the start of the 2011 uprising (Hilsum 2012, 7-46; Pargeter 2012, 170). The chapter analyses the way in which the former regime attempted to deal with the pressure that had been mounting for years. This was initially done by denial of reports of this massacre, followed by a partial admission that men had been killed, and subsequently by offers of compensation. In order to solve the problem the state put pressure on the families to accept reconciliation by instrumentalising the importance of tribal authority.

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## 1.5 A Note on Language, Case Study Methods and Surveys

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### 1.5.1 Language and case study methods

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The research itself was largely conducted in Arabic; the vvi field researcher had conducted previous socio-legal research in Arabic, in Syria and Egypt, and used both English and Arabic during her fieldwork. The Dutch project leader had learned Egyptian Arabic during his field research in 1979-1981 and, although no longer fluent, could consequently benefit from his resid-

ual knowledge of basic Arabic. Most Libyan members of the AJIDIL research group could express themselves well in English. The ability to switch between Arabic and English undoubtedly eased interactions among the researchers and between the foreign researchers and their respondents.

The AJIDIL group's approach to researching the cases studies was qualitative and based on collection of primary data in the field. The researchers slightly differed in their approaches to the research for their case studies, but, generally speaking, the research included interviews, observation of the work of the courts and legal professionals, media analysis, and examination of legislation, case files and draft laws. This work took time. Interviews could not always be arranged speedily and entrance into some institutions had to be discussed before it was agreed upon. Occasionally, potential interlocutors could not commit themselves to a meeting. It should be noted that all names of respondents used in the case studies are pseudonyms.

The case studies were perhaps also a bold experiment in transgressing disciplinary boundaries. Until recently, it would have been rather unlikely to see Libyan jurists committing themselves to social science research and social scientists taking a research interest in justice issues and the functioning of the legal system. Now, socio-legal studies as a sub-discipline has something to offer to both.

The outcomes suggest that there is much to be gained from joint Libyan-international research adopting a qualitative, socio-legal approach towards the wide range of potentially legal problems experienced by Libyans during transition from dictatorship to established democracy. Furthermore, the AJIDIL research group intends to use the outcomes of its case studies for the development of a national survey on access to justice and for further research on institutional development and governance.

### 1.5.2 National Access to Justice Survey (NAJS)

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Stimulated both by the expertise of Dr Fathi Ali of BRCC/BU as principal investigator of several quantitative research projects and national surveys in Libya, and by Dutch and British experiences with the so-called "Paths to Justice" surveys, the research group decided to explore options for a national survey on access to justice (see 11.2). The questions of this national survey would very much follow the basic questions of the AJIDIL project. Initially the NAJS was conceived as part of the one-year The Hague-funded academic research project. However, gradually the importance of such a survey for Libya made it desirable to develop it rather as a project funded

and supported by the Libyan government. Substance-wise, the AJIDIL team has remained very much involved. At the time of writing, several interviews and focus group discussions have been conducted to collect additional data, in order to be able to decide on a proper format and the content of the survey questionnaires (see Chapter 11). By including in the focus groups Libyans of different age, gender, and socio-economic background, and potential justice seekers as well as justice providers, the AJIDIL project wants to adapt the “Paths to Justice” questionnaires so that they are attuned to the voices of the Libyan people and justice practitioners.

### 1.5.3 Libya Governance Survey (LGS)

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In addition, the AJIDIL research group has made plans for a separate governance survey, to answer research question 5 (see 1.2). Göran Hyden (et al. 2004), the lead researcher of a comparative governance research project by the United Nations University, advised the research group on its application in the case of Libya.

For the governance survey Dr Amal Obeidi from Benghazi University selected a sample of around 120 well-informed persons from government, political society, civil society, economic society, the bureaucracy, judiciary, and from other spheres including the security forces, media, clergy, and traditional authorities. At the time of writing, the findings of this survey are still being analysed and not yet ready for publication.

## 1.6 This Report

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The report consists of three parts: chapters 1 to 4 form the introductory Part I, Part II contains six case studies in the chapters 5 to 10, and the concluding part III can be found in chapters 11 to 13.

This first chapter is followed by Chapter 2, which outlines recent developments in Libya, major opportunities and constraints that Libya is facing with regard to addressing its justice concerns. Chapter 3 then discusses how organisations which form part of the international community – be it multilateral, national or non-governmental – have assessed the needs of the justice sector in Libya. Chapter 4 discusses how the Libyan Supreme Court has used its power of constitutional review over time, in particular to rule about the application of Sharia-based law. In doing so it provides many insights into the history, the sources and complexity of Libya’s legal system. Chapters 5 to 10, as said, present short versions of the six case stud-

ies discussed above. Chapter 11 explains how a National Survey on Access to Justice is planned, and presents some preliminary results from preparatory interviews and focus group discussions, in which inhabitants of the two main cities tell about their justice concerns. Chapter 12 of the report, taking again an international perspective, outlines how and why this project's *responsibility to learn*-approach may provide a positive answer to problematic developments in international legal assistance. Chapter 13, finally, summarises the main findings of this research after nine months, providing a first set of answers to the project's research questions.

In addition, the report contains five annexes authored by members of the research group about the following subjects: an overview of Libya's judicial organisation; an introduction to the role of the tribe in Libya; an assessment of the negative impact of insecurity on justice seeking, illustrated by the case of the killing of Abdul Fatah Younis, the late commander of the revolutionary army; a short chronology of the formation and activities of the AJDIL research group; and a set of initial policy suggestions based on the preliminary conclusions as found in Chapter 13.<sup>4</sup>

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4 It should be noted that this is a research report and not an academic book publication; as such referencing and footnoting are limited.

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# 2 Opportunities, Constraints and Dilemmas in Libya's Search for Justice

*Jan Michiel Otto*

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## 2.1 Two Libya's

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Before discussing Libya's justice challenges, they need to be put into context. But into which context? After five trips to Libya in 2012-2013, numerous conversations with Libyans, and as a regular reader of the reliable on-line newspaper *Libya Herald*, I could sketch two different contexts, two competing images of Libya.

There is, as one judge put it, "the Libya I dreamt of on 17 February 2011." This is a Libya of hopes, a country where the people managed to oust the dictator Gaddafi and embarked on a democratic and law-based road ahead. Indeed, a self-appointed National Transitional Council (NTC) and a transitional government led the country throughout 2011 until the summer of 2012. In July, free and fair elections were held resulting in a new, legitimate parliament, the General National Council (GNC). In the autumn of 2012, the government under Prime Minister Ali Zeidan was established. This new Libya allows for a free press. It has secured its national income, mainly from oil production, and is now addressing the next challenges, one by one, with broad support from the international community.

This hopeful Libya is reflected in peaceful appearances of everyday life in Tripoli, Benghazi and other towns. As AJIDIL researchers, whether Libyan, British or Dutch, we could indeed see this Libya every day, in the streets, parks, shops, coffeehouses, schools, universities, offices, airports. We saw normal life everywhere: people chatting, eating and drinking, working, going to the busy markets, buying and selling, driving around in cars, attending weddings, visiting social and cultural events, watching tv, and making jokes. Meanwhile in the media we were hearing and reading

news about the expansion and training of security forces, foreign investors returning to Libya,<sup>1</sup> and a supportive international community (see 3.1).<sup>2</sup> So it seems that for the silent majority of Libyans the present and future look promising, even though, sometimes, there may be problems.

There is another, more troubling Libya, in which militias operate outside state control and put themselves above the law, frustrating the state's law enforcement, a country startled by assassinations, assaults, kidnappings, tortures in illegal prisons, bombs detonated at police stations and embassies, usually without any of the perpetrators being brought to justice. In this troubling Libya every now and then armed conflicts flare up.<sup>3</sup> Vast areas of this immense country are beyond state control, especially in the deserts and mountains in the south.<sup>4</sup> Amongst the main cities Benghazi has been the scene of many violent attacks.<sup>5</sup>

Troubling Libya seems a country in turmoil. In the wake of Gaddafi's regime, which had scarred so many people's lives, the 2011 uprising brought liberation. However, soon social and political cleavages and conflicts became visible. While the government makes serious attempts to improve the situation, the young judge's dream of 17 February 2011 still seems remote.

In the headlines of Libya's free press both sides are reflected. However, readers of the foreign press are mainly informed about Libya's troubles. This chapter could perhaps restore the balance, as it first discusses some of the current hopes and opportunities, followed by some of the problems and constraints.

This mixed picture forms the real, complicated context of any effort towards good governance, rule of law and access to justice in Libya. There are no shortcuts to progress. The main requirements are now stabilisation and security, a long-term commitment to the democratic ideals of the 17<sup>th</sup>

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- 1 "Libyan Minister of Economy expects \$1 trillion in FDI." *Libya Herald* 3 May 2013, <http://tinyurl.com/sjpgl-001>, accessed on 27 June 2013.
  - 2 "Obama meets with Libya's new leader," Jennifer Epstein. *Politico* 13 March 2013, <http://tinyurl.com/sjpgl-002>, accessed on 28 June 2013; "Zeidan looks to UAE for police and security expertise," Hadi Fornaji. *Libya Herald* 28 March 2013, <http://tinyurl.com/sjpgl-003>, accessed on 28 June 2013.
  - 3 "Fresh deadly clashes in Mizdah; army moves in." *Libya Herald* 3 March 2013, <http://tinyurl.com/sjpgl-004>, accessed on 27 June 2013; "Gunmen kill six Libyan soldiers at checkpoint near Sirte." *Reuters* 25 June 2013, <http://tinyurl.com/sjpgl-005>, accessed on 28 June 2013.
  - 4 "The other frontier warriors," Beata Oleksy. *Libya Herald* 13 January 2013, <http://tinyurl.com/sjpgl-006>, accessed on 27 June 2013.
  - 5 "Twenty-five reported dead in clashes in Libyan Benghazi," Feras Bosalum. *Reuters* 8 June 2013, <http://tinyurl.com/sjpgl-007>, accessed on 27 June 2013; "Huge explosion flattens Benghazi police station - no casualties reported," Maha Ellawati and Ayman Amzein. *Libya Herald* 19 June 2013, <http://tinyurl.com/sjpgl-008>, accessed on 26 June 2013.

February Revolution, a comprehensive understanding of the problematic context, and substantial efforts to facilitate well-informed discussion, dialogue, and decision-making. In all this, the roles of Libyan individuals and groups are decisive. The role of the international community is limited and can only be effective if it is willing to learn about Libya, about its society and state, about its ambitions, difficulties, dilemmas, and opportunities.

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## 2.2 Hopes, Opportunities, and Some “Good News”

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To what extent is the environment in Libya conducive to strengthening the rule of law and improving access to justice?

### 2.2.1 Gaddafi and his regime have gone

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The death of Gaddafi put a final end to a regime, which was totalitarian in nature, whimsical in operation, and ruthless towards its opponents and other victims. After 42 years of suppression, since late 2011 people have tasted a new freedom to speak, without the old fear of being overheard, reported or tapped by their government. People no longer need to be afraid when they walk or drive past a state security agency. Gaddafi’s regime, which provided the grounds for many fears – for common people to be arrested (see Chapter 9), for critical students to be publicly hanged or for young women to be sexually assaulted by Gaddafi in his headquarters (Hilsum 2012, 64, 67, 78-79) – is no more.

There may be certain other fears, for other groups (see 2.3.1), but the long collective nightmare created and maintained by Gaddafi, his inner circle and his wider circle of henchmen and helpers, has come to an end. Many of Gaddafi’s men have fled the country, and are in Egypt, Tunisia, or elsewhere (UNHCR 2013). Gaddafi’s heir, Saif al-Islam, and his closest associate Abdullah Sanusi, are imprisoned and awaiting trial.

In the wake of the 17<sup>th</sup> February Revolution, social and political groups in Libya have called for special legislation to prevent Gaddafi’s top and middle elite, and his staunch supporters, from occupying any meaningful positions in the new state of Libya. Indeed, several vetting mechanisms have been established. In April 2012 the NTC enacted Regulation 26 establishing a High Commission for the Application of Standards of Integrity and Patriotism – now commonly referred to as “the Integrity Commission” – for incumbents of, or candidates for, public office. This quasi-judicial commission has the mandate to investigate any person occupying or seeking high public office

for close ties with the Gaddafi regime or for criminal deeds. It has made numerous decisions based on the close scrutiny of personal files. The law allowed those affected by the commission's decisions to launch an appeal with the regular courts (see 5.1).<sup>6</sup>

Just over a year later, in May 2013 the GNC passed Law 13/2013, the much-contested Political Isolation Law. Its purpose was similar to that of Regulation 26/2012 but it went much further. Amidst pressure from armed militias and political factions, the GNC's majority agreed to formulate categories that targeted anybody who had worked in a leading position for the Gaddafi regime since 1969. This would include many politicians with highly respectable, anti-Gaddafi credentials. The most conspicuous example is the GNC-president and de facto head of state Mohammed Megarief, who had to step down. With regard to vetting the judicial system, in the autumn of 2012 a draft law on judicial reform was proposed by the Supreme Council for the Judiciary. It envisaged a radical purge but has not yet been accepted. Some observers expect that the Political Isolation Law will be used to purge the judiciary.

The standards and procedures for transitional justice are contested by different political factions. Yet, there seems to be a broadly shared desire that now that Gaddafi has gone, those who misused the state and oppressed the people on his behalf will also be excluded from leadership positions in the new Libya.

## 2.2.2 The war came to an end

From February until August 2011 Libya was in a state of war, fought between revolutionaries and Gaddafi's army and supporters. The struggle left thousands dead.<sup>7</sup> On 19-20 March 2011 Benghazi narrowly escaped being overtaken and possibly destroyed by Gaddafi's army; brave Libyan pilots and later French warplanes came to its rescue. However, Gaddafi's troops inflicted heavy damage on the city of Misrata, a centre of resistance. Later, in revenge, revolutionaries destroyed much of Sirte, Gaddafi's "home town,"

6 "Inside the Commission for Integrity and Patriotism," Mathieu Galtier. *Libya Herald* 11 April 2013, <http://tinyurl.com/sjpgl-009>, accessed on 28 June 2013.

7 Estimates differ dramatically. After the first four months of fighting, the UN Human Rights Commissioner, Cherif Bassiouni estimated that between 10,000 and 15,000 people had been killed ("Up to 15,000 killed in Libya war: U.N. rights expert." *Reuters* 9 June 2011, <http://tinyurl.com/sjpgl-010>, accessed on 26 June 2013). More recently, the National Transitional Council estimated that "4,700 rebel supporters died and 2,100 are missing, with unconfirmed similar casualty figures on the opposing side" ("Libyan revolution casualties lower than expected, says new government," Ian Black. *Guardian* 8 January 2013, <http://tinyurl.com/sjpgl-011>, accessed on 28 June 2013).



as well as Tawergha, the home to a community also regarded as loyal to Gaddafi.

On 23 October 2011, after Tripoli had been taken by revolutionaries and Gaddafi was finally spotted and killed, the NTC chairman Mustafa Abdel Jalil declared that the war had come to an end. Local, sometimes serious, conflicts remained. Group violence did not disappear. There are also reports of actions and threats by organised terrorist groups in the south and in the east. Nevertheless, as we write this report in early July 2013, there are no signs that large-scale conflict is likely to break out again any time soon. The war, indeed, came to an end.

### 2.2.3 New national unity, a civic sense and a civil society

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The first half of 2012 saw many people in Libya in a state of euphoria about what they perceived as a new sense of national unity. People in the west of the country were grateful to those in the east for having started the uprising. Easterners felt that an end had come to the neglect of their region by the central government. Armed brigades from different towns were working together towards the same goal. To the surprise of many people, for months there was a low crime rate, although most of the security forces had collapsed and the country was flooded with weapons. In fact, ordinary people all over Libya filled the security gap in their neighbourhoods. Many felt that they could finally fulfil a civic duty for their country. During 2012 numerous civil society organisations were established. Some focus on helping victims of the Gaddafi regime, others on problems caused by the civil war. Others again advocate the rights of women, children, or ethnic minorities. Some civil society institutions have also organised major demonstrations to protest against the militias. The development of an active civil society has been supported by government policy, and NGOs have, in many cases, become a vehicle for policy initiatives.

### 2.2.4 Basics of democracy

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Since early 2011 at the outset of the 17<sup>th</sup> February Revolution, the Libyan people and its new leaders have worked hard to establish a democracy, and their efforts have proven largely successful. The changes have encouraged a free press. The government has drafted regulations for local and national elections. In accordance with these laws, Libya was able to conduct democratic elections in 2012. They brought uncontested results, both at national and local levels. In the autumn of 2012 the newly elected parliament (GNC)

approved the formation of a new cabinet. Thus Libya provided itself with a democratic government, and as such created a broad basis for political legitimacy of its new policies and laws.

### 2.2.5 Good government

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After parliament had withheld its approval from the first PM-candidate's proposed cabinet, the next candidate, Ali Zeidan, was more successful. Since the inauguration of this cabinet on 14 November 2012, the government has faced many difficulties and potential crises but so far it seems to have addressed them with remarkable determination and persistence. Zeidan's selection of ministers was made under high pressure from certain cities, parties, tribes, and other strategic groups, which demanded inclusion of their representative(s). So far, the resulting cabinet has seemed to be reasonably stable.

Faced with many political and violent attacks, the Zeidan-government has chosen the path of peace, patience, and domestic diplomacy. Whereas the GNC has at times been very unruly, the government has consistently demonstrated a respect for democracy, and for the parliament as an institution. Zeidan has also consistently referred to the rule of law as a foundation of the new Libya.

### 2.2.6 Basics of rule of law and legal institutions

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Upon independence, during the monarchy throughout the early 1950s, Libya had already established a full-fledged legal system (see Chapter 4). Much legislation followed models from Egypt, which had become independent 30 years before, in 1922. Egypt had, in terms of legal development, taken the lead in the Arab world. Sanhuri, the great Egyptian legal drafter and judge (Otto 1995) had come to Libya to play a central role in the genesis of the new national Libyan law.

During this period, Libya's legal profession established a reputation for the rule of law. More than a few judges and lawyers upheld this reputation, despite the attempts of the Gaddafi regime to undermine it by setting up parallel systems of "revolutionary" and "people's" courts, politically appointed or legally unqualified judges and "people's lawyers." Much of the 2011-2012 transition, led by the NTC, was law-based. Lawyers and judges were in the forefront of the 2011 uprising (Hilsum 2012, 7-46), and contributed much to legal drafting for the new Libya. A private lawyer with

a record in human rights, Salah Marghani, became Zeidan's Minister of Justice.

### 2.2.7 Oil money

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The government also controls Libya's vast oil revenues. The National Oil Cooperation (NCO) and the Oil Ministry are known to be among the best-run state institutions. By mid-2012 oil production had regained its pre-war level of about 1,5 million barrels a day.<sup>8</sup> Libya could, more than other countries in the region, afford to pay for what is needed to restore the rule of law. Yet, the boundaries between the Libya of hopes and the more troubled Libya are blurred here; oil production and transport have been disrupted by militias and workers, prompting Prime Minister Zeidan to state that "anyone who disrupts oil ports wants to fight the Libyan people."<sup>9</sup> Over the past year, the government has needed the oil money, understandably, to buy its way out of problems, for example to buy stability and time by paying monthly salaries to tens of thousands of militiamen. This brings us to the problems Libya is facing.

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## 2.3 Problems, Constraints, and "Bad News"

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To which extent and how is the environment in Libya frustrating access to justice and rule of law?

### 2.3.1 Armed groups

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Among Libya's main problems in 2013, the serious threats to the country's security and stability stand out as the most pressing. A summary from the written press of just one day in June 2013 gives an impression of the numbers and types of reported security problems (see box 2).

Numerous post-revolutionary armed groups, so-called "militias" (*milishiat*) or "brigades" (*kataib*), have kept their arms and their power. Other armed groups have emerged in the space created by the security gap. To keep them in check, the government has followed the examples of other post-

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8 "Libya's oil. Gurgle and splutter," *The Economist*, 8 June 2012, accessed on 11 July 2013.

9 PM Zeidan speaking at press conference on Sunday 7 July 2013: "Anyone who disrupts oil ports wants to fight the Libyan people: Zeidan." *Libya Herald* 8 July 2013, <http://tinyurl.com/sjggl-012>, accessed on 11 July 2013.

## BOX 2

### Morning Headlines Sunday 2 June 2013

- Cyrenaica Federalists Declare Self Government on 64<sup>th</sup> Anniversary of Emirate of Cyrenaica Independence, *Libya Herald*.
- Burqa Region Declares Itself Federal Region and Rejects Political Isolation Law, *Alwatan*.
- ICC Rejects Libyan Trial for Said; Demanded He Be Handed Over, *Libya Herald*, *Libyan News Agency*.
- Hollande: No French Military Action in Libya, *News24*.
- France Hollande Says South Libya Islamists Likely Behind Embassy Attack; Worried by Lawless Southern Libya, Says No plans to Intervene Militarily, Would Need UN Mandate; Initiatives to Help Tripoli to Be Unveiled in Coming Weeks, *Reuters*.
- Al-Kufra Area Commanding Officer Denies Social Media and Satellite Channel Reports of Foreign Forces Entering the South, *Libyan News Agency*.
- Kufra Military Council Chief: Five Kidnapped by Chad Tebu Belong to Border Security Brigade Of Martyr Suleiman Bumtari, *Almanara*.
- Libya: Five Soldiers Kidnapped By Armed Group in South, *Tripoli Post*.
- Guards at Libyan Mellitah Oil Field Protest. *News24*.
- In Eyes of Niger People: Libya Turns From El Dorado Into Terrorist Threat, *Middle East Online*.
- Libya Becomes “the New Mali” As Islamists Shift in Sahara, *Reuters*.
- Libya Rejects Neighbours’ Claims of Destabilising Region, *AFP*.
- Spokesperson for Tripoli Police Directorate Denies Some Media and Social Media Reports About 2 Car Bombs in Dahra Area, *Libyan News Agency*.
- Tawerghans Seek Support for the Return Home, *Libya Herald*.
- Kidnapping of Revolutionary Walid Jumaa Shaaban, Head of Misrata Al-Huda Institution Security Unit, *Alwatan*.
- New Government Agency Named “Force To Protect Foreign Diplomats in Libya” Formed, *Alwatan*.
- Bani Walid Local Council Calls for Comprehensive National Reconciliation Among Tribes and Cities in Libya Based on the Principle of Restitution, *Libyan News Agency*.
- Top Level Mediation Ends Tensions Between Tajoura and Misrata, *Libya Herald*.
- Libya: Government Moves to Protect Southern Region, *Tripoli Post*.
- Libya: New Interior Minister Takes Office, *Tripoli Post*.
- Zeidan Intervention Stops Libyan Airlines’ Strike, *Libya Herald*.

Source: UNSMIL Public Information & Communication Office

conflict administrations, such as in DRC Congo, Lebanon, and South Sudan, in recognising their role, incorporating them formally in a loose national security structure, and paying monthly salaries.<sup>10</sup> Meanwhile armed groups have at times been able to force their will on the government, parliament, on public servants, and on ordinary people. One now has to be careful about openly expressing support for the former regime. Some of the militias behave as autonomous powers within a state, arresting people, keeping thousands of them in prisons, torturing them. Militias may or may not be behind the dozens of assassinations of high-ranking police and army officers, especially in Benghazi.<sup>11</sup> They have also evicted whole communities from their homes – such as those from Tawergha, Mashashiya, Awaniyya and Tiji who fled from Misrata, Zawiyat-al-Bajul – and have refused to let them safely return. Thus at times they can exercise control over parts of Libyan state and society.

The standoff between the government and the militias has also seriously undermined the justice system (see Annex III). As a result, judges, prosecutors and police lack the state's monopoly on the legitimate use of power and thus cannot enforce the law. They receive threats, as do lawyers; some have even been killed.<sup>12</sup>

Ironically, this lawlessness provides the militias with a perfect justification. As long as the government cannot maintain law and order, they can claim that they will take on this responsibility. Libya thus suffers from a vicious circle of injustice and insecurity. According to the International Crisis Group (2013) there are two competing narratives to explain the vicious circle. The first is the state declaring that it cannot enforce the law as long as the militias keep intimidating and terrorising the law enforcement apparatus and ordinary people. In the other narrative, the militias claim they cannot give up their positions as long as the state allows lawlessness and impunity, especially for the stooges of Gaddafi's former regime.

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- 10 A similar policy was pursued in Afghanistan after 2001 ("Just Don't Call It a Militia: Impunity, Militias, and the 'Afghan Local Police'." *Human Rights Watch* 2011, <http://tinyurl.com/sjpgl-013>, accessed on 28 June 2013); Lebanon in 1991 ("Ex-militia fighters in post-war Lebanon," Dima de Clerck. *Accord 24*, <http://tinyurl.com/sjpgl-014>, accessed on 28 June 2013); South Sudan from 2005 ("South Sudan army integrates largest militia." *Sudan Tribune* 10 June 2007, <http://tinyurl.com/sjpgl-015>, accessed on 28 June 2013); and the DRC Congo in 2009 ("Congo: no stability in Kivu despite a rapprochement with Rwanda." ICG (2010)).
- 11 "Few arrests have been made for these attacks and no prosecutions have been brought. Some suspect that many of the killings have been revenge attacks on figures from the old regime, while others believe the killers are Qaddafi regime supporters who are, as they see it, punishing individuals who chose to change sides and serve the February Revolution," in "Another senior officer murdered in Benghazi," Maha Ellawati and Ahmed Elumami. *Libya Herald* 26 June 2013, <http://tinyurl.com/sjpgl-016>, accessed on 29 June 2013.
- 12 "Lawyers slam 'alarming' growth of attacks on judiciary," Hadi Fornaji. *Libya Herald* 19 June 2013, <http://tinyurl.com/sjpgl-017>, accessed on June 28 2013; "Derna local councillors strike in protest at 'government inaction' and judge's murder," Ahmed Elumami. *Libya Herald* 18 June 2013, <http://tinyurl.com/sjpgl-018>, accessed on June 28 2013.

### 2.3.2 Institutional weakness

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In 2013 the question asked by many in Libya has been: why has the government not yet taken the obviously necessary steps? Why haven't we seen the rebuilding of a strong army, a strong bureaucracy, and legal institutions? Why does the government not regain the monopoly of power by negotiating a peaceful transfer of the "good" militias into the security forces?

Most observers agree that it is not because the ministers of Zeidan's cabinet do not have the right intentions. However, they face huge problems with "getting things done." The government seems to lack the institutional strength required to translate good governance into action. The bureaucracy seems not to be able to implement, execute, and enforce the policy plans and regulations of ministers and director-generals.

Participant observers in the system have offered different explanations for this institutional weakness. They often refer to Libya's administrative culture (see 2.3.3), tainted by the influence of Gaddafi's regime and by a lack of productivity as a result of "the oil curse." When probing deeper, they often point to aspects of Libyan society (see 2.3.4).

### 2.3.3 The influence of the Gaddafi regime on administrative culture

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One of the main accusations that has often been levelled against Gaddafi's regime is that he weakened or even destroyed Libya's regular state institutions in order to prevent any challenge to his power. When Gaddafi came to power, the country's institutions were still quite young. There was not much of an inherited colonial administration as the Italians (1911-1942) had systematically excluded Libyans from any bureaucratic and administrative institutions they had created (Vandewalle 2012, 41).

In the first decade of independence Libya was a federation in which administrative tasks were divided in a complicated way among three tiers. Only after 1963 when the federal experiment came to an end, could the central government begin to build strong national institutions (*ibid.*, 63-65); however this development was interrupted.

In 1969 Gaddafi staged a coup d'etat, and in 1977 he launched his *Green Book* ideology. It reflected a profound distrust of political and bureaucratic institutions, which he depicted as obstacles to people's direct participation in political decision-making and the implementation of policies (*ibid.*, 96). According to Vandewalle (*ibid.*, 102),

*the Green Book's central tenet is that ordinary citizens can directly manage the bureaucratic and administrative institutions that shape their lives, and devise their own solutions to economic and social problems. Hence the Green Book contains the essential idea of statelessness, and of people managing their own affairs without state institutions.*

To implement his grandiose visions, Gaddafi created People's Committees, replacing the regular state apparatus. The regime's relentless persecution of critics installed a great sense of fear amongst the general population in particular for parallel organisations, such as the Revolutionary Committees. Gaddafi's own charisma and his informal, non-institutionalised style of leadership "fitted perfectly with the kind of personalized politics that developed within the *Jamahiriyya*" (ibid., 125) (see Chapter 4 for more on the concept of *Jamahiriyya*). While Gaddafi severely and brutally punished certain persons and groups, he always awarded favours to select groups and tribes.

Meanwhile Gaddafi, in contrast to his principle of statelessness, brought all aspects of the economy under state control. Much of his *Green Book* ideology reflected a socialist ideology, modelled after the Arab Socialism Nasser had introduced in Egypt. The state dominated all manufacturing, agriculture, foreign and domestic retail trade, banking, insurance, as well as major services (ibid., 190). In all sectors, new bureaucracies were created, in which the connection between productivity and income was often very thin. We may assume that Libya's big government had all the weaknesses characteristic of other centralised socialist bureaucracies in the Third World at that time: general ineffectiveness, low morale, inefficiencies, patronage, nepotism, and "rampant corruption" (ibid., 164).

For much of the Gaddafi period, failures were attributed to the country's institutions and population, often voiced by Gaddafi himself in public speeches. When in the end this lacked any credibility and the failures of the regime could no longer be ignored, the 2003-2010 period witnessed the beginning of reforms to liberalise the economy, and to roll back some of the regime's failed policies and laws. Committees were established to design new policies, new statutes saw the light, and some noticeable changes raised expectations and hopes for real reform.<sup>13</sup> However, Gaddafi's basic ideology and political style did not change, nor did most of the country's malfunctioning political and administrative system.

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<sup>13</sup> See for examples of such reforms Chs. 5, 8 and 9.

In the state apparatus inherited by the present government, many officials have jobs as “sinecures,” they get a salary without having to do much – or sometimes any – work. Officials, who are professionally dysfunctional, have routinely retained their jobs and enjoyed both legal and socio-political protection, much to the dismay of a minority of dedicated, development-oriented officials. The new government, in an effort to clean the system, disclosed that many officials were found to have more than one job. Many names appeared on two, three or four payrolls of public organisations. When PM Zeidan promoted a new national ID card to the public, he disclosed that one person was even found to have a hundred jobs – and salaries.<sup>14</sup>

The existing disconnect between productivity and income is also manifest on the macro-level. Libya has a rentier economy, where budgets are covered by oil revenues, irrespective of performance in other sectors of the economy. Many ordinary Libyans feel entitled to their “fair share” of the country’s oil wealth, i.e. to an income, or two, provided by the state. For some government officials this works as a secure economic basis, to which they can add income from other sources. Obviously, efforts to reform such aspects of the civil service, meet the resistance of vested interests, and might weaken the silent support the government gets from its own public servants.

A recent phenomenon which may also affect morale in the bureaucracy, is the vetting mechanism to remove “Gaddafi loyalists.” Although there are widely different responses to this throughout the whole state apparatus, many fear replacement, which contributes to a sense of uncertainty.

### 2.3.4 Libyan society: socio-political identities, cleavages and conflicts

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For decades personalism, clientelism, and transactionalism have been dominant features of the social and politico-administrative structure throughout the MENA region (Eickelman 1989, 2002). The proverbially strong tribes, clans, and families in the Arab Middle East have always been a countervailing force to the state and to its efforts to establish strong state institutions. What then are the most important socio-cultural markers in Libyan society?

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14 “Prime Minister calls for understanding, promises explanation of Budget,” Sami Zaptia. *Libya Herald* 5 June 2013, <http://tinyurl.com/sjpgl-019>, accessed on 28 June 2013.



Libyans identify each other usually by their tribe,<sup>15</sup> their town (of origin), their region,<sup>16</sup> or their identity as belonging to the majority of Arabs or ethnic non-Arab minorities (cf. Obeidi 2001). From these social markers people derive much of their identity, “social capital,” and status. In contrast, being a migrant worker – from Egypt, Tunisia, Sub-Sahara Africa, and Asia – usually brings a low socio-economic status.

Certain tribes are associated with certain towns and regions, or with ethnic minorities. Over time, due to migration and urbanisation, tribal bonds have loosened in parts of the country. In contrast, for many in the east and south their tribe still plays a key role in the settlement of conflicts, both between individuals, families, as well as larger scale political conflict (see Annex II and III). Between particular tribes or towns there still are old, deeply seated differences, which flare up occasionally.

In today’s Libya, the following political markers matter: having been revolutionary fighters (*thumar*)<sup>17</sup> or related to them, or not; still being member of a particular revolutionary “brigade,” or not; having clearly been against Gaddafi’s regime during the uprising, or not; being a victim seriously affected by the Gaddafi-regime, or not; having been an active supporter of Gaddafi and his policies during a particular period, or not. Three other socio-political markers may also be important: having recently returned from abroad (“double passports”) or having stayed behind and endured Gaddafi’s rule in Libya; being an active member, supporter or associate of a political party or grouping, or not; and being linked to a particular foreign country, or not.

The abovementioned identity markers make people feel part of groups and communities, which form the present fabric of Libyan society. Below a shared Libyan identity we find a patchwork of identities and cleavages, resulting from the complex combinations of multiple social and political identity markers. In practice, such divisions have often stood in the way of the neutrality of the bureaucracy, and of equality between citizens before the law.

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15 The role of tribe as a unit of social organisation is allegedly strongest in the east and parts of the south, as compared to Tripolitania (see Annex III).

16 The three regions, which were united in 1951 to create the State of Libya are the west, (also called Tripolitania), the east (called *Barqa* in Arabic, or Cyrenaeca), and the south (usually called *Fezzan*).

17 Revolutionaries killed during the uprising are usually referred to as “martyrs.”

### 2.3.5 Legal system: dysfunctional and contested parts

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Laws in the new democratic Libya have been enacted, first by the NTC and presently the GNC. Whereas both parliaments promulgated many laws to regulate the political transition, the main body of legislation enacted during Gaddafi's regime is still in place. Some of those laws, issued to implement "The Leader's Third Universalist Theory," laid down in his *Green Book*, are seen as the root cause of injustices and conflict. A prime example is Law 4/1978 on the reform of property and housing (see Chapter 8). Many Gaddafi-era laws are seen as detrimental to a modern market economy.<sup>18</sup> The business community has voiced serious complaints about the old-style, socialist legislation as an obstacle to their business,<sup>19</sup> and recently the governor of the central bank has denounced old legislation as hindrances to both domestic and foreign investment. Other Gaddafi-era laws have been criticised for other reasons, for example an important article of Marriage Law 10/1984 for contradicting the Sharia, and therefore being unconstitutional (see Chapter 4); or the Criminal Procedure Code, which according to a case study on criminal defence lawyers in this report, does not comply with international human rights standards of "due process" (see Chapter 6).

It will be a major challenge for the new Libyan state to review the whole body of laws, and to reach a near consensus on which parts should be weeded out, and which parts should be maintained, or improved.

Libya's judicial system itself is often criticised; important parts have not yet been operational again since the revolution, especially within criminal justice, and in certain parts of the country. Certain sections of the judiciary have been accused of collaborating with the Gaddafi regime, especially judges who served in the people's courts (ICG 2013, 3). Others have denied such allegations.

Some judges have been assassinated – most recently a prominent judge in Derna in mid-June 2013.<sup>20</sup> Prosecutors have received threats, and some

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18 "Old financial laws curtailing progress in the New Libya," Umar Khan. *Libya Herald* 23 June 2013, <http://tinyurl.com/sjpgl-020>, accessed on 28 June 2013.

19 "Row at Libyan Businessmen's Council forum," Sami Zaptia. *Libya Herald* 16 January 2013, <http://tinyurl.com/sjpgl-021>, accessed on 28 June 2013. A businessman was quoted as saying: "we were expecting some new announcements. Some new policies or some new reforms of the existing business laws. How long must we wait for progress? I am not surprised that the business community is getting frustrated. We are still forced to operate under the old socialist laws which are holding us back and time is passing. How long must we wait?"

20 "Derna judge murdered outside courthouse," Ahmed Elumami. *Libya Herald* 16 June 2013, <http://tinyurl.com/sjpgl-024>, accessed on 28 June 2013.

have been kidnapped. As previously said, police and military officers have been assassinated, especially in Benghazi (see 2.3.1). This has served as a warning to other policemen, who consequently cannot easily confront the militias and other armed groups. Since the criminal justice system relies completely on the police for arresting suspects and enforcing judicial decisions, this has frustrated the investigation and adjudication of major crimes. For minor crimes the lower criminal courts are to some extent operational. Family courts, for example in Tripoli and Benghazi, function again as usual (see Chapter 7), though there are reports of occasional violence related to adjudication of family disputes.<sup>21</sup> It is unclear, though, whether and how this relates to the general causes of insecurity.

### 2.3.6 Demand for federalism; decentralisation not going well

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Historically, there has always been a great distance between the three regions that now constitute Libya. When Libya was established as an independent state in 1951, it became a kingdom and, unsurprisingly, a federation. The formal end of Libya's federal system in 1963 has not prevented the continuation of federalist thinking, notably in the Benghazi region. The fear of being outnumbered and discriminated against by Tripolitarians, in parliament and government, has not disappeared. This has been manifested since the 17<sup>th</sup> February Revolution through a number of well-publicised federalist gatherings, mainly in Benghazi, issuing declarations of "independence."

The same argument has also emerged in conflicts about the composition and election of the Constitutional Assembly, which is to draft Libya's new democratic constitution. On 13 March 2012, Article 30 of the Constitutional Declaration, which had served as the country's interim constitution since 3 August 2011, was amended. One of the provisions of this amendment provided that the GNC, which was soon to be elected, would choose a Constituent Assembly from non-members; this body was to be composed of 60 members "along the lines of the 60-member commission that was formed to prepare the constitution of the independence of Libya in the year 1951."<sup>22</sup> Indeed, during the genesis of the Libyan state over 60 years ago, the Constitutional Assembly consisted of 20 delegates from

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21 "Misrata lawyer attacked." *Libya Herald* 6 June 2013, <http://tinyurl.com/sjpgl-025>, accessed on 29 June 2013.

22 Constitutional Amendment No. 1-2012, Amending The Text of Article 30 of the Constitutional Declaration (unofficial translation), <http://tinyurl.com/sjpgl-026>, accessed on 4 July 2013. Draft Constitutional Charter For the Transitional Stage (original text), <http://tinyurl.com/sjpgl-027>, accessed on 4 July 2013.

the western, 20 from the eastern, and 20 from the southern region of the country.

In Tripoli the word “federalism” mainly gives rise to resistance. The Zeidan government has spoken out in favour of a strong central government but recently agreed to the transfer of several important state institutions to Benghazi, including the National Oil Corporation, Libyan Airlines, Libya Company for Insurance and the Internal Investment Company.<sup>23</sup> These transfers are meant to increase job opportunities and the economic development of Benghazi and the eastern region, and hence reduce the support for federalism.

Unfortunately, Libya has not yet developed an effective decentralisation policy enabling local and regional governments to establish democratic and responsive institutions, and to speed up socio-economic development and to improve services. Several elected members of local councils have stepped down out of frustration with the lack of real responsibilities, decision-making power and resources.<sup>24</sup> Much enthusiasm for the new Libya has waned since local administrators and citizens found that everything still has to be decided by central government institutions, with their cumbersome procedures and tardy administrative practices designed during the decades of Gaddafi’s rule.

### 2.3.7 Libya between anxieties and hopes

It is appropriate to end this section with a long citation of a well-informed observer and actor. On 18 June 2013 Mr Tarek Mitri, Special Representative of the UN Secretary-General and Head of the United Nations Support Mission in Libya, sent a briefing to the Security Council,<sup>25</sup> stating that,

*The risks in Libya should not be underestimated, and by the same token, the opportunities should not be overlooked. Judging by the speed with which last year’s elections to the General National Congress took place so soon after the*

23 “Federalists celebrate return of NOC to Benghazi,” Ahmed Ruhayem. *Libya Herald* 7 June 2013, <http://tinyurl.com/sjpgl-028>, accessed on 28 June 2013.

24 “TLC Deputy Chairman Resigns in Protest over PM Remarks,” Umar Khan. *Libya Herald* 26 May 2013. <http://tinyurl.com/sjpgl-029>, accessed on 28 June 2013; “President of Benghazi Local Council resigns over ‘unworkable’ conditions; aims fire at Tripoli,” Hadi Fornaji. *Libya Herald* 16 August 2012. <http://tinyurl.com/sjpgl-030>, accessed on 28 June 2013. “Benghazi local election results announced— woman candidate wins most votes UPDATE,” George Grant. *Libya Herald* 21 May 2012, <http://tinyurl.com/sjpgl-031>, accessed on 4 July 2013; “Only female member of Benghazi Local Council resigns, citing obstructionism, incompetence,” Maka Ellawati. *Libya Herald* 20 November 2012, <http://tinyurl.com/sjpgl-032>, accessed on 4 July 2013.

25 “Briefing to the Security Council by Special Representative of the Secretary-General and Head of UNSMIL, Tarek Mitri, 18 June 2013,” <http://tinyurl.com/sjpgl-033>, accessed on 2 July 2013.

*cessation of hostilities, we would be forgiven if we thought that the road to democracy was as simple as it appeared. As important as these elections may have been in ushering in the beginnings of a new political process and the building of legitimate state institutions, the Libyan people will continue to endure for the foreseeable future the heavy legacy bequeathed to them over decades of brutal rule. Managing the transition is bound therefore to be difficult.*

*Mr. President, (...) The mood in Libya today may have changed since I last briefed the Council in March. Despite the gravity of some of the security and political developments that have taken place over the course of the last three months, Libyans have not lost confidence. Many of them remain unwavering in asserting the principles that underpinned their Revolution, and their desire to build a modern and democratic state, based on the separation of powers, respect for human rights and the rule of law.*

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## 2.4 The Many Challenges of Justice

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The AJDIL research project has in its first nine months recorded many different demands for justice. Justice is not an area about which there is immediate consensus in Libya, as there are many different views of what constitute major injustices, what are the proper standards for justice, who are entitled to be the legitimate guardians of justice, what remedies will suffice to satisfy the justice-seekers, and, last but not least, what and who should come first.

The first group of injustices date back to the Gaddafi period (1969-2011), and have now provoked demands on the new State of Libya for compensation. To begin with, we can distinguish several categories of political victims of Gaddafi's repressive rule (see Chapter 9 and 10). Then, there is the strong and widespread desire to see those responsible for the Gaddafi-era atrocities and oppression be brought to justice. Based on our observations, it is most doubtful whether a transfer of Gaddafi's son Saif al-Islam or his Chief of Intelligence Sanusi to the International Criminal Court in The Hague would be understood and accepted as just by the majority of the Libyan people. Also, many now want to see the leading functionaries on whose work the regime actually rested, ousted from their positions and permanently excluded from the public sphere. There are other types of injustices and demands inherited from the old regime. There is a huge justice problem, partly of a financial-economic nature, concerning the tens of

thousands of claims from former owners of property, dispossessed by Law 4/1978 (see Chapter 8). Should the government have to restore their property to them, or pay them compensation, and if so, should this reflect the spectacular rise of real estate prices over the last 40 years? Another perceived collective injustice, more of a macro-political nature, is the neglect of the eastern region, which has called for a thorough redistribution of the state's resources.

The second group of injustices were committed during the 2011 uprising and its 2012-13 aftermath, partly by Gaddafi's troops and supporters but increasingly also by revolutionaries, or in their name. Numerous assassinations, kidnappings, assaults, cases of torture and bomb attacks have been committed. Until today militias have kept thousands of real and perceived Gaddafi supporters in their illegal prison facilities. Then there are displaced communities who cannot safely return to their homes, such as the Tawerghans. There are women who fell victim to rape by soldiers from either side. Another injustice is felt by those who were removed from their position but felt that they did nothing wrong.

The third group of injustices needing to be addressed are "ordinary" family disputes regarding divorce or inheritance, "ordinary" labour disputes, "ordinary" commercial disputes, "ordinary" crimes like assault, theft and robbery, committed by individuals or gangs, "ordinary" corruption by state functionaries, fatal traffic accidents caused by careless driving, "ordinary" discrimination and maltreatment of religious and ethnic minorities, of women, and of migrants, and so forth. They are not directly related to Gaddafi's regime, or to the revolution – although on closer observation there are often connections.

Surveying the manifold demands for justice, from different groups and individuals, many of them backed by strong political, social and armed pressure, one cannot but conclude that the new State of Libya faces a gigantic task. To fulfil this task of providing justice to all, it needs both a working system of laws, legal institutions and processes, and a society which allows itself to be guided and protected by that system.

In 2013-14, a Constitutional Assembly is expected to be formed and make major decisions about the make-up of that system, including the degree of autonomy for the regions, the organisation of the judiciary, human rights, the course of transitional justice, and the position of Sharia in the legal system. Processes of political decision-making are to be supported by national dialogue and discussions about all these issues, facilitated by civil society organisations and a free press. At the same time, state and society need a

working justice system. This requires active performance of the judiciary, a build-up of the police and the administration in general, and their protection against the type of violent attacks, which have kept the criminal justice system in limbo.

There is little doubt that the legal system as a whole – laws, institutions, and processes – needs reforms in many of its components. This is a challenge for the mid and long-term and obviously the government has not been able to address this in full. After the successful overthrow of Gaddafi's regime, the government now finds itself caught between several fires. On the one hand there is the pressure from without: all these conflicting demands for justice, dissatisfied and impatient groups and individuals, dangerous armed groups, an unruly parliament, and a critically watching international community; on the other hand, the government must deal with its own often ineffective bureaucracy and an old body of regulations. For a systematic diagnostic analysis of the legal system and how it operates in social reality, the Libyan government could muster the support of those who are trained to understand and analyse Libya's law and society, notably its most qualified academics (see Chapter 12).

Given the challenging and complex environment of Libya's justice issues, one may wonder what contribution the international community could possibly make to foster "justice and the rule of law." During Libya's first years as an independent state, in the 1950s, the UN played a major and positive role. After Libya's liberation in 2011, the UN has again provided generous assistance through the United Nations Support Mission In Libya (UNSMIL). During 2012 and 2013 many more international actors have come on stage, reflecting the rapid growth of international attention for justice and the rule of law. In the next chapter we will look at how some of these actors have regarded Libya's justice problems.

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# 3 Perspectives on Justice in Libya: A Review of International Reports

*Jessica Carlisle*

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## 3.1 Foreign Assistance in the Justice Sector: Fulsome Commitments

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### 3.1.1 Unanimous support for the rule of law in Libya

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On 11 March 2011, the president of the European Council, Herman Van Rompuy, invited EU heads of state to an emergency summit on Libya and other countries in North Africa that would send out a “clear and positive message to the whole region, expressing full support to the transition towards more democracy, pluralism and social inclusion.”<sup>1</sup> This statement of a commitment to change in Libya was to have tangible consequences. In the aftermath of the revolution, during a speech in the UN on 20 September 2011, Van Rompuy stressed that it was now “time for justice, rule of law and human rights and for reconciliation.”<sup>2</sup> This declaration of intent heralded a €10 million development programme sponsored by the EU, together with a multiplicity of subsequent international interventions in Libya, many of them focusing on the legal system or justice sector.

The United Nations Support Mission in Libya (UNSMIL) has the most comprehensive mandate in the country given its role to “[s]upport Libyan efforts in promoting the rule of law and monitoring and protecting human

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1 <http://tinyurl.com/sjpgl-034>

2 Address by President Herman Van Rompuy at the High-Level Meeting on Libya, 20/9/11, <http://tinyurl.com/sjpgl-035>, accessed on 20 June 2013. The EU has since backed up this commitment with €30 million supporting programmes promoting reconciliation, elections and respect for human rights; public administrative capacity; media and civil society and promoting the involvement of women in public life; migration; and health and education.



rights.”<sup>3</sup> UNSMIL is specifically tasked with “assisting the Libyan authorities to reform and build transparent and accountable justice and correctional systems, supporting the development and implementation of a comprehensive transitional justice strategy, and providing assistance towards national reconciliation, support to ensure the proper treatment of detainees and the demobilization of any children remaining associated with revolutionary brigades.”

UNSMIL and the EU, however, are not alone in their involvement in reforming and investing in Libya’s legal systems and justice sector. The Paris conference of 12 February 2013 on Support to Libya in the Areas of Security, Justice, and the Rule of Law, was attended by ministers and representatives from Denmark, France, Germany, Italy, Malta, Qatar, Spain, Turkey, the UAE, the UK and the USA as well as the African Union, the Arab Maghreb Union, the EU, the Gulf Cooperation Council, the Arab League and the UN.<sup>4</sup> The official communiqué following the conference reaffirmed international commitment “to build a modern democratic and accountable state solidly anchored in a rule of law system, institutions and practices, and in respect for human rights.”<sup>5</sup>

The scale of the challenge facing Libya was laid out in the Libyan government’s own assessment at this conference that it included the tasks of “i) building judicial capacity, competence, independence, coordination and training; ii) undertaking a review of relevant legislation; iii) building prosecutorial and criminal investigative capacity; iv) reforming the Libyan prison system; vi) strengthening the coordination between the military and civilian justice systems; vii) promoting transitional justice through truth-seeking processes and national reconciliation, in addition to locating and identifying missing persons; and viii) building state institutions that respect and promote human rights, as well as a vibrant civil society.”<sup>6</sup> In response, the Paris conference pledged to support the Libyan government’s implementation of both a National Security Development Plan and a Justice and Rule of Law Development Plan.

However, over the course of the year, the government has faced successive difficulties in developing and implementing its policies.<sup>7</sup> On 20 June 2013, the UN Security Council issued a press release in which they acknowl-

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3 Resolution 2040 (2012), Paragraph 6:b.

4 <http://tinyurl.com/sjpgl-036>, accessed on 2 July 2013.

5 International Ministerial Conference on Support to Libya in the Areas of Security, Justice and the Rule of Law – Communiqué Paris 12 February 2013, <http://tinyurl.com/sjpgl-037>.

6 <http://tinyurl.com/sjpgl-038>

7 Personal communication, UNSMIL official, November 2012

edged the achievements of the Libyan government under Prime Minister Zeidan, and called for the continual engagement of the international community in order to encourage reconciliation, support the constitutional process, strengthen institutions, prosecute infringements of human rights, and ensure the rule of law.<sup>8</sup>

### 3.1.2 International needs assessment reports

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International and foreign commitments to the development of Libya's legal system and the justice sector are, consequently, definitively stated. Libya is currently host to a large number of UN-to-government, government-to-government, government-to-domestic NGO, and INGO-to-domestic NGO programmes.<sup>9</sup> For most programmes, it can be assumed, assessments have been made of Libya's needs and summarised in a report. Some of these reports are in the public sphere. These open source reports provide a window into the landscape of donor interventions in Libya. In this chapter we briefly discuss some of these reports, evaluate how they have depicted the legal system and justice sector in Libya, and what problems they identify and solutions they propose.

Justice and the rule of law are emphasised as being of the utmost importance to Libya in a number of open source reports produced by UNSMIL, several INGOs, and hired consultants. Yet, we have not found many English language reports specifically addressing the need of institutions in the justice sector. We found no international reports focusing intensively on the Ministry of Justice; the legislature, or the working of the courts; the institutions for management and training of the judiciary; or lawyers. The Bardet et al. report includes the only lengthy discussion of the police that we found.<sup>10</sup>

Three broad categories of open source reports that do specifically focus on the needs of Libya's legal system and justice sector form the basis of this chapter. The first type of report has been issued by international organisations involved in the provision of international and foreign assistance: UNSMIL's *Transitional Justice: The Foundation for a New Libya*, the Briefings from the Special Representative/Head of the United

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8 Security Council Press Statement on Libya, 20 June 2013.

9 See Chapter 12 about international rule of law assistance programmes.

10 The Bardet et al. report discusses the police, but notes that its "structure is very difficult to be defined due to limited information on the structure, with no data available about personal strengths, job descriptions and defined functions," Bardet et al. (2012, 25).

Nations Support Mission in Libya to the UN Security Council, *Formulation of a Security Sector and Rule of Law Programme for Libya: Final Report*<sup>11</sup> and – the International Legal Assistance Consortium’s (ILAC) *Rule of Law Assessment Report: Libya 2013*. The second tranche of reports have been produced by international and foreign think tanks with a particular interest in Libya: Chatham House’s *Libya: Establishing the Rule of Law* (2012) and the International Crisis Group’s (ICG) *Trial By Error: Justice in Post-Qadhafi Libya* (2013). Finally, reports of the proceedings during workshops held with Libyan legal professionals are included: the Euro-Mediterranean Human Rights Network’s *The Reform of Judiciaries in the Wake of the Arab Spring* (2012) and ILAC/ABA’s 2012 workshop on *Libya Rule of Law Priorities*.<sup>12</sup>

### 3.1.3 Background and scope of the reports

The authors of these reports vary from consultants employed to conduct research during short visits to Libya, to teams with long-term commitments to work with the Libyan government and its institutions, through to think tanks with one member of staff permanently posted in Libya. The content of the subsequent reports reflects this difference in approach, with reports published by organisations with a base in Libya providing more fine-grained evaluations of the issues and the perspectives of the actors involved.

The most comprehensive assessments of issues effecting access to justice in Libya, informed by regular contact with Libyan government and a presence since the end of the revolution, are provided by UNSMIL. Their obligation to regularly report to the Security Council results in the production of reports that combine an account of the work that they have been doing in Libya, with a rolling needs assessment for the judicial sector and legal system. In contrast, Bardet et al.’s and ILAC’s reports have been written by teams of consultants, selected for their expertise. Mission teams spent one and a half to three weeks in Libya. Their research has involved

11 This publication was commissioned by the EU. Its contents are explicitly stated as being the sole responsibility of the consultancy AETS and as in no way to be taken as reflecting the views of the European Union. It was produced on behalf of AETS by Celine Bardet (Team Leader), Pieter du Plessis (Security Sector Reform Expert), and Aly Mokhtar (Legal Expert). It should be noted that while this report is not accessible in the public sphere, and thus not an open source report in the sense of the other reports discussed in this chapter, it has been cited extensively by another identification mission, namely in the ILAC 2013 Report, and therefore seems to be part of donor discussions, in a broad sense, on rule of law in Libya. We obtained permission to cite the report from its first author, C. Bardet.

12 There are other INGOs operating in Libya, notably No Peace Without Justice, running programmes relevant to the legal system and justice sector. However, they have not produced needs assessments of this type that can be accessed in the public sphere. For the same reason this chapter does not pay attention to rule of law assistance provided by states from the MENA region, such as Turkey, Jordan, Tunisia, Morocco, and Arab Gulf States.

a combination of interviewing well-placed informants and some visits to institutions.

The reports written by Chatham House and the International Crisis Group also diverge quite considerably from one another in their methodology. While Chatham House is a forum bringing together experts from various backgrounds to discuss major policy issues under Chatham House rules, the International Crisis Group has a permanent researcher on the ground with considerable experience with research on Libya. The Chatham House report subsequently offers broad policy recommendations, while the ICG report interweaves the voices of numerous Libyans and the researcher's personal observations of relevant events through its analysis.

Finally, the reports summarising the proceedings during workshops involving Libyan judges and lawyers provide both an insight into the opinions of sections of the legal profession and a suggestion of the issues that the workshops' foreign organisers consider important to put on the agenda.

The bases on which each of these reports make their assessments are largely dependent on their methodology, specifically the length of time researchers have had to gather information and who their informants have been. For example, a distinction can be made between short-term consultants' abilities to access and explain the attitudes of the general public, or of influential non-state actors, such as tribal leaders or the militias, and those of authors who have a permanent presence in Libya. In addition, the extent to which Bardet et al.'s and ILAC's delegations were able to freely travel around Libya and the extent to which they were able to access statistical information and legal documents has been identified as a constraint (Bardet et al. 2012, 5; ILAC 2012, 14). Bardet et al. consequently state that their initial findings may have to be revised during the implementation phase of their recommendations (Bardet et al. 2012, 5).

Each of these reports consequently present a particular view of the legal system, given the significant diversity in their methodological approaches, the differences in their level of engagement with the "field" under study, and their spread across the year and a half following the end of the revolution. However, Libya's judicial sector is perceived in all of these reports as weak, ill-equipped and challenged by rival centres of power in the aftermath of Gaddafi's regime. Taken in total, the reports identify three major areas of concern in striving to achieve the rule of law in Libya: security; transitional justice and vetting; and, the independence and the efficiency of

the judiciary, which is linked to the ICC's claim to jurisdiction over the trials of Saif al-Islam and Abdullah Sanusi.<sup>13</sup>

The detail included in analyses of the issues of security, transitional justice, and the independence and competence of the judiciary is further influenced by the apparent aim of each report. While the UNSMIL reports record the organisation's ongoing work in the field, the Bardet et al. report foregrounds EU-sponsored programmes and projects to strengthen the legal system. Other reports are orientated towards making policy recommendations to international donors and the Libyan government, namely those by ILAC, Chatham House and the ICG. Finally, reports of workshops held with Libyan legal professionals seem to feed into international understanding of Libya's legal system and the aspirations of members of its justice sector.

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## 3.2. The Shadow of Security Sector Concerns

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### 3.2.1 Security as the main concern

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As would be anticipated, security is the main issue of concern throughout all of these reports. This issue is a shared point of reference for the Libyan general public, the Libyan government and the international community (see Chapter 2, Annex III).

These evaluations of the security situation illustrate their analyses with international newsworthy events such as the death of the US ambassador Christopher Stephens and his colleagues in Benghazi. However, they emphasise that the tragic deaths of some foreigners, although powerfully symbolic, are symptomatic of widespread insecurity caused by the proliferation of militia throughout the period of transitional government. In the immediate aftermath of the revolution, there was disagreement about the best course that should be adopted by the NTC to deal with armed revolutionary groups, but little appetite for direct confrontation through a demand that they disband. However, in hindsight, estimations of post-revolutionary government policy towards "militia" are that an opportunity to assert the new state's monopoly of violence was lost after the revolution.

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13 The reports also highlight that the rights of women, migrants, children and other vulnerable groups should be made a priority in ensuring the rule of law. In addition, several focus to a lesser extent on the constitutional process and the role of the Sharia. See also Chapter 4 of this report.

Moreover, reports note that the make-up of the militias has evolved. Armed groups are now understood to include revolutionary fighters, youth in search of employment, criminals released from prison and then armed by the former regime, and opportunists engaged in land grabs or personal vendettas. In February 2013, UNSMIL's report to the Security Council predicted that military intervention would increase instability.<sup>14</sup> While some militias' Islamist convictions are sometimes mentioned, there is little conviction that Gaddafi loyalists are operating through militias to destabilise the new Libya.

Reports, by and large, do not record the views of members of militias or of the general population, beyond noting that there is general support for the disbandment or reining in of armed groups.<sup>15</sup> The focus is, instead, on the needs of the government in order for it to establish its monopoly on the legitimate use of force. Reports note that the NTC's policy of attempting to integrate revolutionary brigades into working alongside state security forces by paying them a wage may have been counter-productive in the medium term since it has supported some militias' positions (Bardet et al. 2012, 14). Progress on persuading militia members to sign up for the police or army has been slow, and their integration into state security forces has not always been smooth.

The state's consequent inability to assert its monopoly over the use of violence is, therefore, understood as having political, social and economic implications for Libya, with an affiliated impact on the operation of the justice sector.

### 3.2.2 "Militia justice"

The militias are identified in these reports as undermining the rule of law not only by challenging the state's monopoly on violence, but also by establishing and running alternative justice systems that are biased, unregulated and punitive. Many militias have been seen as supporting forms of "victor's" justice, which subjects communities perceived as loyal to the former regime to persecution, and under which militia members are unconstrained by the law (ICG 2013, i, 28; ILAC 2013, 34-35). The presence of armed groups is also identified as a means by which tribal or other political con-

14 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 21/2/13, <http://tinyurl.com/sjpgl-039>, accessed on 7 July 2013.

15 Bardet et al. (2012, 23). The notable exception is the recent report by the International Crisis Group (ICG 2012, 28-30) which includes the views of both militia members and the general public. ILAC (2012, 7) also note that there remains widespread support for revolutionary brigades amongst the general public.

flicts are being settled outside of the control and regulation of the state. These conflicts have occurred both between tribes and between state-backed militias and tribal groups.<sup>16</sup>

In November 2011, UNSMIL flagged up concerns about arrests of alleged former regime supporters and interrogation practices involving “ill-treatment and torture” in “make shift detention centres” holding, what it estimated as, 5,000 to 6,000 detainees.<sup>17</sup> In August 2012, UNSMIL reiterated its concern about informal detention and torture, adding that, “Assurances from Libyan officials that incidents of torture or mistreatment would be investigated and perpetrators duly punished have not been translated into effective action.”<sup>18</sup> By February 2013, UNSMIL praised the new government’s determination to improve the security situation by tackling the presence of armed groups outside the legitimate control of the state.<sup>19</sup> However, in April 2013, the ICG described the militia as still running “a parallel judicial system in which independent armed groups assumed state functions, arresting, detaining and kidnapping individuals without judicial oversight or accountability” (ICG 2013, 18). As a consequence, in parts of Libya, notably in the eastern towns of Derna and Al-Bayda, the state legal system only partly functions.

Efforts to convince the militias to take up legitimate roles within the new state of Libya have not only come from the government. The head of UNSMIL stated in his Briefings to the Security Council in June 2013 that in times of political crisis he and his team have “increased engagement with all parties concerned, underlining the need for dialogue as a means of defusing tensions and ensuring respect for the democratic process.”<sup>20</sup> He continued that following initial encouragement from the government, and requests from “revolutionaries of diverse persuasions,” UNSMIL had initiated a series of discussions to facilitate direct talks between the two sides.

16 For example, as outlined in the UNSMIL report of August 2012, on 21 April 2012, fighting broke out in the south-eastern town of Kufra. The Libya Shield brigade, an auxiliary unit of the Libyan army, had been deployed to the area in February to enforce a ceasefire between the Tabu and Zwaya brigades. Further clashes erupted on 9 June between the Libya Shield and Tabu brigades, amid accusations that the former had compromised its neutrality by aligning itself with the Arab Zwaya tribe. This led to demands by the Tabu community for the brigade’s replacement by Libyan army troops. This round of clashes left some 44 people dead and 150 wounded. *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 30/08/12, <http://tinyurl.com/sjpgl-040>, accessed on 7 July 2013.

17 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 22/11/11, <http://tinyurl.com/sjpgl-041>, accessed on 7 July 2013. See also ILAC (2012, 34-35). A higher number of 7,000 to 8,000 was recently mentioned in *Briefing to the Security Council SRSG and Head of UNSMIL, Tarek Mitri - 18 June 2013*, <http://tinyurl.com/sjpgl-042>, accessed on 7 July 2013. See also Bardet et al. (2012, 17).

18 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 30/8/12, <http://tinyurl.com/sjpgl-043>, accessed on 7 July 2013.

19 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 21/2/13, <http://tinyurl.com/sjpgl-044>, accessed on 7 July 2013.

20 *Briefing to the Security Council SRSG and Head of UNSMIL, Tarek Mitri - 18 June 2013*, <http://tinyurl.com/sjpgl-045>, accessed on 7 July 2013.

The risk of not engaging in such dialogue was highlighted in the UNSMIL briefing of June 2013 in reference to events in Benghazi on 8 June, in which the greatest single loss of life occurred in Libya since the revolution. UNSMIL noted that, "What started as a demonstration outside the barracks of a militia, deteriorated into an exchange of fire leaving many dead and wounded, mostly from the demonstrators. Protestors were calling for the Libya Shield brigades, which comprise mainly revolutionary formations under the operational control of the Chief of General Staff of the Libyan Army, to be dismantled, and the army and police to be entrusted the role of exclusive security forces."<sup>21</sup>

### 3.2.3 Inability of the legal system to function

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International assessments of Libya's legal system consequently emphasise that the security situation has a direct impact on the ability of the courts and police to function. In considering how to prevent militia justice that undermines the rule of law, these analyses clearly view security sector reform as fundamental. Reports focus on the effect that the security situation has had on the capacity of the courts and the police to pursue criminal cases, of the public prosecution to oversee detention centres run by militia, and of the courts to process cases against members of the former regime (see Annex III).

However, while all of the reports observe that empowering and equipping the state is essential to ensuring the re-establishment of rule of law overseen and regulated by state legal institutions, both the ICG and ILAC also note that the general public have little trust in the judicial sector (ILAC 2013, 36). This, they argue, is a significant impediment faced by the Ministry of Justice and is recognised as such by the current Minister of Justice, Salah Al-Marghani (ICG 2013, 18, 20, 27).

### 3.2.4 Criminal violence against vulnerable groups

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The reports further highlight a third, related implication of this climate of insecurity and militia justice, in the form of violence perpetuated against vulnerable or minority groups and individuals, by criminal gangs, or in the settling of disputes. Internally displaced persons (IDPs) such as

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21 *Briefing to the Security Council SRSG and Head of UNSMIL, Tarek Mitri* - 18 June 2013, <http://tinyurl.com/sjgpl-046>, accessed on 7 July 2013.



the Tawerghans have been identified as being particularly vulnerable.<sup>22</sup> In addition, the detention of undocumented immigrants – particularly women and children – in unsuitable conditions, the harassment of settled immigrants, and the settling of disputes using arms have been highlighted as concerns by UNSMIL.<sup>23</sup>

The basis to proposed solutions tackling this violence is considered to be an effective, professional police force. These reports do not give much detail about programmes towards this end, but UNSMIL first described its working with the Libyan police force in November 2011 when “urgent needs include[d] adequate provision of basic equipment, training and assistance in integrating some of the revolutionaries into the police.”<sup>24</sup>

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### 3.3 Transitional Justice and Vetting

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#### 3.3.1 The hiatus in transitional justice

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The imperative to address the many injustices both perpetrated by the former regime, and during and since the revolution, has been high on the international agenda since the early days of transitional government. The importance of beginning a process of transitional justice has, subsequently, been a concern of all of these reports.

UNSMIL stated in March 2012 that a genuine break from the former regime would be dependent on “how the authorities [...] address the country’s decades-long legacy of human rights violations, including violations committed during the eight-month conflict.”<sup>25</sup> It added that this process will also have to include human rights abuses committed since the revolution arguing that “the legal process used to determine their fate will either strengthen or undermine the transition’s legitimacy.”<sup>26</sup> The same report urged that, “the government [should] focus on the development and implementation of a comprehensive transitional justice strategy, on the basis of

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22 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 1/3/12, <http://tinyurl.com/sjpgl-047>, accessed on 7 July 2013.

23 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 1/3/12, <http://tinyurl.com/sjpgl-048>, accessed on 7 July 2013.

24 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 22/11/11, <http://tinyurl.com/sjpgl-049>, accessed on 7 July 2013.

25 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 1/3/12, <http://tinyurl.com/sjpgl-050>, accessed on 7 July 2013.

26 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 1/3/12, <http://tinyurl.com/sjpgl-051>, accessed on 7 July 2013.

sound legal frameworks and international standards.” This sentiment was echoed in reports from Chatham House, which emphasised that a reconciliation commission would be “a vital component in the process in dealing with the development of the justice system as a whole” (Chatham House 2012, 15-16).

These hopes, however, have yet to be met. Although the NTC passed Law 17/2012 concerning National Reconciliation and Transitional Justice, the ICG report notes that foreign and domestic legal experts have argued that the law is flawed (ICG 2013, 18). Criticism of this commission was almost immediate. The law’s establishing of a Fact-Finding and Reconciliation Commission to investigate cases of moral, physical or criminal abuse dating from 1969 has been described as lacking “legislative clarity” by ILAC (2013, 8). Meanwhile its powers to award financial reparations to victims or to refer cases to the public prosecution have been criticised by UNSMIL as too limited given a perceived need for “truth telling.”

In fact, it seems that the real work of this commission has yet to begin. Chatham House’s report – which referred incorrectly to the relevant legislation as Law 4 – observed that the commission could, “theoretically,” be useful, but that its operation and remit remained unclear (Chatham House 2012, 15-16).

In early 2012, UNSMIL further commented that, “It is not clear whether the law as currently conceived will allow for a dynamic truth-seeking process” (UNSMIL 2012, 2). Noting that the commission is composed purely of senior judges, UNSMIL stated that their work “appeared” to be a quasi-judicial process, which would not allow for reflection during public hearings, during which victims would be able to air their views. Moreover, UNSMIL contended that legislation – in the form of Law 35/2012 and Law 38/2012 – exempting anyone from prosecution for criminal acts perpetrated in “defence of the revolution” ran counter to transitional justice.<sup>27</sup> At the time, UNSMIL expressed the hope that the soon to be elected General National Congress would review this legislation, a sentiment that was echoed in the Bardet et al. report, which argued that there is a need for “urgent reform” of Law 38 to meet the “basic rule of law standards” (Bardet et al. 2012, 8).

However, although Law 37/2012 outlawing the “glorification” of the former regime was struck out as unconstitutional by the Supreme Court, international expectations in respect of transitional justice as a whole

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27 Law 38/2012 grants amnesty for acts performed by revolutionaries with the goal of promoting or protecting the revolution, while Law 35/2012 gives amnesty for certain violations other than crimes committed by the family members and aides of Gaddafi.

have yet to be met (ILAC 2013, 32). Law 35/2012 on Amnesty concerning Some Crimes and Law 38/2012 concerning Special Procedures concerning the Transitional Period are still in force, and the Fact-Finding and Reconciliation Commission has yet to begin working consistently. In August 2012, UNSMIL stressed that the time was, “ripe to implement an effective strategy to tackle the crimes of the past” and that this should involve “a truth-seeking process that is victim-centred and socially dynamic, led by individuals who are representative of the diverse composition of Libyan society.” UNSMIL’s recommendation was that this process should result in reparations, reconciliation between communities and recommendations for reform.<sup>28</sup> In December 2012, Salah al-Marghani, the current Minister of Justice, responded to these criticisms by submitting a draft Transitional Justice Law, which specified that members of the commission could include sociologists, archivists and psychologists. However, as the ICG observes, this version also failed to explicitly mention whether events during the transitional period would be dealt with by the commission. The ICG found that the likelihood that post-revolutionary injustices would be heard is low in the current climate (ICG 2013, 18).

### 3.3.2 The right to transitional justice: inclusion and exclusion

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The implications of the stalling of the transitional justice process, as evaluated by these reports, is that individual and groups of justice seekers are in danger of finding their claims excluded. ILAC observes that this issue remains “sensitive” (ILAC 2013, 37). UNSMIL has urged the Libyan government to ensure an inclusive process of truth seeking that will include marginalised people, such as the Tawerghans, embedded in a “victim centred approach” (UNSMIL 2012, 3). The ICG has argued that failures to press on with transitional justice may lead to the further entrenchment of militia justice.

Attempts by Minister Al-Marghani to introduce three new laws have been welcomed and described as seeking “to redefine transitional justice and expand the definitions of victims and perpetrators” (ILAC 2013, 33). The draft Law on Transitional Justice would provide for the prosecution of violations against all Libyans perpetrated before July 2012. The then draft Law on Criminalisation of Torture, Enforced Disappearance and Discrimination was meant to quash the right to amnesty for violations committed dur-

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<sup>28</sup> *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 30/8/12, <http://tinyurl.com/sjgpl-052>, accessed on 7 July 2013.

ing and after the 2011 uprising.<sup>29</sup> Finally, the then draft Law regarding Amendment of the Military Penal and Procedures Laws, would abolish the trial of civilians by military courts (see Annex III).<sup>30</sup>

These reports do not enter into discussions about which issues should be explicitly included in the process of transitional justice, such as whether claimants resulting from Law 4/1978 should also be given a voice in truth telling (see Chapter 8). Neither do they offer detailed analyses of what factors have delayed effective transitional justice; the impression they give is that the government finds itself in a position in which it is constantly fire fighting, allowing no solid basis on which to ground the process. Meanwhile, those excluded from current partial moves towards transitional justice are offered little hope of future inclusion in a more comprehensive process.

### 3.3.3 Recriminations and vetting

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International reservations about the politicisation of justice are illustrated by the reports' critiques of legislation establishing vetting procedures (Bardet et al. 2012, 8). While the principle of vetting is understood as an essential aspect of the process of transitional justice, the reports comment that while the broader transitional justice project is stalled, vetting could become a vehicle for punishing suspected loyalists. Chatham House commented that the "isolation' policy risks crippling the functioning of the government as many experienced officials could be excluded from the political system" (Chatham House 2013, 2). ILAC observes that rulings from the Integrity and Patriotism Commission, although subject to judicial appeal and in some cases overturned, are a matter of concern given "the vagueness of the vetting criteria and the level of due process accorded to those subject to scrutiny" (ILAC 2013, 36). The international community has consequently urged restraint and fairness in response to proposed legislation setting up vetting procedures.

The prospect of the pushing through of the Political Isolation Law following pressure from militias was, consequently, a cause of concern to UNSMIL which contended that the draft law contained "an extensive list of criteria" excluding people from holding government office, many of them

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29 The law concerning criminalisation of torture was enacted by the GNC in April 2013. "Libya: The New Law Criminalising Torture: A first step, but more is needed." *OMCT*, 25 April 2013, <http://tinyurl.com/sjpgl-053>, accessed on 5 July 2013.

30 This law was enacted on 18 April 2013 as Law 11/2013 on the Amendment of the Penal Code and Military Procedures, <http://tinyurl.com/sjpgl-054>, accessed on 5 July 2013.

related to their previous political affiliation rather than to their actions while employed by the former regime.<sup>31</sup> The passing of a version of this law in May 2013, following disruptive demonstrations and stand-offs between government and armed brigades, is linked to criticism that legislation should abide by the “international standards that ought to apply to any vetting mechanism.”<sup>32</sup>

The reports subsequently pay considerable attention to the mooted of a vetting law that will specifically apply to the judiciary. Bardet et al. note in their report that “[a]ddressing the problems of accountability and corruption in the judiciary is problematic and always faced by strong opposition from the judicial institutions itself, even if they seek genuine reform. The judicial institutions are concerned about losing the confidence of the public, which is a key issue for the independence of the judiciary” (Bardet et al. 2012, 35). In October 2012, the Supreme Council for the Judiciary presented the GNC with draft legislation on the vetting of judges (ICG 2013, 21). The law made provisions for the dismissing of all judges and public prosecutors, followed by their readmission subject to the approval of a committee including the head of judicial inspections and members of the judiciary who could show “tangible participation in the 17<sup>th</sup> February Revolution” and “are proven to have good ethics.” The committee’s deliberations would not be open to scrutiny, since it would be accountable solely to the GNC, and their decisions could not be appealed. The ICG report noted that the draft law included criteria that are “unquantifiable, such as having sentenced someone to jail ‘unfairly,’ or ‘having issued verdicts to please the regime.’ The law also proposed to exclude those ‘famous for being corrupt’ and former members of the People’s Court or People’s Prosecution” (ICG 2013, 21).

The international reports, subsequently, recommend striking a delicate balance that will produce a “clear, strict, transparent and systemic vetting process” (Bardet et al. 2012, 7), which enables former abettors of the Gaddafi regime to be excluded from holding important office. In particular, the argument in favour of vetting is supported by reminders in both the ILAC and ICG reports that unqualified, politicised “judges” were appointed to work in Gaddafi’s people’s courts and consequently found their way into the regular courts (ICG 2013, 12; ILAC 2013, 22). ILAC adds that debates over judicial vetting are coloured by “uncertainty regarding whether [qualified]

31 *Briefing to the Security Council SRSG and Head of UNSMIL, Tarek Mitri*, 14 March 2013, <http://tinyurl.com/sjpgl-055>, accessed on 7 July 2013. See also ILAC (2013, 37).

32 *Briefing to the Security Council SRSG and Head of UNSMIL, Tarek Mitri*, 14 March 2013, <http://tinyurl.com/sjpgl-056>, accessed on 7 July 2013.

judges volunteered or were forced to serve on Gaddafi-era special courts” (ILAC 2013, 37).

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### 3.4 The Independence and Efficiency of the Judicial Sector

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#### 3.4.1 Structural adjustments to encourage independence

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The competence and independence of the judiciary is regarded as key in all of the reports. Support for the judiciary and lawyers is consequently central to assessments of the legal system’s needs. Reports note that this is in line with the priorities of both the Ministry of Justice and the Supreme Council for the Judiciary. Most mention the renaming and restructuring of the Supreme Judicial Council as indicative of a move towards promoting judicial independence, and some note the forming in May 2012 of a national committee for judicial development under the council (see below).<sup>33</sup> However, detailed mapping of the judicial sector has presented a challenge to teams of international consultants given the parameters in which they work. The two full assessments of the Libyan legal system have been conducted by eight experts over a period of nine days by ILAC, and for three weeks by Bardet et al. The ILAC report presents a coherent description of the judicial system, but is not well-placed to provide a nuanced analysis of its operation.<sup>34</sup> Bardet et al.’s depiction of the court system and judicial sector is thorough, although sometimes difficult for a non-specialist to follow. The analysis, however, is not very detailed.

In November 2011, UNSMIL noted that priorities to encourage the full functioning of the judiciary included legislation to encourage independence of both the judiciary and the legal profession “and specialized training for judges and prosecutors in order to deal with an array of post-conflict litigation, including on issues relating to transitional justice.”<sup>35</sup> In March 2012, it further noted that, “United Nations agencies would be prepared to provide support in developing the overall judicial infrastructure, including the training of judges, prosecutors and corrections officers, stra-

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33 See *Report of the Secretary-General on the United Nations Support Mission in Libya* UN 30/8/12, <http://tinyurl.com/sjpgl-057>, accessed on 7 July 2013.

34 For example, although ILAC (2013, 27, 29) mentions that the NTC established the National Committee for the Development of the Judiciary, it does not refer to the contents of the committee’s findings, which were published in the same month as ILAC’s mission to Libya in January 2013.

35 *Report of the Secretary-General on the United Nations Support Mission in Libya* UN 22/11/11, <http://tinyurl.com/sjpgl-058>, accessed on 7 July 2013.

tegic planning and budgeting capacity, case management systems and legal aid services to the population.”<sup>36</sup>

In June 2012, the president of the Supreme Council for the Judiciary commissioned the new 17-member National Committee for the Development of the Judiciary to make recommendations on restructuring the judiciary, its administration and legislative framework. This committee is composed of judges, prosecutors, lawyers and academics. UNSMIL agreed to provide technical and advisory support to this committee.<sup>37</sup> In January the committee presented its report. The ICG later noted that in its findings the committee “acknowledged the need to restore public trust in the judiciary and recommended reforming the judicial system to guarantee its ‘independence, integrity and impartiality,’ and that it also underscored that the purpose of the reforms should be to ‘build, not destroy; reform and not damage’” (ICG 2013, 16-17). The ICG concluded from this reading that the reforms likely to be proposed by the committee will be moderate (ICG 2013, 16).

### 3.4.2 Perceptions of judicial independence and how to increase it

Three basic understandings of judicial independence are presented in the reports, which are often combined in these analyses. Firstly, independence is emphasised as entailing a move away from legal practices sponsored by the Gaddafi regime, including the exclusion of some personnel (see 3.3.3). Independence is therefore considered a thorny issue in international assessments of the legal system given that the judicial sector is both “the object of transitional reform efforts, and the vehicle for the transitional prosecution of past abuses” (ILAC 2013, 7). Secondly, independence suggests a “ban [on] the Ministry of Justice from exercising any influence over the judiciary” under the new government (Bardet et al. 2012, 34). In addition, questions of the judiciary’s independence are intertwined with the extent to which the security situation constrains the judicial system’s capacity to operate, and the effectiveness and fairness of any future vetting system.

The Euro-Mediterranean Human Rights Network notes that Articles 32 and 33 of NTC’s interim Constitutional Declaration of 3 August 2011 explicitly provide for the independence of the judiciary, prohibit the establishment of

36 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL, 1/3/12 <http://tinyurl.com/sjpgl-059>, accessed on 7 July 2013.

37 *Report of the Secretary-General on the United Nations Support Mission in Libya*, UNSMIL 30/8/12 <http://tinyurl.com/sjpgl-060>, accessed on 7 July 2013.

exceptional courts, prohibit laws from granting immunity to administrative decrees against judicial control, and guarantee the right to litigation (Euro-Mediterranean Human Rights Network 2012, 81).

An additional move to separate the judiciary from the executive is welcomed by many reports (Bardet et al. 2012, 21). Law 4/2011 altered the composition of the membership of the body responsible for the management of the judiciary, which had previously been headed by the Minister of Justice, and renamed it the Supreme Council for the Judiciary (see 5.3 for more recent developments since these reports were authored). The membership of this council formerly included the President of the Supreme Court, the Prosecutor General, the Deputy Minister of Justice and all of the heads of departments within the Ministry of Justice, including that of the people's lawyers (see Chapter 5). Under the revised legislation, the Council's members were restricted to the President of the Supreme Court, the Prosecutor General and the presidents of the seven courts of appeal.

The ICG records some critics' doubts that this sufficiently guarantees judicial independence, on the grounds that the council remains financially dependent on the Ministry of Justice and that the President of the Supreme Court and the Prosecutor General are both appointed by the legislature (ICG 2013, 16). In contrast, ILAC finds that, "[j]udicial independence has been substantially enhanced through the removal of the Ministry of Justice from the High Judicial Council [...] judges, prosecutors, and private lawyers now appear to share a clear commitment to revitalizing the rule of law in Libya."<sup>38</sup> Bardet et al. suggest that judicial independence from the Ministry of Justice should be enshrined in the powers awarded to the Supreme Council for the Judiciary in the future constitution (Bardet et al. 2012, 34).

However, ILAC adds that the current security circumstances in which the judiciary operates mitigate their full independence, since they are liable to threats and violence following their acquittal of suspected loyalists.<sup>39</sup> Public prosecutors have also reported being subjected to reprisals after pursuing charges against members of militia (ILAC 2013, 47).

38 ILAC (2013, 28). Further on in the report (ILAC 2013, 41), however, it is noted that many observers note that further steps should be taken to separate the MoJ from the judiciary.

39 ILAC (2013, 36) notes that although courts in eastern Libya were most constrained in this respect throughout 2012, judges in the west had also been targeted after such acquittals.



### 3.4.3 Strengthening judicial capacity

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Assessments of judicial competence in both the ILAC and Bardet et al. reports are perception-based, with both sets of consultants interviewing legal professionals about their work and status. Neither delegation appear to have closely observed court sessions, or to have consulted case files. Moreover, apart from a dismissal of the work of people's lawyers (see below), there is not much exploration of the competencies of private lawyers, in whom a great deal of confidence is invested in both the Bardet et al. and ILAC reports.<sup>40</sup>

The assumption in each of these reports is that the existing judicial sector requires considerable restructuring and input, since “creating and training new *ad hoc* judicial, prosecutorial and defence institutions would be far more time-consuming than enhancing the capacity of existing structures” (ILAC 2013, 8). The Bardet et al. report lists the needs for numerous capacity building projects which would provide support to the courts in managing “a large backlog of cases” (Bardet et al. 2012, 8), including police, effective budgeting, increasing salaries, providing training, and bettering the administration (Bardet et al. 2012, 33).

Given the focus of these reports on what reforms would benefit the judicial sector, both sketch out the basic structure of Libya's legal system (see our own description in Annex 1). ILAC's outline of the main legal institutions is precise and clear, and includes reference to how some habitual legal practice deviates from what is laid down in the Criminal Procedural Code. As an example, the public prosecution is described as not always exercising oversight over the whole criminal process, which it should do by law.<sup>41</sup> However, other relevant legal practices are not recorded, such as the tendency towards lengthy detention or the difficulty defence lawyers experience in accessing the public prosecution's case against their client (see Chapter 6).

One example of how the sources of a report can partially inform its conclusions is found in the conclusions of an ILAC/ABA workshop on the needs of Libya's judicial sector that was held in 2012. Most of the Libyan participants to this event appear to have been lawyers in private practice, with the addition of two judges. During a session on legal aid the report records

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40 ILAC (2013, 64), however, comment that the process for admitting lawyers to the Libyan Bar Association “is less than rigorous.”

41 ILAC (2013, 46). See Chapter 6 for a nuanced account of the public prosecutor's involvement in the early investigations of many criminal cases.

that discussants agreed that the people’s lawyers “are generally ineffective, and that either they should be (1) retrained; (2) dismissed with some avenue to other employment; or (3) be used in administrative law cases” (ILAC/ABA 2012, 5). The recommendation of the subsequent working group was to abolish the institution of the people’s lawyers altogether, and to pass legislation enabling private lawyers to represent legal aid cases with financial support from the government. The absence of a representative from the people’s lawyers meant that while they were spoken about, they were not able to add to the discussions (see Chapter 5).

ILAC concludes that the creation of the people’s lawyers in 1981 meant that “the legal profession was forced into illegality until 1990” (ILAC 2013, 23) and further marginalises them by noting that the Libyan judiciary is “understood as including both judges and prosecutors with the latter eligible to become judges after reaching the requisite level of seniority” (ILAC 2013, 41) (see 5.3 for a description of Libya’s “judicial institutions” and the transfer of people’s lawyers to the judiciary). The Bardet et al. report reflects this evaluation of the people’s lawyers by describing it as “a sort of parking lot for judges and lawyers seen as less than compliant with the imperatives of the state,” although private lawyers cannot be forced to become people’s lawyers since 1989 (Bardet et al. 2012, 29).

The ILAC report recognises that courts’ efficiency is also dependent on the administrative staff, who currently receive no ongoing training, and the adequate resourcing of law faculties (ILAC 2013, 59, 69-72). ILAC had more difficulty adopting a position regarding allegations about corruption against the public prosecution, which were made by private lawyers but denied by the prosecutors themselves.<sup>42</sup>

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### 3.5 Concluding Remarks

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This evaluation of international and foreign reports on Libya’s legal system and justice sector is not exhaustive. It has focused on assessments of needs within the justice sector and consequently excludes valuable analyses concerning related subjects, such as those contained in UNHCR’s monthly reports. This chapter has also not considered many of the recommendations that have been made by international and foreign donors towards

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42 ILAC (2013, 48). See also ICG (2013, 15) on the difficulty of assessing the prevalence of corruption in legal processes.

capacity building and reform in the justice sector; hence it has made no reference to documents of UNDP, the bilateral programmes of the UK, USA, Italy, France, Germany, Denmark and The Netherlands, and the many activities in the justice sector provided by other countries in the Middle East and North Africa, such as Turkey, Jordan, Egypt, Morocco, and the Gulf States. The conclusions that are drawn here about evaluations of Libya's justice needs are subsequently restricted to a reading of the English language reports that can be readily accessed in the public sphere.

What all of these reports demonstrate is unanimous support for security, rule of law, and justice in Libya from the international community, which – as assembled in Paris in February 2013 – includes the UN-family (UNSMIL, UNDP, UNHCR, UNIDOC), the EU and its member states, MENA-regional organisations and member states, USA, and international and foreign NGOs, think-tanks and consortia such as ICG, ABA, ILAC, et al. The three overriding concerns for these international and foreign partners regarding the operation of the legal system and judicial sector are, as identified in the reports, security, transitional justice, and judicial reform. Three additional concerns also mentioned are those of the constitutional process, which has yet to begin in earnest; the role of Sharia in future legislation (see Chapter 4); and the position of minorities and vulnerable groups.

The scope and content of these analyses indicate the enormous task entailed in describing and evaluating a legal system that is complex, unique and – moreover – facing seismic change. All of these reports emphasise that Libya's judicial sector suffered from neglect and political interference under the former regime, and furthermore that the post-revolutionary period has brought its own serious challenges, both internal – such as the extent to which the judiciary should be purged of tarnished judges, – and external – including threats against the safety of court staff and the police. Moreover, as the increasing emphasis on the instability in the security situation shows, the circumstances impacting on the work of the legal system in Libya are fluid.

The second observation that can be made about the challenges facing the authors of these reports is the extent to which many of them are reliant on the perceptions of their interlocutors. When reports are authored at a distance from Libya, or following a short visit to the field, they are inevitably based on interviews and readings of formal documentation, such as legislation and policy documents. While these are valuable resources to include in assessments of the working of the judicial system (and access to justice) in Libya, they may mask social and legal realities. Moreover, while the reports' emphases on security and the problem of residual distrust of

the judiciary are reflected in our AJIDIL research, our own findings suggest that a reliance on a select group of informants' perceptions might result in partial evaluations of issues on which there is less general consent. An example of this is the way in which the people's lawyers are represented in several reports: a perspective that is clearly rooted in the views of some private lawyers without reference to investigation of other points of view or research into the work of this institution.

The conclusion that can be drawn from this reading of these reports, therefore, is that their findings are significantly influenced by the proximity of authors to the subjects of their study and the amount of the time they have in the field. Inevitably, it is the reports by UNSMIL or ICG, written on the basis of permanent presence of Arabic speaking experts in Libya, that demonstrate the most nuanced understanding of the legal system and justice sector in the complicated political and social context of contemporary Libya. However, given their limited resources and specific remits, even these reports' authors are not able to give full assessments of all of the significant issues, or to provide systematic evaluations of the justice sectors' achievements and needs.

The international community, therefore, would do well to make use of additional resources that will connect it to expert legal knowledge as well as to the opinion of "the street." We would suggest that qualified Libyan academics are well placed to make these connections through conducting legal and social science research, publishing their findings and analyses and participating in internationally and domestically organised workshops. These contributions could furnish both domestic and international organisations and decision-makers with information gathered from close observation of legal institutions and practices over the medium to long-term.

In the following chapters we will present some of this work in the hope of playing a part in ongoing discussions in support of justice in Libya.

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# 4 Libya's Supreme Court and the Position of Sharia, in the Perspective of Constitutional and Legal History

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*Suliman Ibrahim*

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## 4.1 Polygamy and the Wife's Consent: the Supreme Court 2013 Ruling

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A Libyan couple, Mustafa and Maha, has been married for 22 years. One day, Maha, a housewife aged 46, found out that, Mustafa, her husband, a government employee aged 46, married another woman on 19 July 2011 without taking her consent. However, Libyan law, to be precise Article 13 of Law 10/1984 on Marriage and Divorce, requires such consent.<sup>1</sup>

So Maha filed a lawsuit with the District Court of Tripoli, demanding the annulment of the second marriage, as Article 13 stipulated when the required consent was not obtained. In response, Mustafa, advised by his lawyer, argued that this Article 13 was actually unconstitutional. It required indeed the consent of the first wife, but, as Mustafa argued, this consent was hardly possible to get. Thus, it made polygamy, at least in most cases, unattainable. This made the article inconsistent with Sharia that knows no such restrictions.

Since Sharia is, according to Article 1 of the Constitutional Declaration that was issued by the interim National Transitional Council (NTC) on 3 August 2011, "the principal source of legislation" in Libya, the inconsistency of Article 13 with Sharia made this provision inconsistent with the Constitution as well.

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1 This article was amended by Law 9/1994. See section 4.4 below.

According to Libyan law, jurisdiction over unconstitutionality claims lays with the Supreme Court. Therefore, on 5 January 2012 the case before the District Court was suspended, and on 26 March 2012 Mustafa filed his claim before the Supreme Court. On 5 February 2013 the court issued its judgement fully upholding his argument, and declaring Article 13 unconstitutional. The court's justification given was only half page long and simply reiterated what Mustafa said.

This judgement raises several important questions. The first regards the functioning of the Libyan judiciary as such. Recently, public discussions have been initiated about whether the judiciary has maintained its independence during Gaddafi's rule. Observers have wondered to which extent Libya's present judiciary is ready and able to be the main guardian of the rule of law in the new, democratic Libya. The way it deals with the important and sensitive problem of Sharia-based law may give us at least an indication. Therefore this chapter will explore what we can learn from the *Maha vs. Mustafa* case about the role of the Supreme Court as a constitutional court, notably when it comes to the incorporation of Sharia in Libya's national legal system. I will henceforth refer to the case as the court's 2013 polygamy ruling.

Before discussing the role of the Supreme Court, I should note that this case also raises three major questions concerning the relationship between Sharia and national law. The first is about what Sharia means, and which of the conflicting opinions on this should be adopted. The second question is about who are the legal decision makers in the Libyan legal system of which Sharia is the principal source of legislation: who decides on what rules constitute Sharia and thus should be incorporated: religious scholars, officials of the state, or judges trained in national law rather than Sharia? The third question is about the impact that constitutionalising Sharia might have on future and existing legislation: will it be necessary for the former to be explicitly based on specific Sharia-based norms, or will it be sufficient to not contradict it? And as for existing legislation, will it have to be reviewed to ensure that it is Sharia-compatible, and if so, by whom: by the national legislature, by the judiciary, or by another body?

These three questions have been of the utmost importance to the Libyan legal system. This was true in the early 1970s when Libya was one of the first countries in the Muslim world to reattempt to incorporate Sharia in the national law, and so had to decide on the questions at hand. It is equally true today, in the aftermath of the 17<sup>th</sup> February Revolution, as Sharia is

expected to be recognised in the upcoming constitution. While there seems to emerge a general consensus on that, opinions differ as to the details and effects of such recognition.

Whereas these three questions are complex and cannot be exhaustively answered in the context of this chapter, I intend to touch upon them as part of my analysis of the role of the Supreme Court.

The 2013 polygamy ruling offers a useful point of departure for this chapter since the court exercised in this case its power of constitutional review. This is the means by which the court transcends its traditional role in a civil law country as what Montesquieu called the “mouth of the law”. In this role the judge is supposed to apply the law as it is, and to abstain from modifying it, or ending it altogether. Constitutional review is a far-reaching tool to influence the legal system. It makes the judiciary’s role also politically sensitive, and so, through assessing how the court has utilised it, we could assess how independent it has been in its interpretation and application of the law.

In order to evaluate how the Supreme Court has applied its power of constitutional review to Sharia-related issues, a historical approach is appropriate. I intend to review and discuss the answers given throughout Libya’s legal history, at times by the Supreme Court itself. In doing so, I will focus on the legal history of independent Libya (from 1951 onwards), though reference will be made to earlier times when necessary. A distinction will be made between three eras: the Kingdom’s (1951-1969), Gaddafi’s (1969-2011), and the aftermath of the 17<sup>th</sup> February Revolution (2011-up to now). Gaddafi’s era will be subdivided into two periods, before and after 2 March 1977.

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## 4.2 The Kingdom’s Era (1951-69)

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A review of the Kingdom’s era shows that while the Supreme Court enjoyed considerable autonomy, its role with regard to Sharia-related issues was to a large extent limited.

Despite its weak position in the 1951 Constitution, the Supreme Court enjoyed, in practice, great autonomy. The weak position was a result of leaving important issues such as the size of the court to non-constitutional law that would be enacted by the legislature. In fact, most of the structure of the judiciary was left to non-constitutional law. This weakness was also represented in the unbalanced relationship between the judiciary in general and the Supreme Court in particular on one hand, and the executive

and legislative powers on the other. While the executive power, the King and Council of Ministers, appointed the judges of the Supreme Court and was vested with the power of granting pardons, the latter had no authority of checks in return. The same was true of the relationship between the legislative authority, Parliament, consisting of Senate and House of Representatives, and the judicial authority. The former was given the power to determine the structure of the latter, while the judiciary enjoyed no constitutional power to review legislation (Democracy Reporting International 2012, 3; Murzat 1969, 533-534). This constitutionally weak position would leave the judiciary, as some writers pointed out, under the mercy of the executive and legislative authorities (Murzat 1969, 533-534).

However, being given such a weak position in the Constitution did not prevent the Supreme Court from receiving considerable powers through non-constitutional law and autonomously practising it. On 10 October 1953, the Law of the Federal Supreme Court was issued, endowing it with the power of constitutional review.<sup>2</sup>

The court did not wait very long to practice this power. In 1954 a dispute arose in the then federal state of Libya between the governor of Tripolitania province and the head of its legislative council. The conflict concerned the legal position of the former and how responsible he was to the council led by the latter. The dispute was solved in favour of the legislative council; however, the governor resorted to the King and made him issue a Royal Decree on 19 January 1954 disbanding the legislative council. On 31 April 1954, the head of the legislative council, Ali Mohammed al-Deeb, filed a lawsuit before the Federal Supreme Court against the Royal Decree for being unconstitutional. Remarkably, the Court accepted his argument and declared the King's Decree unconstitutional and null and void.<sup>3</sup> This judgement sparked a political storm and demonstrations against the court were held. The fact that the president of the Supreme Court and two other judges who participated in making the judgement were Egyptian was used by the opponents to present the judgement as an act of interference by the Egyptian government in Libya's internal affairs, and this contributed to the negative reception of the judgement. However, in the end, the King had to issue a new Royal Decree that satisfied requirements of constitutionality (for more details, see Yusuf 2008, 155-158). Clearly, this judgement was a testimony to the Supreme Court's independence.

2 *Al-Jaridat Al-Rasmiyat I-il Mamlakat Al-Libiyat Al-Mutahidat* [Official Gazette of the United Kingdom of Libya] No. 10. 18/11/1953.

3 Tain distori. No. 1. Sanit qadiya 1. *Qada Al-Mahkimat Al-Aliya al-Itihadiya*. Part 1, 14.



During this period, however, the court's constitutional review did not extend to Sharia-related issues, because Sharia was simply not constitutionally recognised. Indeed, Islam was proclaimed "the religion of the state"; but this was understood as a mere declaration of the state identity, and was never taken to attribute Sharia any role as a standard for legislation. This is quite interesting given that King Idris was at the same time the Head of the Sanusi Order, which was a very prominent religious movement. As a result, it was constitutionally possible to bring in new legislation on any matter regardless of it being Sharia-compatible; non-Sharia compatible legislation could not be challenged for being unconstitutional. However, the fact that Sharia was not constitutionalised during the Kingdom era does not mean that Sharia was completely ignored in law making and enforcement.

In non-constitutional law, an old Ottoman and Italian distinction between personal and non-personal status affairs was maintained.<sup>4</sup> While Sharia was the sole governing law of the personal status affairs of Muslims, it played a much more limited role with regard to other matters.<sup>5</sup> In correspondence with this distinction, there were variations in the answers given to the questions on what Sharia meant and who could decide on that. In terms of personal status affairs, Sharia was interpreted according to the Maliki school of thought, which was predominant in Libya. Since there could be different opinions in this school concerning the matter at hand, it was stipulated that the judge shall apply the *rajaḥ* opinion, i.e., the stronger in terms of evidence regardless of how many scholars adopt it.<sup>6</sup> So, judges applying Sharia did not have much room left to decide to which rulings they could apply Sharia, but yet they were required to be specialist in Sharia. This was due to the fact that dealing with personal status matters was assigned to *shari* courts wherein judges were trained in Islamic jurisprudence (Qasem 1954, 187).

About the question of polygamy, since the supremacy of Sharia was not constitutionally recognised even with regard to personal status affairs, it was theoretically possible to restrict it or disallow it altogether. Still, this was practically unattainable, because the prevailing opinion was that per-

4 Personal status affairs are those related to familial relationships such as "marriage, divorce, succession, guardianship, wills and the very important topic of waqfs or religious endowments." See Qasem (1954, 135). This distinction was inherited from the Italian occupation that preferred to leave the former to the indigenous people's law, which happened to be Sharia. See Gazzini (2012, 4-5).

5 Personal status affairs of non-Muslim Libyans were regulated by their own religious rulings. As to Article 192 of the 1951 Constitution, "the State shall guarantee respect for the systems of personal status of non-Muslims." See also Qasem (1954, 136) who mentions the existence of the Rabbinical courts.

6 Article 17, Law 29/1962 on the Judicial System. *Al-Jaridat Al-Rasmiyat* [Official Gazette]. Adad khaas [special issue] No. 12. 11/12/1962.

sonal status matters should be left to Sharia understood in the manner previously described. Two examples could be cited to support this claim. The first is the failure to merge *shari* and civil courts. This merger was concluded in 1954; however, in 1958 and as a result of public dissent, the old division was restored.<sup>7</sup> The second example is the legislature's abstention from regulating personal status affairs; until the end of the Kingdom's era, they were completely left to Sharia.<sup>8</sup>

The case was different with regard to non-personal status matters as they were for the most part regulated by legislation derived from European, or indirectly from Egyptian, codes. Still, envisaging that there could be a case of a lacuna, the legislature stated in the Civil Code that the judge shall resort to the "principles of Sharia" to rule in such case.<sup>9</sup> As to Abd al-Razzaq al-Sanhuri, the Egyptian drafter of the Libyan Civil Code, the term "principles" meant Sharia rules that do not differ from one school of thought to another, such as "The greater of two harms should be averted by assumption of the lesser," and "the lesser of two evils is committed in order to avoid the greater." More detailed Sharia principles and rules that are subject to variation were excluded. He also added another qualification to the interpretation of Sharia: the principles chosen must not contradict the foundational principles of the Civil Code. This would result in, as he put it, "...the Code's losing its character and legal harmony".<sup>10</sup> In theory, the Civil Code placed Sharia in a position higher than that it previously enjoyed; yet, as some writers plausibly argued, the referral to Sharia in such a way limited to a large extent "its practical usefulness," leaving the phrase "the principles of Sharia are almost as nebulous as 'natural justice'."<sup>11</sup>

In light of that, one could conclude that during the 1950s and 1960s Sharia's role in Libya's legal system was limited, and so was the role of the Supreme Court with regard to it. Indeed, Sharia was the governing law of personal status affairs; however, it was, first, confined to "Muslim" personal status matters, and, secondly, placed in a secondary position with regard to other matters. In the latter case, it was narrowly interpreted. In both cases, the interpretation was given by the legislator and the judge's role was lim-

7 Metz (1989, 120). In an interview with al-Muhami Journal, Mohammed Khaleel al-Qumati, the first Libyan president of the Supreme Court (3/11/1954) said that one of the reasons behind abolishing the merger of *shari* and civil courts was the refusal of *shari* judges to join civil circuits as they decide on cases not as to what Allah has ordered, *tagdi bi ghair ma anzal Allah*. Al-Muhami (1990, 2).

8 Layish (2005, ix). According to him, "Until Qadhdhafi's coup in 1969, no codification of *shari* law pertaining to personal status, succession and *waqf* had been attempted."

9 Article 2 of the Civil Code.

10 Al-Sanhuri (1997, 61). As cited by Bechor (2007, 83).

11 Anderson (1954, 31-32). As cited by Bechor (2007, 83).

ited in applying it. As said, Sharia was not constitutionally recognised as a source of legislation even with regard to personal status. Still, this was about to change with Gaddafi's coup d'état in 1969.

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### 4.3 Gaddafi's first period (1969-1977)

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On 1 September 1969, Colonel Gaddafi seized power in Libya, and an acceleration in incorporating Sharia into law followed. This rapid expansion, however, was not accompanied with strengthening the Supreme Court's role concerning Sharia-related issues. On the contrary, the court's role in reviewing legislation in general became subject to restrictions, sometimes self-imposed; this resulted in significant limitations that could be seen as indicators of lack of judicial independence. This featured in Gaddafi's rule throughout his time. Yet, a distinction should be drawn between two periods: 1 September 1969 – 2 March 1977 and 2 March 1977 – 17 February 2011. As will be shortly explained, the role of the Supreme Court differed significantly between the two periods.

During the first period, Sharia was given a much wider incorporation in national law than in the Kingdom's era, but the role of the Supreme Court did not increase accordingly. This broad incorporation of Sharia took place despite the fact that its supremacy was not recognised in the Constitutional Declaration of Gaddafi's Revolutionary Command Council (RCC), issued on 11 December 1969. The declaration just stated that Islam was the religion of the state, which in itself would not bring about any change. So it seemed that Sharia would have no impact on legislation inherited from the Kingdom's era that contained plain contradictions with Sharia.<sup>12</sup>

However, on 28 October 1971 the RCC issued a decree stating that Sharia was a principal source of legislation. As such, it would have to be considered when enacting any new legislation. Existing legislation had to be reviewed to ensure that it was Sharia-compatible. The decree made clear that it concerned "the basic principles" of Sharia rather than Sharia as a whole. The decree established committees to review existing legislation and guidelines were issued for these committees to know these "principles." The committees were required, firstly, to review the legislation in force and identify any contradictions to Sharia's conclusive determinations and

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<sup>12</sup> These contradictions were targeted by Sharia-compatible laws introduced by the RCC as will shortly be explained.

basic rules, and, secondly, provide suggestions as to how such contradictions would be eliminated. In doing so, they were given the liberty to look for solutions in different schools of thought, not just the Maliki one, and choose the most feasible solution as required by public interest. They were also asked to consider any local custom recognised by the Maliki school.<sup>13</sup>

The way of issuing and drafting the decree provides an answer to the question on who decides what Sharia is. It was the RCC that issued the decree and detailed the interpretation that would be followed in understanding Sharia. It was also the RCC that had asserted the legislative power, and so was responsible for enacting new laws based on the basic principles of Sharia, and other laws amending or abrogating existing laws inconsistent with these principles.

Since personal status affairs had already been subjected to Sharia, the committees' role was confined to reviewing legislation on other matters. The impact of their work was very significant. Upon their suggestions, the RCC enacted a new law (74/1972) to ban *riba al-nasia* (usury) in civil and commercial transactions between natural persons. Also, it introduced new laws on *hadd* offences: theft and robbery (Law 148/1972), adultery (Law 70/1973), unfounded accusations of fornication (Law 52/1974), and, finally, the consumption of alcoholic beverages (Law 89/1974) (Peters 2005, 153, 154).

In comparison, the changes concerning personal status affairs were limited. These affairs continued to be regulated by the Maliki school albeit in 1976 the opinion implemented became the *mashour* (popular or mainstream opinion) rather than the *rajah*, regardless of the strength of its evidence.<sup>14</sup> Interestingly, according to the Supreme Court, judges were required to identify the scholars adopting the opinion claimed to be *mashour*, so that such a claim could be verified (Duwi 1989, 161). This led to considering the Maliki school books to be a formal source of law, as some writers rightly pointed out.

Meanwhile, a noticeable change was introduced with regard to the *shari* courts dealing with these affairs. They were merged into civil courts by virtue of Law 87/1973. Unlike the 1954 attempt, which had been a failure, this one succeeded, thanks to the fact that since both personal and non-personal status affairs became, to a large extent, regulated by Sharia-

13 The decree as well as its explanatory note were published in *Majalat Al-Diraasaat Al-Qanuniyat* [journal issued by the University of Benghazi (Garyounis back then) Law Faculty]. Adad khaas [special issue], part 7, year 8. 1978: 21-30.

14 Article 159, Law 51/1976 concerning the Judicial System. *Majalat Al-Mahkimat Al-Aliya* [Journal of the Supreme Court] 2 (13). January 1977: 307.

compatible laws, there was no longer the need to preserve the separation between courts dealing with either.

Apart from this change, the legislature maintained its abstention from regulating personal status matters. Law 176/1972 on Protecting Some Rights of Women in Marriage, Divorce for Prejudice, and Consensual Divorce is a clear example of that.<sup>15</sup> The only important changes it introduced were those concerning the marriage age and the guardian's authority to enforce marriage. While it stipulated the maturity of the spouses as a condition for marriage – 16 for females and 18 for males –, it eliminated the right of the guardian to impose his word onto a marriage (Mayer 1978, 47). Admittedly, the law in its 1973 amendment addressed the issue of polygamy. Still, this was only incidental and was limited to marriages of Libyans to foreigners: while a man who married a Libyan wife was allowed to marry a second one, he whose wife was a foreign national was not.<sup>16</sup>

As such, Sharia occupied a prominent position in the first period of Gaddafi's rule: personal status affairs were mainly governed by Sharia, while other affairs were regulated by laws that were to a considerable extent derived from, or at least made compatible with, it. But, one cannot help but notice that the Supreme Court was assigned no role in the process of incorporating Sharia. The supremacy of Sharia was not recognised in the 1969 Constitutional Declaration, and so, the Supreme Court was deprived of any role in reviewing legislation, based on its constitutional review jurisdiction, to ensure that it was Sharia-compatible. The task was completely left to the legislature, i.e. to the RCC that issued legislation in accordance with the recommendations of the committees previously mentioned. If, for some reason, the legislature preferred not to abolish legislation contradicting Sharia, there was nothing the Supreme Court could do about it. This is not a mere hypothetical question, as Law 74/1972 to ban *riba al-nasia* (usury) in civil and commercial transactions was limited to natural persons; if the transaction involved a legal entity, e.g., a bank, charging interest was permissible. Prohibiting interest in such cases was left, as the Supreme Court put it, to “an upcoming round”;<sup>17</sup> however, this round never came.

The limitation of the Supreme Court's role in the Sharia incorporation process could find its justification in the suspicion that the RCC seemed to

15 Official Gazette no. 61 of 23 December 1972.

16 According to Mayer (1978, 47), “The purpose of the law is to curb the disruption and dissension that was occasioned by the introduction of foreign women in the Libyan family after the Revolutionary Command Council modified the former legal restrictions on Libyans marrying foreigners to facilitate marriages with other Arabs.

17 Tain madani [Civil Appeal] No 3. Year 36. 2/12/1992. *Majalat Al-Mahkimat Al-Aliya* [Journal of the Supreme Court] 25 (1 & 2): 145.

view this court with. This resulted in an inclination to “cut the nails of the Supreme Court,” as some writers put it (Aboudah 1986, 49). The first indication of this happened just a few months after the 1969 coup in the form of Article 18 of the Constitutional Declaration that disallowed challenging measures, *tadabir*, taken by the RCC, whether they were constitutional declarations, laws, decrees, or decisions. This was understood by some jurists as ending the Supreme Court’s power of constitutional review (Arim 1971 as quoted in Aboudah 1986, 47). However, others rightly argued that the RCC measures that were given immunity from any judicial checks were described in the same article as being necessary to protect the revolution and the political system established thereof; therefore, the constitutional review, albeit largely restricted, was still applicable to other measures. Still, the Supreme Court was reminded in Article 27 of the declaration that the aim behind issuing judgements was to protect the principles of society as well as the rights, dignity, and freedom of individuals. This reminder was a lesson that the judges of the Supreme Court, as some writers said, learned well, as their subsequent published judgements show (Aboudah 1986, 49).

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#### 4.4 Gaddafi’s second period (1977–2011)

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Concerning the second period of Gaddafi’s rule, 1977–2011, the trend continued to be, in principle, the same. That is, while the process of incorporation of Sharia into the legal system further increased, the role of the Supreme Court declined, not only in this process, but also in reviewing legislation in general. The beginning of this phase was on 2 March 1977, when Gaddafi issued his Declaration on the Establishment of the Authority of the People (DEAP). This declaration outlined the general constitutional framework for Libya: changing the country to *Jamahiriyya*, i.e. the state of the masses wherein the people’s direct democracy was the basis of the political system, and “the authority, all authority, is in the hands of the people alone,” basing its ideological stance on a form of Islamic socialism, and, more importantly, stating that the Qur’an was the law of Libyan society. Seemingly, this declaration placed Sharia in a high position, and, being of constitutional nature, opened the door to the Supreme Court to play a role in the incorporation of Sharia via its constitutional review. Yet, this was part of the application of Gaddafi’s Third Universal Theory, and should be read as such.

This theory was Gaddafi’s alternative to both capitalist and communist ideologies. In its political expression, it provided for the organisational framework within which direct democracy was to be exercised. At the

most basic level of this framework laid Basic People's Congresses in which every citizen who attained the age of eighteen was a member. Amongst the powers granted to these congresses was that of law making; any congress member could propose a law and when discussed and adopted by his own congress, and subsequently by other congresses, it would be made into law (Otman and Karlberg 2007, 64). In this system, Gaddafi was supposed to have no authority apart from that enjoyed by any other congress member. However, in practice, Gaddafi continued to play a significant role in the process of law making, e.g., setting the agenda for Basic People's Congresses' annual meetings, and giving instructions about how these agendas could be discussed. Later, on 11 March 1990, the Bill of Revolutionary Legitimacy was issued, and, in Article 12 it was clearly stated that any directives issued by the Leader of the Revolution, i.e. Gaddafi, were mandatory and had to be enforced.<sup>18</sup>

The impact of this on the questions previously raised should be clear when considering that Gaddafi had a particular understanding of Sharia, which he transformed into laws claimed to be Sharia-based. As some writers plausibly argued, while he, at first, used classical Islamic jurisprudence to legitimise his political measures, he, later, reformulated Islamic precepts to fit his own ideology as contained in the Third Universal Theory (Takeyh 1998, 161-62). One significant feature of this approach is the denial of the authority of Sunnah, i.e., the Prophet Mohammed's sayings and acts, which is considered to be the second source of Sharia, after the Qur'an (Takeyh 1998, 161-62; Martin and Tayob 2004, 557). Another feature was his call for opening the gates of *ijtihad*: free reasoning on Sharia (Martin and Tayob 2004, 557). He gave himself the liberty to practice it, and this led him to denying that the hajj was one of the essential pillars of Islam (Martin and Tayob 2004, 530).

Gaddafi's interpretation of Islam affected Sharia incorporation in Libya considerably. Various examples could be cited to show how, but due to space limitations only two will be mentioned. The first is the announcement of the DEAP that the Qur'an, rather than Sharia as a whole, comprised the law of Libyan society. In spite of the attempt of some Libyan jurists to interpret this statement as encompassing both the Qur'an and the Sunnah (Aboudah 2003, 38, 41), there are reasons to believe that it was only the Qur'an that was meant. The first reason is that the apparent meaning when

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18 Al-Mgaryaf, Mohammed Yousef, extracts from *Libya from the Constitutional Legitimacy to Revolutionary Legitimacy*, <http://tinyurl.com/sjpgl-061>, accessed on 16/01/2011.



considered along with Gaddafi's well-known denial of the authority of the Sunnah leaves no doubt that Sharia as a source of law was restricted to the Qur'an.<sup>19</sup> The second reason is the fact that so-called Basic and Municipal Congresses that discussed the draft declaration recommended that both the Qur'an and the Sunnah should be the source of legislation. This was reported by Gaddafi himself in his speech on 22 March 1977. Nevertheless, when this recommendation was discussed by the General People's Congress (GPC), in its meeting in Sabha on 28 February 1977, Gaddafi insisted on the exclusion of Sunnah, even though the GPC was inclined to adopt the recommendation made by the Basic and Municipal Congresses (Yusuf 2008, 432).

The second example of the impact of Gaddafi's interpretation on Sharia incorporation concerns polygamy. Whereas it was not a common practice in Libya, Gaddafi spoke out against it (Pargeter 2010, 11). Law 10/1984 on Marriage and Divorce and the Effects thereof,<sup>20</sup> allowed polygamy only with prior judicial permission, and on the grounds of the spouse's financial and physical ability. Later, a further restriction was added. According to Law 22/1991, it became necessary to get the written, formal (*rasmi*) consent of the first wife. Failure to meet any of the conditions would result in the annulment of the second marriage along with all of its effects. Subsequently, Law 9/1994 required the husband to present "serious reasons" for wanting to marry a second wife, and to get either the first wife's written consent before the competent court, or the court's permission after a successful lawsuit by the husband against her. If these conditions were not met, the second marriage would be void, and the first wife could initiate a lawsuit, orally or in writing, asking for the divorce of the second wife.<sup>21</sup> This trend of increasing women's rights seemed to come to a halt, however, in 1998 when the General People's Congress enacted a law removing the requirement of the first wife's consent. Gaddafi then, in a move plausibly described as being of "dubious legality," annulled that 1998 law (Hinz 2002, 23, as cited by Welchman 2007, 31). This is undoubtedly a very clear indication of his role in law making: both in form and content. Hence, it can be concluded that the interpretation and incorporation of Sharia were largely affected by Gaddafi's own understanding. While he limited Sharia to the Qur'an, he practiced free *ijtihad* to determine what Sharia in this interpretation meant.

19 Supporting this opinion, see: Tekaari (1982, 35). See also Muhsan (n.d., 417).

20 Official Gazette no. 16 of 3 June 1984, 640.

21 For a detailed analysis of Article 13 and its amendments, see Zubiya (2009, 224-233).



Still, one would think that there could have been room for the Supreme Court to lessen the effect of Gaddafi's personal interpretation on the legal system through its constitutional review. For example, it could have relied, in terms of Sharia incorporation, on the argument made by some Libyan jurists to interpret the term Qur'an in the DEAP as encompassing the Qur'an and the Sunnah. This could have significantly extended the scope of its constitutional review, and enable it to participate effectively in Sharia incorporation.

However, a study of the history of the court during this second period of Gaddafi's rule shows that it was either unable or unwilling to play such a role. It was first unable to review the constitutionality of any legislation because as from 1982 it was basically deprived of this jurisdiction for the consecutive 12 years. This came a result of Law 6/1982 on the Reregulation of the Supreme Court that while detailing the jurisdiction of the court, it did not mention constitutional review.<sup>22</sup> This omission was interpreted as depriving the court of such power. The justification given for that was that constitutional review of legislation would contradict the DEAP. This declaration did not only abolish the 1969 Constitutional Declaration, it also, according to some writers, abolished the concept of constitution altogether. It stated in Article 3 that the authority was in the hands of the people alone, and this meant that "the people practise the authority by themselves, and hold all its legislative, executive, and judicial manifestations" (Al-Maskuni 1979, 107; see also Aboudah 1986, 56). This came to be known as the principle of the concentration of powers, as opposed to the principle of separating them. Since constitutional review by a court assumed a separation of powers, it became baseless in Libya after the announcement of the DEAP (Aboudah 1986, 49).

Yet, other lawyers argued that there was a more plausible interpretation of the DEAP. A constitution cannot be limited to a charter stating rules regulating the powers of higher authorities in the state, they argued; it can also mean the totality of basic rules that determine the essence of authority in a given society, how it can be practised, and what is necessary to realise the freedom and happiness of both: the individual and society. As the DEAP dealt with all these issues, it should be attributed the status of constitution.

Even if one disagreed with considering the DEAP as a constitution, it would be impossible to deny that the DEAP contained principles that were more than positive rules, such as the principle deeming the Qur'an as the

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22 *Al-Jaridat Al-Rasmiyat* [Official Gazette] 20 (22). 7/8/1982: 754.

law of society, and the principle of freedom, and that of direct popular democracy. These principles had to be taken into account by Basic People's Congresses and Popular Committees when making legislation and implementing it. Otherwise, they would lose any practical value, and be a mere declaration of good intentions; even the opponents of seeing the DEAP as a constitution would not accept this. In addition, the term "constitutional review" should not be an obstacle, as constitutional review could easily be termed "review of the legislation's correctness" (Aboudah 1986, 57).

Such review of the legal correctness of legislation would exist even if the Supreme Court was deprived of constitutional review jurisdiction, and would be applied by any court as part of its duty to apply the law. In the same way a court would check whether a relevant law was still in force, it would ensure that that law was correct in the sense that it did not contradict the DEAP's principles. This could not be refuted on the basis that courts, then, would "expropriate" the Basic Congresses' legislative authority, and place them, courts, in a higher position, as they, basically, would not abolish any "incorrect" legislation. Instead, they would only refrain from applying it to the case at hand, and their judgement on that would be limited to that case; no other court would be obliged to follow that judgement should it decide differently on the issue of the correctness of that particular law (ibid., 1986, 58).

However, the Supreme Court was not inclined to take these arguments on board. It first, hastily, interpreted Law 6/1982 as depriving it of the power of constitutional review. Its judgement on that is quite telling.

The case started on 8 April 1979 with a dispute when Ali was being caught digging an artesian well for Hasan in agricultural land owned by the latter. They were both accused by the public prosecutor of breaking Law 3/1979 on Economic Crimes that criminalised digging a well in agricultural land without a licence from the relevant authorities. On 30 June 1980, the Tripoli Court Accusation Chamber referred them to the Felony Circuit based at the same court. When the trial started on 11 April 1981, their lawyer claimed that Law 3/1979 was applied retrospectively: it was issued on 29 April 1979 while the act attributed to the accused was committed three weeks earlier. This was justified through Article 40 that gave the law such retroactive effect. Since the 1969 Constitutional Declaration stated that there was no crime or punishment without a written "law," and the accused, when they committed the act, could not know that it was a crime, Law 3/1979 was, the lawyer argued, unconstitutional. Tripoli Court Felony Circuit suspended the lawsuit and referred it the Supreme Court to decide on this claim. The prosecu-

tion of the Supreme Court gave its opinion that the law was indeed unconstitutional, and, in support of this opinion, argued that all constitutions, written or otherwise, state that penal laws must have no retroactive effect, and the Qur'an, the law of society, ordains that too. The first hearing took place on 13 February 1982, but it was postponed until 25 October 1982 to conduct more research on the case. However, during this time, specifically on 25 May 1982, Law 6/1982 on the Reregulation of the Supreme Court was issued, and, as mentioned above, ended the Supreme Court's power of constitutional review. On 25 October 1982, the court concluded that the rules of Law 6/1982 detailing the jurisdiction of the court had immediate effect, as being of procedural nature. Since they deprived it of the power of constitutional review, the court was no longer capable of deciding on the unconstitutionality of Law 3/1977 and the claim at hand. It, then, returned the case to Tripoli Court to decide on the criminal accusation. As such, the Supreme Court washed its hands from the constitutional review of a penal law, and did not address as a serious claim as one concerning the retroactive application (Aboudah 1986, 41-62, 41-55).

If seen from a legal reasoning viewpoint, this judgement was quite plausible; still, one cannot help but join other lawyers in wondering why the court applied Law 6/1982 to a case that it was supposed to decide upon prior to the issuing of this law, given the hearing on 13 February 1982. In my viewpoint, the reason was the court's unwillingness to confront the political regime that showed clearly and from its early days how uncomfortable it was with strong judiciary, and so attempted to reduce its power (Aboudah 1986, 49).

The court's effort to avoid any open confrontation with the regime could also be seen in its deafening silence on whether Tripoli's Criminal Court could abstain from applying Law 3/1979 in what is known as the abstention constitutional review, *raqabat al-imtianah*. Several years later, the court recognised that ending constitutional review did not prevent courts from deciding on claims of incorrectness of any legislation. Yet, it found a way to avoid deeming as incorrect, legislation that clearly contradicted the DEAP. This was the case when the constitutionality of the law permitting charging interest in commercial and civil transactions involving legal entities was challenged for contradicting the Qur'an. The Supreme Court, however, concluded that the DEAP provision deeming the Qur'an as the law of Libyan society, though of constitutional nature, addressed the legislature not the judge. The former, hence, was invited to review legislation in force, and amend or abrogate it if found to be inconsistent with the Qur'an.

Meanwhile, any legislation that was correct before the announcement of the DEAP would still be so, and the judge had to apply it.<sup>23</sup> Consequently, the mere act of constitutionalising Sharia would have no effect on existing legislation, and courts would have to apply it as it is until amended or abrogated by the legislature.

In addition, when the Supreme Court's power of constitutional review was finally restored by Law 17/1994, the court did not practise it for more than ten years; this is another clear indication of its efforts to evade any confrontation with the regime. The court achieved this by simply abstaining from issuing the internal regulations necessary to implement Law 17. Tired of this delay, a number of lawyers submitted a request to the president of the court, Husain al-Buaishi, to issue the regulations or risk being sued in his administrative capacity. Only then, in 2004, the General Assembly of the Supreme Court finally issued the required internal regulations (Durah 2007, 14). As some writers put it,

*The delay in issuing the internal regulations as required by Law 17/1994, is attributed to the reluctance [of the court] to accept the principle of the judicial review of the legislative work, as this principle leads to far-reaching effects that may not be in conformity with the prevailing political discourse. (ibid.)*

The issuing of the internal regulations was not the end of the Supreme Court's efforts to limit the application of its own power of constitutional review. It continued to do so using means that, though perfectly acceptable from a purely legal viewpoint, clearly show the court's reluctance to apply the review. A polygamy case of the late 1990s, which is quite similar to the case described in the introduction (see 4.1), provides a good example.

In 1997, a first wife filed a lawsuit before Tripoli's District Court asking, besides other requests, for the annulment of her husband's second marriage for concluding it without her consent. Article 13 of Law 10/1984 on Marriage and Divorce that restricted polygamy makes such consent a requirement for a second marriage. The court granted her this request and declared the second marriage null and void; however, the husband challenged this ruling before an appeal circuit of the North Tripoli First

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23 Tain madani [Civil Appeal] No. 3. Year 36. 2/12/1990. *Majalat Al-Mahkimat Al-Aliya* [Journal of the Supreme Court] 25 (1&2): 139.

Instance Court that, while seeing this case, concluded that the relevant article seemed to be unconstitutional as it limited polygamy contrary to the Qur'an that ordained no such restrictions. As the Qur'an was, according to the DEAP, the law of the society, this made Article 13 unconstitutional. Upon that, the appeal circuit on 13 September 1998 suspended the case and referred it to the Supreme Court for constitutional review.

After several years, the Supreme Court, however, dismissed the case without discussing its substance. According to the court, Article 23 of Law 17/1994 provided for two ways to challenge the constitutionality of any legislation. The first one was filing a lawsuit before the Supreme Court by anyone who has personal and direct interest in deeming the concerned legislation unconstitutional. The second one was a courts' referral of any serious and essential claim of unconstitutionality, which arose while hearing a case, to the Supreme Court. The second way required, as the Supreme Court interpreted it, that the unconstitutionality claim be raised by one of the litigants, not by the court hearing the case. Allowing a court to refer an unconstitutionality claim by its own initiative while no litigant had raised it, would unacceptably add a third way to the two stated in the law. As a result, the Supreme Court decided on 19 May 2005 not to accept this constitutional lawsuit and returned the case to the North Tripoli Court.<sup>24</sup>

As some Libyan jurists appropriately argued, the Supreme Court narrowly interpreted the second way of raising unconstitutionality claims. It restricted serious and essential claims of unconstitutionality to those raised by the litigants while it could have plausibly interpreted it to include those, like the one at hand, when the court realised that the applicable legislation appeared to contradict the constitution (Durah 2007, 18-19).

The option of such wider interpretation, however, was soon ruled out altogether. On 26 June 2005, a few weeks after ruling on the polygamy case, the General Assembly of the Supreme Court met and issued Decision 285/2005 amending Article 19 of the court's internal regulations concerning constitutionality claims. The amended article read:

*If a legal issue that concerns the constitution or its interpretation is raised by one of the litigants in a case being heard by any court, and the court realises the essentiality of the issue, it shall suspend the case, and set a period of time not exceeding three months for the litigant who has raised the issue to file a*

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24 The full judgement is published in Al-'Asably (2010, 210-224).

*constitutionality lawsuit before the Supreme Court. (...) If he/she does not file the lawsuit within the time set, raising the issue shall be considered as if it never happened.*<sup>25</sup>

As such, the possibility of accepting constitutionality claims raised by courts while hearing cases was explicitly eliminated. However, there was a legitimate concern about the legality of the internal regulations' amendment for it implicitly amended Article 23 of Law 17/1994. This went against the existing hierarchy of legislation wherein regulations cannot amend ordinary legislation. This shows how far the Supreme Court went in its efforts to limit the application of constitutional review.

An even more bitter disappointment with this tendency of the Supreme Court, as a Libyan jurist phrased it, was felt when it rejected an unconstitutionality claim which arose during its hearing of a civil case. The court argued that this claim of unconstitutionality was not a public order related claim, and as such it was not acceptable to raise before the Supreme Court for the first time – this court being a court of law not fact. Since judgements made by the court are final and can never be challenged, this meant that the court permanently closed the door for the concerned claim. This position was not, as a Libyan lawyer correctly argued, a plausible one. Article 23 of Law 17/1994 explicitly stated that serious and essential unconstitutionality claims could be raised before “any court,” and the Supreme Court was no exception. It could have also suspended the civil case, and set the litigant a date for raising the claim before the Supreme Court in its capacity as a constitutional court. The choice not to do so was another clear indication of the court's unwillingness to practise constitutional review (Durah 2007, 18-19).

In conclusion, Gaddafi's era was marked by restrictions placed on the role of the Supreme Court in the legal system. This now seems to have changed in the aftermath of 17<sup>th</sup> February Revolution.

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#### **4.5 The Independence of the Supreme Court in the Aftermath of the 17<sup>th</sup> February Revolution**

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On 17 February 2011, another Arab Spring revolution started, this time in Libya, and later that year it ended Gaddafi's regime. Since, the legal system,

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25 The amended regulations are published in Abu Tutat and Al-Zuriqi (2007).

being heavily influenced by Gaddafi's thoughts and beliefs, has become one of the areas targeted for reform. The Supreme Court has a major role to play in that process. How has it dealt with unconstitutionality claims since the revolution?<sup>26</sup> In the 2013 polygamy case, the court could use its power of constitutional review to decide on one of the most pressing issues in Libya nowadays, i.e. the relationship between Sharia and national law. An analysis of the court's ruling on this case could also be used to identify some of the considerations that the court would need to take on board in order to play a constructive role in shaping Libya's legal system.

The debate about the relationship between Sharia and national law is not new to Libya, as was shown earlier, but it has gained momentum after the revolution due to the increasing political and legal importance of Sharia. Several indications of this importance could be mentioned. The first of these is the Constitutional Declaration issued by the interim National Transitional Council (NTC) on 3 August 2011 that deems Sharia as the principal source of legislation. Another is the speech given by Mustafa Abdul Jalil, the NTC President, on Liberation Day on 23 October 2011 in which he announced that "any law violating Islamic Sharia is suspended with immediate effect, including the one that restricts polygamy." He also added that the new Libya would establish an Islamic banking system wherein *riba* (usury) would be prohibited.<sup>27</sup> This statement is, legally speaking, implausible as Abdul Jalil could not in his capacity as the president of the NTC annul or even alter any law; still, it clearly shows the importance of Sharia to Libya's political decision makers.

Some other laws that the NTC enacted later confirm this claim. For instance, Law 15/2012 on the Establishment of Dar el-Efta, the state office for religious advice, has restored the position of the Mufti as the state's offi-

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26 In the aftermath of the 17<sup>th</sup> February Revolution, the Supreme Court has ruled on several unconstitutionality claims. These include a ruling issued on 14 June 2012 deeming Law 37/2012 on the Criminalisation of the Glorification of the Tyrant unconstitutional for restricting the freedom of thought and expression. Another ruling was made on 25 November 2012 declaring unconstitutional Law 52/2012 that set criteria for holding some posts preventing those that had them during Gaddafi's rule from continuing to have them. The justification was that this law contradicted the principle of equality stated in the interim Constitutional Declaration. A third ruling was issued in the lawsuit NO. 25/59 on 23 December 2012 considering as unconstitutional Article 2 of Law 7/2004 that abolished the people's court as it transferred the exceptional powers of this court and its public prosecution to specialised courts and public prosecutions while it should have abolished these powers altogether for contradicting basic human rights and freedoms. A further judgement was made concerning the constitutional lawsuit NO. 28/59 on 26/2/2012 and declared unconstitutional the third amendment of the constitutional declaration introduced by the NTC whereby the members of the constitutional committee responsible for drafting the permanent constitution would be elected rather than appointed. The decision to amend the constitutional declaration in this way was taken by only 49 out of 102 members of the NTC. This number did not amount to the majority required for such a decision to be taken, which is two thirds of all members not only those present when voting. As such, this amendment was unconstitutional (to the best of my knowledge, these rulings have not been published in the official gazette yet, as Article 20 of the Supreme Court internal regulations requires).

27 See "Hinting at an End to a Curb on Polygamy, Interim Libyan Leader Stirs Anger," *New York Times* 30 October 2011, <http://tinyurl.com/sjpp1-062>, accessed on 17 April 2013.



cial religious adviser, an office that Gaddafi's regime had abolished.<sup>28</sup> This law requires all society members to respect fatwas given by Dar el-Efta, and prohibits discussing them in any mass media. One of the tasks allocated to Dar el-Efta through its *Shari* Research and Studies Council is to review draft laws referred to it by state institutions.<sup>29</sup>

Another example is Law 29/2012 on the Regulation of Political Parties, which bans parties from circulating or publishing any thoughts violating Sharia. As a result, all political parties participating in the election of the General National Congress (GNC) called for Sharia to be considered in law making. Also the National Coalition Forces Party, which is not an Islamic party and very often described as being liberal, stated in its manifesto that Sharia should be recognised as a principal source of legislation.<sup>30</sup>

All these are indicators that Sharia will occupy a significant position in the future permanent constitution. However, it is not clear yet how the new constitution will address the questions on Sharia incorporation, namely, which interpretation of Sharia will be adopted, what role religious scholars, judges, or state officials will play in determining and applying this interpretation, and what effect constitutionalising Sharia will have on the existing national legal system.

One possible answer concerning the interpretation of Sharia has been proposed by the Dar el-Efta and the Ministry of Religious Endowments (*Awqaf*) and Islamic Affairs in a seminar they organised on 29 December 2012. According to them, the constitution should state that "Islam is the religion of the state, and Islamic Sharia with all its credited sources is the source of legislation, and shall be deemed null and void any text (*nass*) violating it." Still, it is not clear from this definition what is meant by "credited

28 For Al-Sadiq al-Ghariani's statement on the Law of Dar el-Efta see <http://tinyurl.com/sjpgl-063>, accessed on 8 July 2013.

29 Since then, Dar el-Efta has been noticeably active in issuing fatwas and opinions on issues of different nature. For example, in the meeting of the Council of Dar el-Efta on 25/11/2012, it was unanimously recommended that "it must be ensured that the constitution declares Islam as the religion of the state, that Sharia is the source of legislation, and that any text violating it is null and void. The provision declaring this must not be subject to any referendum." It is recommended that "the scholars of Sharia must play a role in drafting the constitution and explain it to people." There are also recommendations concerning judicial reform, establishing Islamic universities, enacting a law to solve housing problems created by Gaddafi's laws, and tax law reform. Another example is the letter the Grand Mufti sent to the Council of Ministers urging them to politically recognise the state of Kosovo. See the official website of Dar el-Efta, <http://ifta.ly/web/>, accessed on 25/4/2013.

30 The National Coalition Forces Party is a collection of about 40 groups led by Mahmoud Jibril, the Head of the Executive Office that was established after the 17<sup>th</sup> February Revolution. Knowing that he is accused of being secularist, which would badly affect his party's chances in the elections, Jibril ensured to appear with religious scholars and cite verses of the Qur'an and the Prophet's sayings in his speeches. However, the Mufti, Sheikh al-Sadiq al-Ghariani is reported to accuse liberals of using Islam to please Libyans who are mainly conservative. This accusation was strongly denied by Jibril who also announced that the adherence to the principles of Islamic *Sharia* is one of his principles. See Maggie Michael, "Libya Elections: Liberal Party, Alliance of National Forces, Says It Is In Lead." *Huffington Post* 07/08/12, <http://tinyurl.com/sjjpgl-064>, accessed on 25/4/2013; "Al-Manara. Jibril calls for a wide coalition and announces his adherence to the principles of *Sharia*." 9/7/2012, <http://tinyurl.com/sjjpgl-065>, accessed on 25/4/2013.



sources.” It could be taken to mean the four sunni schools of thought, but even then the question arises as to what opinion, if there are several, one should resort. As explained earlier, this is not a mere hypothesis as opinions do differ even inside one school of thought; the Libyan legislature in particular had once chosen the *rajah* opinion from the Maliki school, but later it opted for the *mashour* one (see 4.3). In addition, what if a piece of legislation is claimed to contradict detailed rulings of Sharia? It is well known that many of these are controversial even amongst scholars belonging to the same school of thought. Would that legislation then be deemed unconstitutional, and who would be entitled to decide on that? These are examples of the issues that are expected to arise from constitutionalising Sharia, which have not yet been sufficiently debated in Libya.

These concerns are further deepened by the current stance of the Transitional Constitutional Declaration on the issue. As mentioned earlier, this declaration deems Sharia as the principal source of legislation. It also considers existing laws effective as long as they are not inconsistent with any of its provisions. This means that any law inconsistent with any of these provisions including that about Sharia is no longer valid. The legitimate question then is how and by whom this can be determined, if such a claim is made. This is quite problematic given that the declaration neither defines what is meant by Sharia, nor determines who can decide on that.

As the polygamy case referred to at the beginning of this chapter shows, the Supreme Court could apply its power of constitutional review to play a significant role in filling this gap. In this case, legislative restrictions on polygamous marriages were challenged before the Supreme Court for being inconsistent with Sharia, hence unconstitutional. Given that any decision about this claim would have significant impact not only on the parties involved, but also on the legal system in general, as similar claims would be expected to arise about other laws, one would expect the highest court in the country to address all relevant issues.

The first of these is the interpretation of Sharia, especially with the argument being made that restricting polygamy is acceptable to Sharia. Polygamy is only permissible, the argument goes, and restricting what is permissible is permissible, the juristic ruling says. Such a ruling is claimed to be the justification behind disallowing polygamy in the Tunisian family law, and regulating and limiting it in many other Muslim countries including Egypt, Morocco, Pakistan, and Indonesia (Otto 2010, 631-2; Otto 2006, 99).

In addition, the relevant issues include the question of whether and which courts have the power to decide on such a matter, given that courts

often consist of judges mainly trained in law.<sup>31</sup> Moreover, since the Supreme Court previously ruled that the authority to revoke laws inconsistent with Sharia resides exclusively with the legislature, and until it does so, judges have to apply such laws, one would expect the court to sufficiently explain why it no longer holds this view.

However, as it appears from the half page long reasoning, the Supreme Court has not really addressed any of these questions yet. It simply cited verses of the Qur'an on polygamy, and did not mention any opinions, which could have been expressed by the defendant.

This is not the first time that the Supreme Court fails to appropriately deal with unconstitutionality claims based on incompatibility of a law with Sharia. In fact, it happened twice regarding the same claim, but for different reasons. As previously explained, Article 13 of Law 10/1984 restricting polygamy was already subject to an unconstitutionality claim during Gaddafi's time. However, the Supreme Court then did not decide on the substance of that claim; it simply dismissed the case for procedural reasons. As clarified before, these procedural reasons were not legally sound, and the court had to amend its internal regulation to prevent unconstitutionality claims coming before the court the way this case had come.<sup>32</sup> This position could be understood when bearing in mind the political sensitivities of the case especially at the time it was brought before the Supreme Court. It was Gaddafi who spoke out against polygamy, and supported placing restrictions on practising it. He was so enthusiastic about it, that he tore up, in front of tv cameras, the unpublished Law 12/1998 that removed the requirement of the first wife's consent.<sup>33</sup> This explains why the Supreme Court preferred not to risk assessing how constitutional these restrictions were, especially as the claim was brought before it in the same year Gaddafi tore up the law lifting them. Even the dismissal of the case took the court more than six years, and this was in itself a sign of its lack of independence.

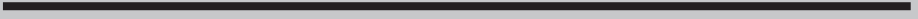
The way in which the court chose to address the same claim in the case of *Maha vs. Mustafa*, raises again questions of judicial independence, albeit of a different type. Since this case was brought before the court in the aftermath of the 17<sup>th</sup> February Revolution, the court was now suddenly relieved

31 In the mid-seventies, Gaddafi started abolishing religious education institutions, and so the main university specialising in Sharia, i.e., the University of Mohammed bin Ali al-Sanusi, was converted into a humanities and social sciences university under the name Omar al-Mukhtar. The Sharia faculty was abolished and students and staff were transferred to the Law Faculty in Benghazi. Since then and up to 1996 there were no Sharia education universities. As a result, there are few remaining judges who are trained in Sharia.

32 See section 4.4 above.

33 This incident is mentioned by the Supreme Court General Prosecutor in the report he submitted to the Supreme Court advising it to accept the claim of the unconstitutionality of Article 13 of Law 10/1984. See Abu Al-Qaasim (n.d., 11-12).

from the political pressure not to rule against laws deemed to be Gaddafi's laws. In fact, it would now require a considerable degree of independence not to rule against these laws. Also, in a political environment wherein calling for incorporating Sharia has become the norm, it would demand more autonomy from the Supreme Court to analyse traditional interpretations of Sharia, and assess their validity for the current time and place. This would not necessarily end in excluding these views. However, judged by its ruling on the 2013 polygamy case, the Supreme Court has so far failed to rise to such challenge.



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# 5 Access to Justice and Legal Aid in Libya: The Future of the People's Lawyers

*Jessica Carlisle*

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## 5.1 A Working Day in the Administrative Circuit

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Jamila's client is sitting silently waiting for his case in the administrative court to begin. He does not want to talk and avoids my eye. However, Jamila quietly tells me that he is here to contest the evidence on which he has recently been sacked from his job with the Ministry of Foreign Affairs. She adds that she is taking more and more cases like this. She is now in her third year of specialising in administrative claims as a people's lawyer attached to the Tripoli Appeal Court. Before the revolution her cases largely involved public servants disputing their conditions of employment or their pay, but current efforts to weed out and punish Gaddafi loyalists have changed this workload.<sup>1</sup> Jamila has become interested in taking on the cases of public sector employees dismissed after they have been subject to an enquiry by the Integrity and Patriotism Commission. She is representing three such clients at the moment. The cases are a new challenge for her professionally, but also she feels strongly that the people involved have a right to bring a legal appeal against their dismissals in these circumstances. The court, she believes, is the arena in which civil servants can best be judged for their past actions.

Jamila's client's case comes before the court around halfway through the morning session. I'm not able to ask her client why he has chosen to use a

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1 The state is the dominant employer in Libya. As a result the administrative courts workload involves a large number of cases from public sector employees.

people's lawyer to represent him. Private lawyers can be expensive, but this man is well-dressed and was a fairly senior employee in a Libyan embassy at the outbreak of the 17<sup>th</sup> February Revolution. He was notified of his dismissal by letter. The High Commission for Integrity and Patriotism does not invite the subjects of their enquiries to their deliberations and makes its decisions based on files of evidence. Jamila has managed to get a copy of the reasoning behind the commission's decision to terminate her client's employment. His name and a signature have been found on a document that was sent by his embassy in support of the regime at the height of the revolution. Jamila's client says that he can prove that he was not present when this document was signed. He contends that the embassy's staff was intimidated into drafting the letter on orders from Tripoli, and that his colleague signed it on his behalf in order to protect him.

Jamila is conscious that the people's lawyers themselves have also come under scrutiny in the democratic period following the overthrow of the former regime. The profession was a creation of Gaddafi under Law 4/1981. The services of people's lawyers are provided free of charge to citizens and either for a fee or free to non-citizens, and there are branches of the institution throughout Libya offering legal representation for all types of cases.<sup>2</sup> The people's lawyers subsequently work alongside private lawyers in the courts in representing clients seeking justice. However, currently there is both domestic and international pressure to abolish the institution in favour of some other provision of legal aid.

Jamila tells me that it is a good thing that her client has attended his hearing today, even though the court barely considers the case in this session since she is only submitting some supporting documents. She thinks, nonetheless, that it is better that a judge sees a litigant to assess his character, particularly in administrative cases which largely rely on documentation. She later tells me that perceptions of the people's lawyers are equally vital in informing how people currently evaluate the service they provide. She worries that they are regarded unfairly, "The people's lawyers started off badly. They were Gaddafi's idea. But thanks to God, they do good work now, helping the poor."

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2 Article 10 of Law 4/1981 enables foreigners to seek the service of the people's lawyers in return for payment. However, they may be exempted from paying based on a decision by the Minister of Justice acting on a recommendation from the head of the Directorate of the People's Lawyers. In practice, non-Libyans who do not have private lawyers and who face major criminal charges for which they are obliged to have legal representation, are represented by people's lawyers for free.

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## 5.2 Aims and Methodology

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My fieldwork for this research centred on regular meetings with four people's lawyers, in particular Jamila who I regularly met at the court and in her home over a period of a month. I was also a frequent visitor to Tripoli's main court on Saadi Street throughout late April and May 2013 and to the adjoining Tripoli branch office of the people's lawyers. In total I interviewed four people's lawyers at length and the head of the Tripoli office. I also chatted to several of the administrative staff at the Tripoli office, where I was able to look through the registers of cases. In addition, I asked several judges, private lawyers and public prosecutors about the status and work of the people's lawyers and attended a two-day UNDP organised conference during which there was an hour and half long session discussing the future of "legal aid" in Libya.

The purpose of this short piece of research was to gather both an insiders' and an external evaluation of the professionalism of the people's lawyers, of their contribution to access to justice, and of their future prospects as a profession. During my fieldwork, domestic and international discussion about the future of the peoples' lawyers was dominated by two arguments from its critics: that the institution is not independent and that the work of its lawyers is not competent. I will assess debates about the validity of these criticisms among Libya's legal professionals and, in conclusion, make some recommendations for further research and possible policy initiatives.

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## 5.3 Professional Training, Professionalism and Professional Networks

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The institution of people's lawyers is associated with the Gaddafi regime. In 1981-89, a decade in which Gaddafi pursued numerous "revolutionary" economic, social and political policies, private practice as a lawyer was prohibited in Libya, and all legal practice was "nationalised."<sup>3</sup> Lawyers were now directly employed by the state in which capacity they were to be known as "people's lawyers." They were appointed to work in all areas of law in both the regular, state courts and in the regime's parallel system of revolutionary,

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3 ILAC (2013, 57) have noted that at least for some in Libya, the institution is associated with the "revolutionary" courts of the 1980s in which "people's lawyers were needed to provide at least the appearance of a defence for the accused."



military and special courts. With this abolition of private practice, lawyers were allocated positions and rank according to their experience into the newly created Directorate of the People's Lawyers. Branch offices of people's lawyers were established, and still remain, attached to Libya's seven nationwide appeals courts, with sub-offices set up alongside courts across the country.

Individual lawyers are allocated to a section under the Directorate of the People's Lawyers for a year at a time. Their services are available at all levels of Libya's courts' system (see Annex 1). This includes the facility to prepare documentation in respect of constitutional cases. In June 2013, the state was employing 1,139 people's lawyers across Libya: 773 of them women and 366 of them men.<sup>4</sup>

The current distinction between the people's lawyers and lawyers practising as members of the private bar was established when the private practice of law was re-authorized in 1989.<sup>5</sup> Law graduates now chose between entering the "judicial institutions" following a year's additional training at the Institute for the Judiciary, or taking up private legal practice (see Chapter 6). On successful completion of this training they are allocated to work in the public prosecution, as a people's lawyer or in the department of government lawyers (tasked with defending the state in administrative cases). Despite this training, Fatima, a people's lawyer with over a decade of experience, told me that when she began work she still spent a great deal of time reading through her colleagues' cases for guidance on how to do her job correctly. Currently there is also an alternative route into the practice of people's lawyers available to court clerks and other administrative employees, who can take exams after several years of working at the court.

The system created by the former regime pools people's lawyers, public prosecutors, government lawyers (tasked with defending the state in administrative cases) and judges as the "judicial institutions" under the direction of the Ministry of Justice. State employed legal professionals are all paid the same salary dependent on their length of service, with ten grades of increasing seniority. The work of all of these state-employed legal professionals is subject to review by the Judicial Inspectorate, which includes judges on its staff and has powers to evaluate the work of judges,

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4 This figure was published on the Facebook page of the Libyan Judges Association. Attempts to find this statistic from a more formal source were unsuccessful. The LJA's Facebook, therefore, can be considered the official source provided by the Libyan judges for this information. See <http://tinyurl.com/sjpgl-066>, accessed on 3 July 2013.

5 This review of the legal professions included the passing of Law 8/1989 on the Right of Women to Assume Posts in the Judiciary.

people's lawyers and prosecutors if a complaint has been made against them, or in relation to possible promotion.

In theory, all employees' positions are reviewed on an annual basis when the Supreme Judicial Council either reappoints or transfers lawyers, judges and public prosecutors. However, according to the people's lawyers I asked about this, employees can to some extent negotiate their forthcoming positions (since some people's lawyers, such as Jamila, had remained in the same position for several years) and may develop considerable expertise as a result. The head of the Tripoli branch of the people's lawyers told me that 80% of judges had former experience of working as a people's lawyer. It is not, however, currently possible for lawyers in private practice to enter the judiciary although, conversely, judges may leave state employment to set up private practice (see Chapter 6).

The embedding of people's lawyers in the state's judicial institutions was underpinned until 2011 by the inclusion of the head of the Directorate of the People's Lawyers in the Supreme Council for Judicial Institutions, which also included the Minister of Justice and representatives of the Mufti's Office (*dar al-ifta'*) and other judicial institutions.<sup>6</sup> However, Law 4/2011 appeared to marginalise the institution by transferring the management of the judiciary to a newly formed Supreme Council for the Judiciary, the membership of which was restricted to the president of the Supreme Court, the presidents of the seven appeals courts and the public prosecutor general. This change was regarded by many state legal professionals as demoting the people's lawyers in the judicial hierarchy and as signalling future changes to the profession (see 3.4.2 for other assessments of this reform). All of the people's lawyers I spoke to in the spring of 2013 voiced disquiet about the restructuring of the Supreme Council for Judicial Institutions. The head of the Tripoli section believed that the move was undertaken by the NTC in order to emulate the kind of judicial independence found in Egypt.

The impact of this amendment, however, has subsequently been reversed. Law 4/2013 concerning the Amendment of the Judiciary not only refers to the institution as "public lawyers" – thereby seeming to distance the people's lawyers from Gaddafi's ideology – it also reintegrates the head of the Directorate of the People's Lawyers into the Supreme Council for the Judiciary.

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6 This council had responsibility for managing the judicial system under Law 6/2006 concerning the Regulation of the Judiciary.

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## 5.4 Lawyers' Case Loads and the Working Week

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In common with other members of the judicial system, people's lawyers are not well paid, although their wages were increased along those of other public servants shortly before the outbreak of the revolution. Judges, public prosecutors and state-employed lawyers are contractually forbidden from having secondary employment. The people's lawyers I asked were all living solely on their Ministry of Justice wages, however it is common knowledge that state-employed legal professionals do have other jobs or businesses apart from the practice of law. Jamila and her husband's household only had her income during my fieldwork since he had lost his job after his foreign employer withdrew from Libya in 2011. However, they had access to extensive support from her extended family.

Even before I was able to obtain official figures confirming the fact, the general consensus I gathered during my fieldwork was that the people's lawyers are a predominantly female profession.<sup>7</sup> The reason commonly given for this is that the hours are short and can be fitted around childcare. However, from observation the gender distribution throughout the different sections of the Tripoli office did not seem to be even; all of the nine lawyers working on family cases were women in May 2013, while I was told that most of the lawyers in the criminal section were men.<sup>8</sup> Jamila freely admitted that she was generally only in court one or two days a week, albeit that her caseload had reduced as a result of the revolution and its aftermath. The rest of the week she works from home. During the month I spent with her she was handling five cases.

This relatively light workload may, in part, be a reflection of the number of people's lawyers employed by the state. Aisha, a judge in Tripoli who feels strongly that the people's lawyers provide a valuable service, expressed surprise at suggestions she had heard that there are too few lawyers in Libya. Her feeling was that, in fact, there was too little work for too many lawyers. As a result, it seems that litigants are in a position to freely choose what lawyer to involve in their case, although the choices they make are likely to vary between their legal know-how and the type of case (see Chapter 6 for reasons why private lawyers might be more beneficial in the early stages of criminal cases). During my observation of a family court of first instance

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7 One informant told me that as many as 70% of the profession are women.

8 Legal practice in the criminal courts is not exclusively male. Although most public prosecutors are said to be men, I interviewed a female judge working in the lower criminal court during my short fieldwork and there is at least one well-known private female lawyer who takes on defence of criminal cases.

it seemed that the involvement of people's lawyers (predominantly young women) outweighed that of private lawyers.<sup>9</sup> Moreover, when litigants came before the court without legal representation, the judge recommended that they contact the people's lawyers if she felt that they needed assistance with their cases.

Jamila argued that given the lightness of their case load, people's lawyers tend to put significant amounts of work into each case. This conviction might predominantly be a reflection of her own sense of professional duty (the head of the Tripoli office initially introduced me to her as one of his star members of staff), but other informants, including judges, expressed similar opinions about people's lawyers' professionalism. The perceptions that people's lawyers, and their advocates, have of their role in Libya's legal system, therefore, is in stark contrast to the views expressed by their detractors.

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## 5.5 Criticisms of Competence

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The strength of feelings that this difference of opinion elicits was demonstrated during a UNDP-sponsored conference on access to justice in Tripoli in April 2013. During a session on legal aid there were very public disagreements between delegates, who included private lawyers, public prosecutors, the national head of the Directorate of the People's Lawyers and members of the judiciary. One male, private lawyer described the profession of people's lawyers in extremely hostile terms, associating it with the Gaddafi regime and demanding its abolition. In reaction, a female judge from Benghazi defended the institution on the grounds that it was of particular benefit to the poor and women in court. Following this intervention, a private lawyer with an established reputation for activism and a high profile, added her support to the people's lawyers given their work representing female clients.

The additional information I have been able to gather from a broad range of legal professionals about the people's lawyers is equally conflicting. I have been told by some lawyers in private practice and members of the public prosecution that the people's lawyers provide a poor service to their clients and provide employment for the weakest law graduates. Many

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9 It is possible to identify private lawyers by their black robes. The robes of the people's lawyers are currently being redesigned and produced since they previously bore a green sash that was symbolic of Gaddafi's *Jamahiriyya*.

legal professionals, from inside and outside state employment, observe that there is hostility between private lawyers and people's lawyers. While private lawyers stereotypically consider people's lawyers to be politically compromised and incompetent, people's lawyers are thought to regard private lawyers as motivated by financial gain with no stronger claim to competence.

It is impossible to make an accurate assessment of these claims without more extensive research, however three points could be noted in reference to the generalised claim that people's lawyers lack competence: the general profession of private lawyers is also criticised for incompetence (see Chapter 6), there is professional and economic rivalry between private and people's lawyers, and much of the casework done by the profession is on low status, administrative, family and petty criminal cases that do not feature in (particularly international) policy discussions about the rule of law.<sup>10</sup>

Aisha, a judge who worked as a public prosecutor before entering the judiciary, regrets that the people's lawyers may be disbanded since she believes that the services it provides "suit" the Libyan situation. She argues, together with others, that private lawyers' hostility to their professional rivals is unfounded. She notes that there was already impetus to reform the people's lawyers before the revolution because of its association with Gaddafi's "revolutionary" period. However, she claims that the current judicial system encourages the development of better judges. She notes that her work as a public prosecutor was useful preparation for her promotion into the judiciary, arguing that gaining experience as a people's lawyer is equally beneficial to early career judges. Jamila, who worked for four years as a judge before she entered her present position in the people's lawyers, believes her current work would have better prepared her for the judiciary. However, now that she's been working for three years as a people's lawyer, she says that she prefers the work and would not go back to the judiciary.

For other people's lawyers the prospect of promotion to the judiciary is said to provide an incentive to perform well particularly, according to most of my informants, amongst men who are considered to be more ambitious by-and-large. This aspect of the yearly reshuffle balances a powerful and frequently voiced criticism that the Supreme Council for the Judiciary uses

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10 ILAC (2013, 58) discusses the relevance of the people's lawyers in respect of serious criminal cases in noting that "if the private bar is unable or unwilling to provide legal representation to the current backlog of 'conflict-related' detainees, the people's lawyers may be the only option." The EU (2012, 49) report's assessment of the people's lawyers makes no mention of its impact on the legal process other than commenting that it has served "as a sort of parking lot for judges and lawyers seen as less than compliant with the imperatives of the state."

this opportunity to dump judges who are incompetent or are corrupt in the ranks of the people's lawyers (ILAC 2013, 57-58; EU 2012, 49).<sup>11</sup> Most of my interviewees from within the profession acknowledged that some unprofessional judges have been demoted into the people's lawyers. The head of the Tripoli branch said that judges and public prosecutors who are moved to the people's lawyers feel diminished, even if they have been transferred for administrative reasons. He could have been making an argument for more effective disciplinary procedures when he explained that some poorly performing judges cannot be dismissed due to a lack of substantial evidence, but are simply moved instead to the people's lawyers.

However, he and all the people's lawyers I interviewed, together with some from the judiciary or public prosecution, noted that the ploy of demoting a few bad judges does not necessarily reflect on the profession as a whole. The profession, they agree, is made up of individuals with a variety of skill sets and ambitions.

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## 5.6 Who are the Clients?

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Perhaps the most potent argument in support of the people's lawyers, which was made by everyone I spoke to who was in support of the institution, is that they are used by the poor and disadvantaged.<sup>12</sup> People's lawyers must, in principle, take whichever case they are allocated. My own observation from sitting in on sessions in the family court is that their services are widely used and that they are often of assistance to people from less privileged socio-economic backgrounds. Private lawyers' fees can be substantial; it is difficult to get general consensus on the costs involved, but I was told they would be a minimum of €500-€2,500 depending on the complexity of a case. In addition, the whereabouts and availability of the people's lawyers seem to be common knowledge in Tripoli. The formalities by which the people's lawyers will take on a case are apparently minimal and I saw judges in both the family court of first instance and court of appeal suggest that litigants make use of their services.

It was notable that litigants who appeared to be quite prosperous also make use of the institution. This suggestion that the people's lawyers can-

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11 This argument was also made at a UNDP conference on 22-23 April 2013. I was present at this conference, but the proceedings of it are not publicly available.

12 I have not yet been able to obtain statistics for who uses the services of the people's lawyers. It is possible that statistics recording their clients' professions and/or incomes do not exist.

not be characterised as the last refuge of those who cannot afford an alternative, is backed up by supporters who note that they are used by all segments of society. It may be that those who are able (both financially and in terms of having the information) pick and choose their legal representation depending on the type of case in which they are involved. The people's lawyers' office in Tripoli is mostly busy with family cases, registering 430 new family cases from January to May 2013, while throughout 2012 the section for minor criminal offences dealt with a total of 215 cases.

Based on my observation of disputes over divorce settlements in the family court I found no generalisable difference in the level of commitment shown to clients between private and people's lawyers. On one memorable occasion a people's lawyer representing a wife sufficiently irked the private lawyer representing the husband that he retorted that the settlement she was suggesting would make her client "a millionaire."<sup>13</sup>

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## 5.7 Doubts about Independence

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Potentially the most damning criticism of the people's lawyers is that they lack independence from government. Even if levels of competence can be proved to be adequate to support the utility of individual lawyers, their direct employment by the state is regarded as impeding their ability to freely represent their clients. There is an assumption, in most of the current, international, policy related discussion – when it discusses the people's lawyers at all – that an institution directly funded and managed by the state cannot provide the kind of independent legal representation demanded within the framework of the rule of law (ILAC 2011, 14; ILAC 2013, 57-58; EU 2012, 49).<sup>14</sup> This claim is particularly made in respect of cases pitting litigants against the government, or in criminal trials.

Judging by the limited amount of research I have been able to conduct on this subject so far, people's lawyers and their supporters are least able to provide a rejoinder to this particular critique. While private lawyers have apparently engaged in discussions about alternative routes by which a state might provide legal aid, people's lawyers defend the *status quo* in which they would remain the sole source of free legal representation. Both

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13 This was an argument over the amount of gold that the wife would be keeping on the divorce. The private lawyer was exaggerating with a theatrical flourish.

14 This assumption was also made by some participants at the aforementioned UNDP conference on 22-23 April 2013.

the arguments for and against the relevance of direct state funding of the people's lawyers do not seem to have been subjected to empirical analysis. Moreover, this discussion takes place in the shadow of the former regime's interference in the legal system.

The first tentative argument that might be made to complicate complaints about the assumed effects of a lack of independence is that the services of the people's lawyers cannot be forced on litigants. While there might be an economic incentive for a litigant to take a case to the institution (given the cost of private lawyers), there has been no political compulsion to use peoples' lawyers since the reintroduction of private legal practice in 1989. Moreover, as previously discussed, the private legal profession is well manned.

Critics of the people's lawyers note that, particularly given the numbers of lawyers in private practice, *pro bono* legal representation could alternatively be provided through forms of legal aid. However, the second argument nuancing debates about the people's lawyers might be said to be that the standard set by the current Libyan system of freely available, easily accessible, nationwide, non-means tested legal representation for all forms of cases to all citizens is hardly equalled in states currently urging reform. This raises the question of how independent state provided legal aid systems can be said to be when the criteria for eligibility, both for the litigants entitled to receive *pro bono* assistance and for the types of cases covered by a scheme, are set by government. The recent curtailment of legal aid services in some EU states has effectively disallowed some cases from being brought to court as a result of policy decisions that have excluded some claimants and some claims.<sup>15</sup>

In addition, the system as it stands has the attraction of being provided at a calculable cost to the state. Despite Libya's oil wealth, anticipating the possible budgetary impact of contracting legal aid out to the market seems advisable. People's lawyers' employment as public servants working contracted hours enables the state to set a flat rate for legal aid, rather than allowing the cost to be established by the market.

Finally, it might be argued that Jamila is already demonstrating professional independence by taking on cases against the government to defend

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15 Lord Neuberger, President of the UK's Supreme Court, has recently implied that access to justice for all - particularly "the poor, the vulnerable [and] the disadvantaged" - is being put at risk by the UK government's planned cuts of £220 million to a national legal aid budget totalling £2.2 billion a year, <http://tinyurl.com/sjvgl-067>, accessed on 20 June 2013. In 2008 the Dutch government announced a plan to cut its legal aid budget by €50 million per annum because of rising costs, <http://tinyurl.com/sjvgl-068>, accessed on 20 June 2013.



those sacked under instructions from the Integrity Commission. Her colleague, a public prosecutor, commenting on the work that she, and others, do concludes, “The general public don’t really understand what the people’s lawyers do. There would be uproar if there was similar talk about putting an end to food subsidies. But if the government closes them down, then people will know what they’re missing.”

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## 5.8 Recommendations: Possible Future for the Institution

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There are sufficient reasons after even a short period of research on the people’s lawyers to suggest caution about drawing rapid conclusions about the institution’s contribution to legal practice in Libya. Although the people’s lawyers continue to provide legal aid to litigants in courts across Libya, as the Ministry of Justice reviews possible reform of the legal system, assesses its needs and makes decisions about the allocation of resources, time may be running out for this institution. Recent government policy suggests that the people’s lawyers are by no means guaranteed continued political support. Moreover, the prospect for the institution is bleak in the evaluations of the Libyan legal system contained in many INGO and foreign-authored reports. It seems that the people’s lawyers suffer both from an association with Gaddafi and the reliance of many foreign assessments of the legal system on members of the private bar (see 3.4.3).

It is the recommendations of this report that future policy regarding the people’s lawyers be open to the possibility of retaining the institution, albeit subject to reform and restructuring. We would therefore suggest that the Ministry of Justice integrate the Directorate of the People’s Lawyers into its forthcoming plans for reform of the whole legal system, in particular, by focusing on training, the structuring of the institution’s working conditions, and the fostering of professional independence.

There is widespread agreement that all branches of the judicial system would benefit from ongoing training. The same requirement has been identified within the private branch of the profession, with international capacity programmes in areas such as human rights focusing on members of the bar associations and on the judiciary. Joint training and capacity building would bring both branches of Libya’s lawyers together and equalise professional skills.

Secondly, further restructuring of the people’s lawyers, preferably as part of wider civil service reform, could consider their times and conditions of work, and the level of staffing in the branch offices. More efficient alloca-

tion of caseloads and more accountability for hours worked might allow for a slimmed down, or perhaps more active service, as the courts continue to handle increasing numbers of cases in the post-revolutionary period.<sup>16</sup> Moreover, the institution might begin the work described under Article 5 of Law 4/1981 under which the people's lawyers are tasked with providing legal information and guidance to the general public to raise "awareness concerning their rights, duties and interests." This could be of benefit to the courts (see 7.10) and perhaps encourage Libyans to make more use of the legal system while establishing more confidence in the legal system.

Finally, the independence and professional identity of the people's lawyers will be improved as the conditions ensuring the independence and impartiality of judges and public prosecutors are strengthened under current Libyan law. If the people's lawyers are subject to rigorous, non-partisan inspection, and encouraged to develop professional solidarity this may go some way to further fostering their independence as an institution. Moreover, healthy competition between themselves and private lawyers might be encouraged by allowing lawyers to move between state and private practice, and also by opening membership of the judiciary to private lawyers.

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16 Improvements in pay and recognition of part-time working could continue to facilitate the employment of women who are juggling professional and family commitments.

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# 6 The Role of Criminal Defence Lawyers in the Administration of Justice in Libya: Challenges and Prospects

*Nasser Algeitta*

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## 6.1 A Serious Criminal Case

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In a crowded court room in Tripoli in January 2012, one of a panel of three judges calls on the accused who is sitting in a metal cage awaiting the start of his hearing.<sup>1</sup> The accused man stands up and confirms his identity. The judge then reads out the criminal charges against him in formal Arabic (*fusha*) in which the defendant is accused of committing manslaughter while driving his car negligently and consequently hitting his victim, who sustained injuries leading to his death. The judge asks the accused: “What do you have to say to this?” The accused confirms that he had been involved in a car accident involving other vehicles. However, he adds that he had been driving carefully, that he hadn’t exceeded the speed limit and that he had tried to avoid hitting the victim. The accident happened, he says, because the victim wasn’t being cautious enough while driving.

The judge continues to read out a list of traffic offences while the accused remains silent. Observing proceedings from the public gallery, I wonder if he really understands the case that is being made against him. The public prosecutor is invited by the judge to make her submission. She stands up and says that the public prosecution supports what had been

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1 Trials of serious criminal offences, defined as felony crimes that are punishable for at least three years of imprisonment, are overseen by a panel of three judges.

stated in the indictment and that it demands the harshest possible punishment for the accused. The defence lawyer is standing below the bench in front of the judicial panel waiting for her turn to make her case. After the prosecutor has finished speaking, the defence lawyer asks the judges for the immediate release of her client and the termination of the proceedings against him. She argues that her client should benefit from a general pardon law passed by the previous National Transitional Council and also because he has forgiveness from the victim's family.<sup>2</sup>

This short encounter in a Tripoli court in early 2012, illustrates a number of things about the criminal process in Libya, in particular the critical relationship between the defendant in a case and his lawyer, and the interaction between the public prosecutor, the judge and the defence. Although Libya's legal system is currently under scrutiny in the aftermath of interference from the Gaddafi regime, raising the possibility of reform of legislation, the judiciary and other legal institutions, there is little specific focus on the strengths and weaknesses of the criminal process that deals with non-political, day-to-day criminal offenses. The treatment which suspects receive in the criminal justice system, nevertheless, should be of concern in evaluating access to justice, from the point that a suspect is arrested by the police to the stage at which the accused finally comes to trial.

Defence lawyers working on criminal cases are well placed to make assessments of this process and to make suggestions for which aspects of the system might be improved. Their involvement in a case should ideally begin long before the accused is brought to criminal trial. They can consequently make an assessment of the route to achieving justice for suspects through all points during the investigation and hearing of criminal cases, commenting on the legacy left by the past regime and the internal logic of the legal and court system.

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## 6.2 Methodology and Aims of the Research

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Lawyers with lengthy experience of criminal cases participated in this research and were asked about their training, their relationships with clients and other legal professionals – notably the police, public prosecutors

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2 In criminal trials in Libya, forgiveness from the victim or his family may have a determinative role in some cases and in all cases forgiveness is regarded as a mitigating factor which can, for example, reduce the length of imprisonment.

and judges –, the criminal process, and what difficulties and challenges they face during their conduct of a case. They were particularly encouraged to point out shortcomings in the system, and to suggest possible reforms in law and legal practice in order to improve it. In total I interviewed seven private defence lawyers, two people's lawyers, three public prosecutors and one Supreme Court judge. This study is also informed by my own participant observation of the practice of criminal defence lawyers in Libya as a public prosecutor in the South Tripoli Primary Court in 1997 and in the Tripoli Juvenile Court from 1998 until 2001, and by my previous academic research (Algehitta 2011).

The ensuing study examines the role of defence lawyers in seeking justice for those accused of criminal offences in Libya and analyses the legal and practical obstacles affecting their work. It became apparent that defence lawyers have genuine concerns about some of the legal rules and practices governing all stages of the criminal process: the police enquiry, the investigation by the public prosecution, detention of the accused and the pre-trial hearing, and the trial itself. In addition, several interviewees made remarks about the training and preparation they received to work as defence lawyers.

In conclusion, I make some recommendations for improving lawyers' capacities to represent their clients and to obtain justice for people accused of a crime in Libya.

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### 6.3 The Need for a Defence Lawyer

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The 1951 Criminal Procedure Code (CPC) and the Law on the Judiciary<sup>3</sup> regulate the criminal process in Libya, the structure of the courts and their jurisdictions, the power of the police and of the public prosecutors, the rights of the accused and the role of the defence lawyers. The jurisdiction of the courts is determined by the gravity of the punishment prescribed in the Penal Law.<sup>4</sup> Minor crimes or misdemeanours carry a punishment of less than three years and are overseen by the lowest criminal court. This court is called the Misdemeanours Court and it is presided over by a single judge. Its decisions are subject to appeal before a primary court, where a panel of three judges sits on a case.

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3 Law on the Judiciary 6/2005.

4 Articles 53, 54 and 55 of the Penal Law determine categories of crimes according to the gravity of the punishment.

Major crimes, carrying a possible punishment of the death penalty or imprisonment of more than three years are overseen by three judges in the Felonies Court, also referred to as “assize court.”<sup>5</sup> The CPC accords the accused the right to hire a defence lawyer to represent him before the public prosecution or before the judge. However, the law makes it obligatory for the accused to have a lawyer in the case of serious crimes heard in the assize court<sup>6</sup> and the court is prohibited from hearing the case until legal counsel has been assigned. If the accused does not have a private lawyer, the court will assign a state-appointed “people’s lawyer” to represent them (see Chapter 5).

Criminal justice in Libya has the general character of a continental inquisitorial system in common with mainland Europe and the rest of North Africa. This system emphasises the centrality of a pre-trial official inquiry and the responsibility of state institutions, namely the police, prosecutors and trial judges, to establish the truth and to ensure that justice is done. Contrary to an adversarial form of criminal process, the judge plays an active part in the inquisitorial form through the gathering and selection of the evidence. The outcome of the case is the result of a cumulative administrative process in which a dossier of largely written evidence has been assembled, rather than the conclusion of oral testimony heard by the trial court (Duff 2007, 153).

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## 6.4 Becoming a “Criminal Defence Lawyer” through Training or Experience

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In Libya, the private practice of law is an attractive profession and many private lawyers are, in fact, former judges or public prosecutors. For some, their principal motivation to join the bar was to become self employed and free from government control. Other lawyers make no attempt to hide the financial motives behind their decision.

There are two routes by which law graduates can become private lawyers. The first of these is through training under the supervision of an experienced lawyer. Law 10/1990 states that the “training period should be for at least two years during which lawyers must join an office of a registered lawyer who is licensed to stand before the Supreme Court or Courts

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5 Law on the Judiciary 6/2005, Article 14.

6 CPC, Article 162.

of Appeal.”<sup>7</sup> Once trainee lawyers have finished their two-year training period they may apply to the Committee for Admission of Lawyers at the Ministry of Justice for admission to stand before the primary courts and to open an office of their own. This Admission Committee makes its decision after consulting the report of the trainee’s supervising lawyer.<sup>8</sup> An alternative route into the private profession is available for those with experience in the legal profession such as judges, public prosecutors and law professors. Anyone who has practiced law for more than two years can also apply to the Admission Committee to register and become a lawyer and will be assigned a certain ranking according to his or her years of experience.<sup>9</sup>

Peoples’ lawyers are trained and appointed in a similar manner to judges and public prosecutors. They have to be holders of a law degree and need to have completed two years of training at the Higher Judicial Institute in Tripoli.<sup>10</sup> They are attached to the courts and based in offices divided into departments and regional offices. The services of these people’s lawyers are available to all justice seekers both claimants and defendants in all sorts of cases: criminal, civil, administrative and family.<sup>11</sup>

Those respondents who had started their careers as private lawyers and who had undertaken their training under the supervision of a registered lawyer spoke of different experiences during their traineeship and their first encounters with real cases in a courtroom. Some thought that they had been supported well by their former employers who had spent time and effort to train them. Others felt, however, that they had had little support from their supervising lawyer, and commented that they had been left almost alone to deal with cases and to learn through their mistakes.

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## 6.5 The Police Enquiry

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Lawyers with established reputations for acting in defence of suspects in criminal cases are likely to be recommended to potential clients. A defence lawyer’s work on a case is agreed in a signed contract and he/she begins by contacting the office of the public prosecutor who is in charge of the case. The initial work preceding the investigation by the public prosecutor, how-

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7 Executive Decree 885/1990 of Law 10/1990 concerning the Restructuring of the Profession of Lawyers, Article 10.

8 Decree 885/1990, Article 10.

9 Decree 885/1990, Article 13.

10 The Judicial Institute was established in 1982 and belongs to the Ministry of Justice. Its mission is to prepare Libyans to work in the judiciary. The institute is based in Tripoli.

11 Law 4/1981, Article 6. For more about people’s lawyers see Chapter 5 of this report.

ever, is done by the police and this is the first barrier that lawyers report to ensuring justice for their clients.

Lawyers expressed several concerns about the way in which police conduct their enquiries noting that their clients often allege that they were assaulted while in police custody, that the police receive little supervision – despite the provision in the CPC for the public prosecution to oversee the entire investigation process – and that defence lawyers are frequently not informed about, or invited to, interrogations or searches of premises. According to defence lawyers, the police believe that if they are allowed contact with their clients, they will ruin the case, since they will encourage the accused to keep silent or not to admit to his crime. Lawyers attribute the attitude of the police also to other causes: a lack of awareness of human rights and that evidence must always be obtained through legal procedures, the absence of routine practice of stricter police supervision and discipline, and a shortage of resources and advanced equipment with which to search for evidence.

In particular, they raised concerns about the problem of confession under duress, which can have serious consequences for a suspect's case in court. It is at the prosecution's discretion to refer the accused for medical examination to look for evidence of physical torture, but in many cases the referral does not take place until the bruises and signs of assault have disappeared. This makes the confession very difficult to later contest during the trial.

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## 6.6 Investigation by the Public Prosecution

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Although defence lawyers state that it is easier for them to work with the public prosecution than with the police, they nevertheless add that they often feel distrusted by public prosecutors. The CPC prescribes that all investigative procedures should be conducted in the presence of the accused and his lawyer. This includes hearing witnesses, consulting experts, and searching a suspect's house. The public prosecution, furthermore, should notify the accused and his defence lawyer of the time and place of such activities. However, as in the defence lawyers' dealings with the police, actual legal practice often differs significantly from the standard outlined in law, and the majority of the investigation is done in the absence of the accused and his lawyers.

In the event that defence lawyers are present during the interrogation of the suspect or the taking of a witness statement against the accused, they are in fact not allowed to intervene or to advise their client whether or not



to answer questions. Neither can they voice their objection to certain questions. The practice is that defence lawyers must wait for the prosecutor to finish his interrogations or recording of witness statements, before presenting their defence or submitting their observations.

In summarising their position in these early stages of the criminal process, lawyers noted that since the prosecution has a monopoly on the investigation, which it conducts according to its discretion, there is little chance for defence lawyers to influence the process. In theory, the prosecution is entrusted with searching for evidence both against and in favour of the accused. Lawyers, however, asserted that they have no power to ensure that this investigation is fair, adding that it is entirely up to the prosecutor to respond to their request to follow a certain line of inquiry, or to call witnesses in their clients' defence.

This highlights an important issue in the way the criminal process is handled in Libya. The concentration of power in the hands of two institutions – police and public prosecution – puts defence lawyers at a disadvantage. The public prosecution has responsibility for the indictment of the accused and the pursuit of a case against suspects in court. This makes the prosecution an opponent of both the accused and his defence. Yet it also has absolute power to direct the investigation of a crime and is entrusted with gathering evidence both for and against the accused. Furthermore, it carries out this task without any judicial supervision ensuring its impartiality and integrity. The way in which this work is conducted therefore boils down to the professional attitude of the individual prosecutor handling the investigation, including whether it is carried out in good faith and does not overlook evidence favouring the accused.

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## 6.7 Detention and the Accusation Chamber

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A thorny issue for defence lawyers is the detention of the accused. This is another implication of the power vested in the public prosecution, compounding the other difficulties related to the pre-trial stage of the criminal process.

In Libya there is a heavy reliance on pre-trial detention.<sup>12</sup> Public prosecutors sometimes demand that the period of detention be extended to

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<sup>12</sup> According to the statistics of the International Centre of Prison Studies more than half of the prison population in Libya was being detained in pre-trial detention in 2010, <http://tinyurl.com/sjpgl-069>, accessed on 06 April 2011.

45 days in one go. While this is the longest period they can request, judges often grant it. Defence lawyers insisted that the period of the pre-trial detention must be restricted. Investigation in circumstances in which someone is detained should be completed within a certain time frame, at the end of which the prosecutor should either refer the accused for trial or release him. Lawyers also described an unwillingness of judges reviewing pre-trial detention, to allow the defence to call witnesses. Judges give reasons such as that the trial is yet to begin, or that the court has many cases to review and that there is no time for hearing the defence witnesses.

An additional concern voiced by some lawyers regarding legal provisions on pre-trial detention is that there is unequal treatment of defence lawyers and prosecutors in a detention hearing. If the judge refuses the demand of the prosecutor to remand the accused in custody, the public prosecution has the right to appeal against the decision before a panel of three judges. However, if the judge remands the accused in custody, defence lawyers do not have the same right to appeal.

Once the investigation is completed and the public prosecutor feels that he has gathered enough evidence to convict the accused, he is obliged under the CPC to refer the accused person in the case of a major crime to a primary court's accusation chamber. This chamber is composed of a single judge who is authorised to re-examine the case of the prosecution against the accused. He has the power to reopen the investigation, to add more suspects or more crimes to the case file, and to terminate the process by issuing a decision not to prosecute.

The chamber is meant to be a filtering point, which ensures that only strong cases with high probability of conviction will go to the court for trial. According to the law<sup>13</sup> the procedures before an accusation chamber are meant to be adversarial, during which both the public prosecution and defence lawyers can argue their cases before a neutral judge. However the practice again differs from the letter of the law. Lawyers complained that this stage has become just a paper exercise for referring the accused to the major crimes court without the opportunity for lawyers to challenge the case against their clients. Requests from lawyers for judges to hear their witnesses or seeking an early termination of the case are commonly refused with the explanation that this is not a trial court and that the defence lawyer should wait till the case is before the court. Lawyers complained that

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13 CPC, Articles 147-148.

the accusation chamber consequently only worsens the position of the accused and prolongs the legal process.

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## 6.8 The Trial

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The defence lawyers stated that the trial is the stage of the criminal process during which they feel most comfortable and able to represent their clients. The trial is open and public, and defence lawyers state that they are in a better position to present their defence than during the investigation and in the accusation chamber. Unlike the prosecutors, judges do not regard the defence as opponents, so they are more sympathetic to lawyers. The lawyers reported being treated well by trial judges, especially by senior members of the judiciary. Judges agree to lawyers' requests to summon defence witnesses or to be allowed additional time in which to prepare a defence. The reason for such positive attitude from judges, lawyers believe, is that they are serious about their task as trial judges and their responsibility for finding a person guilty or innocent. It is their duty to allow the defence fair play, and so they can only be satisfied in their decision if they allowed the accused and his defence lawyer a chance to defend their case.

However, this stage too is not devoid of difficulties and shortcomings. Lawyers believe that the criminal process is too formal and that it is subject to many regulations which make it difficult for ordinary citizens to defend themselves without help from an expert. The use of legal terminology and the enforcement of strict deadlines by which certain procedures must be exercised, such as appealing the first court's decisions, are confusing for suspects. Some lawyers even claimed that court procedures may lead to miscarriages of justice. One risk is posed by the language used to conduct the criminal investigation and for the presentation of charges and evidence.

In traffic offences, in particular, the wording of the legal provisions may lead to confusion in cases of a car accident which results in fatality or serious harm. This happened in the case described at the very beginning of this chapter. According to the Penal Code, negligence on the part of a suspect leading to death of someone is a serious crime punishable by no less than three years in prison. It is frequently the case that when presented with a charge of causing an accident which results in a death, the defendant confesses. However, it is not unusual that the suspect is only consciously confessing to the charge that he was involved in an accident that resulted in the death of someone. This is not necessarily to suggest that he has con-

fessed to being the cause of death in the accident. In truth, the prosecution often puts its accusation to the suspect in such broad and confusing terms that any ill-equipped defendant will not understand the charges. Suspects and their defence lawyers consequently find themselves disadvantaged once the prosecutor presents this confession in court.

Despite their general approval of the trial stage, lawyers also have some concerns about the conduct of some judges and about the management of trials. Their criticisms are largely related to short-cuts adopted in court processes, the inflexibility of the trial stage and judges' levels of experience. Some lawyers believe that oral presentation of evidence and direct confrontation between prosecutors and the defence have become less common. Judges, in their view, prefer to consult the evidence collected during the pre-trial stage, which is kept in the case file. Moreover, in major crimes cases, the accused and his defence lawyer must submit a list of witnesses they wish to summon in the case to the accusation chamber before the trial begins. In practice, many defendants do not have a lawyer at this stage, as the law makes having legal representation obligatory only during the trial stage. As a consequence, a newly employed defence lawyer frequently has no witnesses with which to counter testimony from the prosecution's witnesses.

Furthermore, lawyers believe that young judges are introduced into practice without proper training and preparation, which affects the quality of the judiciary's work and their ability to deliver justice. Judges are usually selected from amongst the public prosecution and other judicial entities, and they are not given training courses before their promotion to the judiciary. According to the lawyers, the time of the trials is often prolonged due to problems in the organisation of judges' work and the circulation of judges between different courts. Judges are so often moved between different courts that it is rare for a judge to spend more than a year in the same court. Under the CPC litigation must be restarted once the trial judge has been changed. In addition, judges have to examine a large number of cases in their session due to the growing number of cases, which has shortened the time spent on each case, making the job of judges more difficult.

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## 6.9 Recommendations

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The lawyers' assessments of the criminal process, developed out of their experience of working in the system in defence of people who find themselves accused of having committed a crime, were accompanied by a series

of recommendations for reforms which, they believe, will better ensure justice for their clients.

Their first recommendation regards lawyers' training, with one suggestion that law graduates should receive two years of training divided into one year dedicated to a training programme in a special institute for young lawyers, and a second year spent in actual practice in an office of an experienced lawyer, followed by an evaluation exam.

All of the lawyers I spoke to agreed to a second recommendation that police need to be trained and that they should be better informed about the rights of the detainees to legal counsel. The most critical time for the accused is when he is in the hands of the police and this is when serious violations of human rights take place. Police should be aware of the importance of lawyers and their essential role in the criminal process. This is the stage when most of the evidence against the accused is collected. The presence of defence lawyers during police interviews with suspects would help to monitor intimidation or pressure from the police during investigations. Moreover, preventing the police from carrying out certain procedures without a judicial warrant would further protect the rights of the accused. The introduction of sanctions as a consequence of police failure to adhere to these requirements would additionally strengthen the defence's position.

In particular, lawyers stated that it is currently difficult to invalidate confessions obtained under duress, since they can only be challenged once the public prosecution becomes involved in the case. Some lawyers suggested that in the event that the prosecution refuses to refer the accused for medical examination to check for signs of torture, or that a referral takes place after a certain amount of time has elapsed, that then the confession should be struck out.

Lawyers also support a broader review of the power vested in the public prosecution. Many mention that the CPC has provisions calling for criminal investigations to be carried out by a judge. They think that the presence of a judge to oversee the investigation would place both the prosecution and police under scrutiny, which would encourage them to adhere to the rules and pressure them to complete the investigation swiftly, thus limiting the amount of time a suspect spends in pre-trial detention. Furthermore, if such changes to the procedure were introduced, lawyers would be able to approach the judge overseeing the investigation to suggest a certain line of inquiry in the event that the prosecutor is not willing, or is unable, to grant the request of a defence lawyer.

The introduction of an investigative judge would consequently make this stage of the process more balanced and more adversarial. Defence law-

yers should also be enabled to play a more active role during this important stage of the criminal process, when the evidence that will be used during the trial is gathered and organised. Overall, the building of the case against a suspect should be regulated more in order to further protect the rights of the accused and to limit abuse of power by state agents, particularly the police and the prosecution. There is a clear need for suspects to have legal assistance at an early stage of the criminal process, since evidence gathered at the investigation stage may result in the defendant being found guilty at the trial stage. There is also an impetus to make the whole criminal trial process simpler and more accessible, with charges being explained properly to the accused and presented in writing to allow him to better understand them.

Lawyers furthermore suggested that the accusation chamber should either be reformed to allow for a fully fledged adversarial process, or that it should be abolished altogether and replaced with a two-stage trial of major crimes. Currently the CPC only allows for a one-stage trial in the case of major crimes, with no possibility for appeal against the verdicts in this case. Lawyers, finally, suggest that judges are assigned to a specific court for at least three years in order to ensure that they complete most of the cases that have been brought before them. They additionally stress that there should be more resources and training for the judiciary in order to equip them better to oversee criminal trials.

The success of democratic government depends on its ability to deliver the safe environment essential for the justice system to function and to provide the protection and justice Libyan citizens deserve. Restoring law and order, ensuring security through effective policing and the army, dismantling militias and armed groups or integrating them in the conventional army and police forces, are consequently on the top of the Minister of Justice's agenda. As a result, one may not expect an immediate follow-up of these recommendations. Nevertheless, basic aspects of the criminal justice system, such as fairness of procedures against those accused of common crimes, and enabling criminal defence lawyers to do their work properly, are no less an issue of importance in ensuring day-to-day access to justice in Libya after Gaddafi.

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# 7 Her Day in Court: The Work of a Judge on Family Law Cases in Tripoli

*Jessica Carlisle*

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## 7.1 Judge Maha and One Litigant's Story

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In May 2013, Wael has come back to the family circuit of the court of first instance for the second time to tell the judge, Maha, that he is set on divorcing his wife. The judge, however, has a few matters she wishes to settle with him before she'll agree to register the marriage as over. While all Libyan husbands have the right under Libyan law to divorce their wives by repudiation (*talaq*) and Wael is doing the right thing by notifying the court of his own divorce,<sup>1</sup> Judge Maha has had some concerns that he might not be legally married at all.

Wael is a quietly spoken, short man of around fifty who seems crushed and despondent. He has come to the court with his young, female lawyer. He was last in court two weeks ago with his own and his wife's lawyer for quite a lengthy session during which the judge tried to persuade him to think again about the divorce. He and his wife have children and have been married since 2003. However, the couple already had problems in 2004, when Wael said he divorced her.

Libya's Law 10/1984 concerning the Regulation on Marriage and Divorce and their Effects, outlining marriage and other areas of personal status (broadly, family) law, is Sharia-based and follows that of most of the Middle East and North Africa in allowing husbands to unilaterally repudiate their

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1 Article 28 of Law 10/1984 concerning Regulation of Marriage and Divorce and Their Effects stipulates that "divorce will not be established except by a decree of the relevant court." All translations of Law 10/1984 cited in this article are from El Alami and Hinchcliffe (1996).

wives.<sup>2</sup> However, this right is circumscribed, and divorce does not necessarily take immediate effect.

For a repudiation to be legally valid, a husband must be of sound mind, neither drunk nor angry, and not acting under duress when he divorces his wife. Moreover, for three months after a repudiation, a wife is required to observe a three month period of *'idda*, during which she is prevented from remarrying. During the *'idda*, her ex-husband should continue to support her financially, and during this time after a first and second repudiation the divorce can be revoked simply by the couple restarting the marital relationship. After a third repudiation, the couple are considered definitively divorced and cannot remarry unless the wife has married another husband in the intervening period.

Judge Maha has already quite thoroughly checked the circumstances of Wael's first repudiation to be sure that both the divorce and the couple's subsequent reconciliation were legally valid. During the hearing two weeks ago, she explicitly asked him if the 2004 divorce was sound and, anticipating that she wanted to be sure that he was able to pronounce a valid divorce, Wael replied that he was not angry or of unsound mind at the time.<sup>3</sup> However, he didn't seem to have registered this divorce with the court. Moreover, he later changed his mind and reconciled with his wife. This interested the judge since, while Wael had the right to revoke his repudiation, it seemed that the reconciliation occurred after the limited amount of time allowed under the law. Wael said that he thought that he and his wife had reconciled within three or four months, but he couldn't give a more specific date. To compound the confusion he added that he repudiated his wife again in 2011, and that he had no idea at all when they reconciled. Both the judge and her court clerk, Wafa, encouraged him to think hard. If the reconciliation happened more than three months after the repudiation and the couple did not contract a new marriage, then they have been living together out of wedlock for two years.

The judge and the clerk urged him to be more precise: was it a day, a week, a month? When he insisted that he really couldn't remember, the judge told him that, in any case, this was between him and God. However, if he had already repudiated his wife twice before and he did it again, the

2 Article 32:1 of Law 10/1984. Turkey and Tunisia are exceptions; they have banned this Sharia-based type of divorce.

3 Article 32:2 of Law 10/1984 states that "*talaaq* by a minor, insane, demented or coerced husband or one who has no deliberate intention shall not take effect."



law would not allow him to either reconcile with her, or to remarry her even through a new marriage contract.<sup>4</sup> She told him to go away and think about it, and then to come back to discuss it with her again, adding, “If you’ve been dealing with all of this outside of the court for so long, we can give it another two weeks to try to fix it in court.”

Now Wael is back, making the same request. His wife is again absent, neither has her lawyer attended. Judge Maha looks him in the eye and asks him if there has been any change since she last saw him.

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## 7.2 Methodology and Aims of the Research

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This brief account of the work of a family court judge in Libya is the result of observations of two court sessions presided over by Judge Maha in May 2013.<sup>5</sup> She allowed me to observe both sessions in full, including hearings during which she asked that the door be closed in order to ensure spouses’ privacy. She also encouraged me to ask her questions and sometimes commented on cases after the parties had left the room. This was extremely helpful in providing extra information, not only about the legislation and the legal process but also about the judge’s reading of the social and economic circumstances of the litigants. Our conversations were aided by my experience in previous research projects on legal practices during Muslim personal status disputes in Syria, Morocco and Egypt.

The information I gathered during my time in the court was supplemented by conversations with my academic colleagues in Libya, other legal professionals I met during my three and a half months in Tripoli, and friends and acquaintances I made during my visits. The perspectives of my Arabic tutor on the stresses on the Libyan family and the utility of the legal system, illustrated by stories from her and her family’s own experiences, were particularly illuminating.

This resulting assessment of the work of one family court in Tripoli is consequently a qualitative survey of the working conditions, the type of disputes, the arguments made and some of the conclusions that are reached in one judge’s court. It is, therefore, a snapshot of troubles Libyan

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4 Article 34 of Law 10/1984 stipulates that after the third repudiation of a wife by her husband he will not be allowed to remarry her unless she has been married to another husband in the intervening period and that marriage has been consummated.

5 This article describes hearings that took place during the second session.

families brought to the Tripoli court in the spring of 2013 and how this judge deals with them.

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### 7.3 Working Conditions in the Family Court

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On a Monday morning the corridor outside Judge Maha's court is regularly packed with lawyers and litigants. The lawyers chat amiably between themselves, or briefly enter the office in which the hearings will be held to check for information about their cases in the court register. By the time the judge arrives, between nine and nine thirty in the morning, her room is generally buzzing with lawyers, who are ushered out by her court clerk, Wafa, and the doorman, Selim.

The court itself is a small office on the second floor of the newer building of the two that make up Tripoli's main courthouse. The recognisable courtrooms – with a bench for the judge, a stand for witnesses, seating for spectators and sometimes a cage to confine the accused (in criminal trials) – are downstairs. Judge Maha makes do with an office in which the white walls could do with redecoration, and in which the court's work is recorded by hand on paper. The files of the day's cases are already stacked up on her desk on one side of the room when I arrive. Facing where the judge sits are three big filing cabinets, which I assume contain the current files, and at the end of the room is a window overlooking an old, apparently abandoned schoolyard. There are a couple of chairs free for visitors to sit on. I sit, conspicuously, behind a third desk under the window.

The court is only open for hearings in the morning, but on the two Mondays I attended Judge Maha dealt with 18 and 24 case files respectively. Some of this work is simply the submission of documents by lawyers; and some litigants (or their lawyers) do not turn up for their hearings, but many of the hearings involve interactions between the judge and the litigants. These hearings are not recorded verbatim. Judge Maha first questions and listens to the litigants in colloquial Libyan Arabic, before she summarises what they have had to say and dictates this out loud to Wafa, the clerk. As a result not everything that happens in court is recorded in the file, although lawyers and litigants have the opportunity to object to the judge's rendition of them.<sup>6</sup>

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6 This was also the practice of the Syrian Sharia court judge during my PhD fieldwork in 2004-5.

Judge Maha's court is more a female, than a male space. Apart from the judge herself and her court clerk, the majority, if not quite the overwhelming majority, of lawyers and litigants are also women. Sometimes female litigants attend their hearings with male relatives to support them. It is not obligatory for litigants to be represented by lawyers in the family court, but when they come alone and seem confused by the law the judge suggests that they go to the people's lawyers, who are also mostly women, for advice and representation.<sup>7</sup>

Maha has been hearing family cases for four years. She is hoping for a change of scene after the next round of annual judicial appointments this coming summer. Other judges and lawyers have previously told me that family cases are the most taxing to deal with given their emotional complexity. After a couple of hearings in which warring spouses have battled their dispute out in front of her, she turns to me and remarks, "The life of the judge can be tough!"

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#### 7.4 Law 10/1984: Legal Rights and Responsibilities in the Libyan Family

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The legislative framework within which Judge Maha tries to resolve family disputes is principally provided by Law 176/1973 and Law 10/1984 regulating certain aspects of the rights of women in marriage, and judicial divorce on the grounds of harm, *khul'* and maintenance (Alami and Hinchcliffe 1996, 181).

Law 10/1984 states that a husband has the right to his wife's "concern with his comfort and his psychological and sensory repose," and that she is also responsible for the "supervision of the conjugal house and organisation and maintenance of its affairs."<sup>8</sup> A wife is entitled to the financial support of her husband, control over her private wealth, and the right to be free from mental or physical violence.<sup>9</sup> Law 10 also includes provisions on the minimum age at which a young person can marry without judicial permission, preventing forced marriage and extending women's access to divorce beyond that allowed under the 1973 legislation.<sup>10</sup> Both laws are largely derived from the jurisprudence of the Maliki school of Islamic law.

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7 For more on the work of the people's lawyers, see Chapter 5.

8 Article 18, Law 10/1984.

9 Article 17, Law 10/1984.

10 Article 6, 8 and 49, Law 10/1984.

Law 87/1973 merged Libya's civil and Sharia courts so that the Sharia courts retained jurisdiction over personal status cases within the structure of civil courts. In Libya the judges overseeing such cases are law graduates rather than experts in Islamic studies, and, unlike Sharia courts in many other MENA states, they may be presided over by a female judge.<sup>11</sup>

Maha presides over a court of first instance in the family circuit of the court. The family court of appeals is on the floor below, but the latter court is more concerned with the procedural correctness of the initial judgement and does not reopen the case itself or hear litigants or their witnesses.

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## 7.5 Divorce

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In her second session with Wael, Judge Maha appears to have decided to consider his last two divorces and his subsequent reconciliations with his wife as legally sound. Wael is subsequently entitled to pronounce *talaq* for a third time.

The wife of a man who wishes to repudiate her, or the wife's lawyer, has the right to object to this type of divorce. In this case, the court has to appoint arbiters to try to reconcile them.<sup>12</sup>

Arbiters should ideally be two men “of upright character,” one each from either side of the spouses' families, who are aware of the marital problem and are given up to a month to try to reconcile the couple.<sup>13</sup> If they are unable to effect reconciliation, they must submit a report to the judge, who then has to rule on the case.<sup>14</sup>

That this happens in practice is illustrated by the mid-morning arrival of two lawyers – one for a wife and the other for her husband – to notify the judge that a report will be coming from their clients' arbiters. However, by the time the dispute reaches court there is usually little hope of reconciliation, particularly as family members will almost inevitably already have tried to mediate between spouses.

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11 See Amar (2003); Cardinal (2010). In contrast see Voorhoeve (2013).

12 Article 36, Law 10/1984.

13 Article 37:b and c, Law 10/1984.

14 Article 38:b, Law 10/1984.

Wael is adamant that there is no future for his marriage. The judge asks him where his wife is living now and he explains that she has moved into another flat that he owns upstairs from his own. Judge Maha tries to dissuade him one final time, but when he won't change his mind she asks him to repeat the oath of repudiation, specifying that this is his third divorce. Wael signs the record of his divorce for the court's files. Records of litigants' divorces and any post-divorce financial agreements are both signed and authenticated with a thumbprint.

There are three ways in which a divorce can be effected under Libyan law and each has differing financial consequences. The first is repudiation as the result of which the husband will be required by law to automatically pay his wife's as-yet-unpaid dower (*mahr*). Spouses alternatively have the option to end their marriage through the second route of negotiating a *khul'* divorce between them, in which they can specify the financial terms on the ending of their marriage. This is an opportunity for divorcing husbands to avoid paying the unpaid dower and to request repayment of any dower they have already paid in return for consenting to a divorce. The judge can force the husband to give the wife *khul'* if he initially agrees to it and then subsequently withdraws his offer to divorce (through "obstinancy"). The judge is also able to postpone the wife's repayment of her dower if she is hard up.<sup>15</sup>

Together with repudiation and *khul'*, Libyan law allows a third way to end a marriage through requesting a judicial divorce. The grounds for this are quite specific. Both husband and wife can request divorce on the grounds that they have been harmed by the spouse, although this can be difficult to prove. Wives can also ask for divorce from a husband who fails to financially maintain them<sup>16</sup> or is absent from the family home, ill or impotent. The party responsible for the divorce bears all of the financial consequences for it.<sup>17</sup>

This morning the cases come in thick and fast with lawyers submitting paperwork or requesting postponements of hearings with little discussion, hence I am not sure if any cases today are related to requests for judicial divorce. It is clear that I will need to do more research before I can chart divorce strategies in the Tripoli court.

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15 Article 49:b & c, Law 10/1984. See Welchman (2007, 121).

16 Article 40, Law 10/1984.

17 Article 39, Law 10/1984.

## 7.6 Child Custody

In addition to authorising and recording divorce, the court has legal authority to rule on some repercussions of a marriage's end. This morning the divorced parents of some children have come in with the request that custody be transferred to their children's maternal grandmother.

Child custody (*hadana*) is defined as the protection and raising of a child and the looking after his or her affairs<sup>18</sup>; during a marriage it is the right and responsibility of both parents.<sup>19</sup> Custody lasts until a male child reaches puberty and until a female child marries.<sup>20</sup> In the event of a divorce, responsibility for children's welfare is divided into that of custody and legal guardianship. Custody after divorce is exercised by the mother. Guardianship is assumed to be the right of the father, providing him with the authority to make decisions in matters such as the children's education, or finances.<sup>21</sup> If the mother is unable to exercise custody it is then accorded to her mother, then the father, and then the father's mother.<sup>22</sup>

The parents in Judge Maha's court this morning have come in to confirm the mother's mother as the children's custodian. The parents laugh between themselves amiably as Judge Maha looks over their file. She looks up and asks them why, since they get along so well, they are divorced. The father says, "We agreed. That's life (*al-dunya*)."<sup>23</sup> Later the mother comments that they were always more friends than spouses. The father and the grandmother have already agreed on the amount of child maintenance he will pay.

I am curious about the case too and ask Judge Maha if the reason for the wife's decision might be that she wishes to remarry, as under Libyan law she should then lose legal child custody. She looks as if she disapproves of the question and notes that, "They'll have their own reasons."

18 Article 62:a, Law 10/1984.

19 Article 62:b, Law 10/1984.

20 Article 62:d, Law 10/1984.

21 Article 34, Law 17/1992 on the Regulation of the Situation of Minors.

22 Article 62:c, Law 10/1984.

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## 7.7 Child Maintenance and Housing

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Not all cases about child custody and maintenance are so harmonious, although today there are a high number of couples coming in having formerly made agreements. Halfway through the session the judge is surprised that a divorcing wife in her mid-twenties is agreeing to a payment of only LYD150 (around €90) monthly maintenance for all of her three children from her quiet, much older husband. Both the wife and her father confirm that this will be enough since the wife works. After they leave, the judge tells me that the husband doesn't own a house and hasn't received a wage for the past two months. The ex-wife has moved back in with her parents.

Judge Maha agrees with what I have heard elsewhere from other judges and lawyers, that post-divorce child maintenance and housing are the biggest problems in the Sharia courts. Fathers are legally obliged to pay child maintenance and this can be directly deducted from their wages if they are state employees; the average amount awarded seems to be about LYD100-150 per child per month. Fathers who do not work for the government may try to avoid paying at all. Divorced mothers are also legally entitled to housing in which to raise their children, which should be provided or rented for them by the father. However, Judge Maha, several lawyers and other judges said that in practice some intimidate and bully their ex-wives into giving up this right by making their lives intolerable.

Today two lawyers come in already arguing about one mother's housing situation. The father's male lawyer says that accommodation has been provided for her in his family home. Judge Maha asks if the couple are already divorced or just estranged, but the lawyer doesn't know. The wife's female lawyer retorts that this situation isn't at all suitable since the mother doesn't get on with the father's family. The father's lawyer suggests that the mother have a flat on a floor of her own. The judge tells them that she'll give them a ruling in the next session.

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## 7.8 Marriage Requiring Judicial Consent

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The penultimate case today is that of a young woman who has come in with both of her elderly parents to request permission to marry.

The age of marital consent for both men and women is 20 in Libya, and the court's permission must be gained by anyone wishing to marry before

they reach this age.<sup>23</sup> A guardian can neither force a young person to marry someone against his or her will,<sup>24</sup> nor can a guardian prevent a young woman from marrying the person she chooses.<sup>25</sup> Moreover, the court can permit someone under the age of 20 to marry when “it determines some benefit or necessity and after the agreement of the guardian.”<sup>26</sup>

Judge Maha has already granted two young women permission to marry during this session. Both women seemed to be about 18 or 19 years of age and in both cases Judge Maha asked their parents to leave the court before asking each woman in private if she was freely consenting to the marriage. In this third case, she spends more time considering her response. The girl is only 16 and 1/2 years old and very slight. When the judge sends her parents out of the room she not only asks the girl whether she wants to get married, she also asks her what she knows about her prospective husband: he is in the army, but the girl doesn’t know where he lives. Judge Maha sends her out of the room and asks me if I think she is too young to marry.

The matter is settled when she invites the mother into the court to ask her if she is sure that this marriage should go ahead. The mother says she is. Judge Maha asks her where she and her family live, and for a bit more information about the husband, then sends her out to reconsider the request. While the courtroom is empty she tells me that this family are internally displaced persons (*naziheen*). These families, she says, will marry even their young daughters to give them a chance to get out of the refugee camps, where they might be targets of violence. She is still reluctant, leaving the family outside for several minutes, but finally she grants the request.

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## 7.9 At the End of the Court Session

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Although in the case of Wael the judge failed to persuade him to reconsider his divorce, she is determined to try to reconcile one young couple whose case comes up towards the end of the court session. Wafa has already remarked on how many litigants have come to an accommodation between

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23 Article 6:b, Law 10/1984.

24 Article 8:a, Law 10/1984.

25 Article 8:b, Law 10/1984.

26 Article 6:c, Law 10/1984.



themselves during today's session, and she tells the husband that Judge Maha has "a feeling" about his case.

The relationship, however, seems sufficiently doomed that the husband has bought a plastic bag containing a huge block of ten dinar notes wrapped in cellophane, which will cover all of his wife's financial entitlements on divorce. However, Judge Maha notices that he has also included a small box of chocolates as a gift. He tells Judge Maha that the break-up isn't his wife's fault, their problems stem from the wider family. In addition, the wife's brother, who has attended court as her representative to receive the money, confirms that he has been a caring husband. This provokes the judge to insist that the wife's brother call his sister and ask her to come into the court. She arrives towards the end of the session and after all the other hearings are over, Judge Maha has both the wife and the husband in separately to try to bring about reconciliation. It seems that it is too upsetting for them to come into the office together.

Both of them say that the problems have been caused by the other spouse's relatives. They live in a flat above the husband's parents; the wife says that the husband's mother and sister are hostile to her, while the husband says that the wife's sister constantly interferes. Accusations fly. It doesn't matter how much Judge Maha reminds them that they have children and the right to a private, married life, they both reply that the situation is hopeless. After around half an hour, Judge Maha relents. The wife's brother signs to say that he has witnessed the *talaq*, while the wife stays out of the court. After the husband has gone, leaving the money and the chocolates behind him, Judge Maha asks her to come in for a final chat. The wife becomes tearful, after which both the judge and Wafa stress that both husband and wife have the opportunity to save the marriage within the *'idda* period.

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## 7.10 Recommendations

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There is little that legal reform can do to help the Libyan family court judge reconcile families that cannot get on, increase the incomes of divorced fathers, or to protect internally displaced persons from hostility from the wider community. However, legislation currently empowers the judge to take remedial action in disputes caused by the breakdown in family relationships: granting divorce requests from both husbands and wives, regularising child maintenance payments, adjudicating on arguments about

post-divorce housing and overseeing changes to post-divorce child custody.

It is worthwhile observing that Judge Maha is admired for the patient attention that she pays to her work in the corridors outside of her courtroom. Both her compassion for litigants and her skilful application of the law was well-regarded by both private and people's lawyers. The broad recommendation of this research, therefore, might be that Libya would benefit from retaining and increasing the number of judges it has like Judge Maha. However, both she and lawyers noted that there are several reforms that might ease her working day. A number of recommendations can consequently be drawn from even brief observation of Judge Maha's court.

The first of these is that the family court would undoubtedly benefit from additional resources, both in terms of easing its own workload and towards increasing litigant's access to justice. The computerisation of this court's work might considerably aid the management of cases. Moreover, litigants and lawyers often have practical difficulties in finding their way in court, as clear signs or well-informed and helpful receptionists are lacking.<sup>27</sup> Judges might not have to direct litigants to the services of the people's lawyers (see 5.4), if litigants have access to a reception in the court, which could provide them with basic information and direct them to legal services.

Secondly, the recent government proposal to establish a fund for the direct payment of child maintenance to divorced mothers – with the state subsequently taking responsibility for collecting amounts from children's fathers – would be of immediate benefit to children following the breakdown of their parents marriages. The state's current policy of issuing all Libyan citizens with a new ID card may enable efficient deduction of maintenance payments. However, the amount set for child maintenance may not, in any case, be sufficient to support divorced mothers and their children. Future policy regarding state welfare payments – in particular child benefits – might consider which parent receives these payments following divorce, and how much they are worth.

Thirdly, the resourcing and working practices of supporting institutions, most notably the police, have a direct impact on legal rulings on family matters such as protecting a divorced mother's access to housing. Further research might consider the extent to which police intervention in, and recording of, cases of domestic and child abuse affects the work of the fam-

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27 Personal communication senior lawyer, 26 March 2013.

ily court. The priority given to gender awareness and child protection in current training programmes for the police may, then, be of benefit to the family court judge.

Fourthly, the possibility of ensuring litigants' privacy, particularly that of women, through establishing separate, specialised family courts could make family cases easier for both litigants and the judge, given the sensitivity of many issues discussed during hearings.

The final issue is that of the legal norms enshrined in the personal status legislation itself, which Libya has inherited from the Gaddafi period. The interpretation of Islamic legal jurisprudence as embodied in Law 10/1984 was contested during my fieldwork, as demonstrated by the Supreme Court ruling regarding the court's regulation of polygamous marriage in 2013 (see Chapter 4). The remainder of Law 10/1984 facilitates access to divorce for both spouses; ensures that mothers retain custody of their children, while fathers retain rights to make important decisions in their lives; and, makes legal provision for housing for divorced women.

The work of the family courts is also effected by several other legislative issues that have recently been under debate. These include the definition of the Libyan family, in the form of discussions about Law 24/2010 (1378) concerning the Libyan Nationality, which currently excludes the children of Libyan mothers and non-Libyan fathers from citizenship. In February 2013 the General National Congress voted to extend state child benefits to such children, although full citizenship remains a subject of disagreement. If Law 10/1984 and other relevant legislation are subject to further review, legal debates about interpretations of the Sharia and national identity should involve as many qualified stakeholders as possible in order to optimise the future welfare of the family in Libya.

# 8

## Developing the Case Against Law 4/1978: Property Claimants in Tripoli

*Suliman Ibrahim and Jessica Carlisle*

### 8.1 Disputed Property between Neighbours

Naima, an archivist in Tripoli, has been in dispute with her upstairs neighbour since 1978 and wants the woman out. Her neighbour used to rent a flat owned by Naima's husband's family, above their own home, in the mid-1970s. However, in 1978 the ex-regime passed Law 4, by which housing, commercial premises and undeveloped land were expropriated from the owners and ownership mostly re-allocated to tenants. Ever since then the neighbour has claimed the flat as her own, although Naima's husband has tried several times to claim it back.

He made his first attempt while he and Naima were planning to marry in 1980, but the neighbour refused to leave. Naima remembers angrily that the flat was supposed to be their marital home, but that this had no effect on the neighbour who, she feels, could act with impunity because of her associations with the regime, "She was pro-Gaddafi. She knew that she had power on her side. She knew too that we were anti-Gaddafi. She held that against us. She could use it. She used to throw rubbish out onto the staircase and we used to clean it up. She knew that she could do this, because we couldn't do anything against her."

Naima's husband took the case to court twice in the 1980s. The legal claim was complicated by the fact that during the period in which Naima and her husband were engaged, their neighbour, a Libyan, was married to an Egyptian man. The couple later divorced and the neighbour remained in the flat with her child. Naima's husband's first court case was denied because it was brought against the Egyptian man, who had initially been granted ownership of the flat under Law 4. Naima says that the woman, because she was a lawyer and understood how to do it, had changed the

name to her own on the necessary paperwork. She even suspects corruption was involved, although this seems unlikely.<sup>1</sup> Naima's husband took the case back to the court, making a claim against the correct name, but the judge refused the request again. Naima believes that she and her husband were particularly disadvantaged because the woman was Libyan: "If she had been Egyptian the court would have told her to go." However, she also remembers that a friend of her husband, a lawyer, told them that their claim was hopeless; courts and lawyers had been given instructions to refuse claims arising from Law 4, "The political atmosphere made it impossible."

Since the end of the revolution, Naima and her husband have become more determined than ever to get the flat back. She says that her son is reaching the age at which he is thinking about marrying and that the flat should now go to him. She feels upset and frustrated that Law 4 has not been abolished. Moreover, she worries that there is a risk that her family might find themselves subject to criminal prosecution if they try to sort the matter out directly. Her husband has been warned by the public prosecutor to stay away from their neighbour after the woman complained that she had been threatened by him. There are estimates that as much as 60-70% of property in Tripoli is subject to dispute as a result of Law 4 or other laws related to property expropriation passed during the late 1970s.<sup>2</sup> The issue has become politically and socially contentious in newly democratic Libya and the government is under enormous pressure to come up with a solution to the problem.

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## 8.2 Methodology and Aim of the Research

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During this research into disputes arising from Law 4, which was conducted in Tripoli, we spoke to individual property claimants and members of two groups lobbying for the annulling of Law 4, the Minister of Justice, bureaucrats, consultants working for INGOs and lawyers. We also had meetings with the Minister of Justice, Salah Al-Marghani, and with Judge Hanish, the judge appointed to oversee a committee set up to deal with property

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- 1 Naima believes that her neighbour must have been involved in some corruption in order to get her name registered on this documentation; however, given that the neighbour's ex-husband was Egyptian and that she was divorced it is likely that she made a submission to the local Real Property Registry to have the papers registered in her name.
  - 2 The UNHCR (2013b, 32) have reported an estimation that three-quarters of Tripoli's 2.2 million population may live in a property that was expropriated and redistributed under Law 4/1978.

claims in the last period of Gaddafi's regime.<sup>3</sup> We also consulted files held by this committee on individual claims, read relevant internal government documents from before and after the 17<sup>th</sup> February Revolution, and analysed the relevant law and statements made by the ex-regime, the NTC and democratic government regarding property ownership.

Our first aim was to explore how former property owners have responded to the implementation of Law 4 and related legislation, and what, if they now claim back their property, are their expectations of justice. Our second goal was to discover how governments (under Gaddafi and following the 17<sup>th</sup> February Revolution) have responded to the protests, complaints and claims of former owners: both through the passing of legislation and the setting up of legal institutions, and through less formal policies of greater or lesser tolerance and acceptance of property claimants' demands. Our analysis takes Libya's evolving politics into account in assessing the ways in which law, legal processes and alternative strategies have been employed by property claimants and the evolution of a definition of justice in regard to disputed property that has apparently become dominant in debates about Law 4. We will ask how justice in relation to Law 4 is being defined in the post-Gaddafi context, by whom and with what likely effect.

Our recommendations are situated in wider considerations about state building, the development of institutions and the establishment of citizen/state relations in post-revolutionary Libya.

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### 8.3 Law 4/1978: Effecting Fundamental Change to Property Ownership

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Law 4/1978 was one of a raft of policies pursued by the regime in the 1970s and 1980s, which included nationalisations, the abolition of several private professions, limits to the role of the market and regulation of private property ownership. Gaddafi's *Green Book* asserts that an individual cannot be free unless he "controls" his basic needs, namely: a house, an income, and a vehicle.<sup>4</sup>

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3 Minister Al-Marghani highlighted the importance of Law 4/1978 during a meeting with members of the AJIDIL research group in December 2012. Judge Hanish gave us permission to consult the 2006 Committee Archives and to interview the administrative staff with responsibility for the files.

4 "There is no freedom for a man who lives in another's house, whether he pays rent or not ... In the socialist society no one, including society itself, is allowed to have control over a man's needs. No one has the right to build a house in addition to his own and that of his heirs, for the purpose of renting it, because the house represents another person's need, and building it for the purpose of rent is an attempt to have control over the need of that man and 'In Need Freedom is Latent'." *Green Book Part Two*: 14-15.

Article 1 of Law 4/1978 states that every citizen has the right to own a house or a plot of land on which to construct a house and that this “ownership of the house is sacred.” The law prescribes that anyone in possession of an amount of property in excess of this should choose which house or plot of land they wish to retain (Article 2); all additional properties, unless required to run a business, and land fit for construction (Article 3) should be transferred to the ownership of the state. Excess properties are then to be assigned to citizens in need of housing, although the law allows for properties to be kept by the state in order to serve the purposes of public interest (Article 7). The law entitles those whose property is expropriated to compensation (Article 8), however it refers to implementing regulation for determination of the methods of payments. Today, most property claimants say that this compensation was never paid.

The accompanying regulation for implementation mandates the setting up of two committees in each municipality to respectively identify and reassign properties. Owners were obliged to comply by providing the necessary information. Although it seems that some property owners managed to avoid being detected under Law 4, the stories of this kind that we heard from property owners were rare and anecdotal in Benghazi and Tripoli. There was some scope to retain more than one property within a family within the terms of the law given the rule that every male, Libyan adult was entitled to a residence. As a result, some property owners registered relatives as the owners of property that was at risk of being expropriated. However, this brought mixed results: while some families successfully managed to hold onto property in this way, this strategy also caused long lasting rifts in other families with relatives later falling out over who has the strongest claim to rightful ownership.

Tenants had the strongest claims to obtaining ownership of the properties they already inhabited. However, property claimants tell stories about bribes changing hands in order for people to be allocated plots of land on which to construct a house, of people with connections exploiting the law to accumulate property or move into a bigger house, and of neighbours in some (but apparently not the smaller) cities informing on each other.<sup>5</sup> There were fights over possession and Libyans studying or working abroad returned to find that their homes had been occupied in their absence. Although responsibility for the expropriation and distribution of prop-

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5 A report from the Libyan regime’s Public Administration Control Authority in 1986 noted that such infringements had taken place. See Inspector General of the Central Agency for General Administrative Oversight (1986, 443-446).

erty was supposed to be that of the local Law 4 committees and later the Property Registry, property owners make it clear that the regime's People's and Revolutionary Committees were also involved in the process, which they often found intimidating. All of our interviewees stressed that resisting this policy would have been foolish and dangerous since, as one property claimant told us, "It would have been against Gaddafi himself."

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## 8.4 Tightening of Legislation to Prevent Property Claims

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In the aftermath of the enactment of Law 4, in 1979, a decree issued by the General People's Committee (Cabinet) amended the implementation regulation of Law 4. It stated that every citizen occupying a house was to be considered its owner, provided that he met the conditions stipulated in Law 4 and its implementation regulations,<sup>6</sup> unless it was the sole property of a Libyan studying or working abroad.<sup>7</sup> In 1984-5, the regime further extended the policy's reach by stating that Law 4 applied to any vacant plots inside and outside of the urban planning area,<sup>8</sup> and prohibiting any court cases requesting compensation for its effects.<sup>9</sup> Finally, in 1986, the ownership of land itself was abolished,<sup>10</sup> further undermining the pre-1969 form of property ownership, by redefining the right to land as one of "possession." The implications of this for potential property claimants, therefore, was that claiming compensation for the loss of a plot of land was rendered impossible since land could simply not be owned.

The regime's subsequent admission, although limited, that there had been abuses and misapplications of Law 4 – most notably in a speech by Gaddafi and a report from the Public Administrative Control Authority in 1986 (Al-Mazughy nd., 25-36 & 470-472) – signalled that it might be more open to circumscribed challenges. However, the regime appeared ambivalent about allowing cases to come to court. Initially, it empowered the newly established "people's courts" in 1988 to hear cases concerning

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6 According to Article 5 of Law 4's Enforcement Regulations, in order for anyone to be assigned the ownership of a house he was occupying, he would have: 1) to be a Libyan citizen, 2) to be married; to be a breadwinner for children, parents or siblings who live with them; or to be alone with no one supporting him, and 3) to not already own a house or a plot of land on which he could construct a house.

7 Official Gazette, Issue No 33, 12/12/1979.

8 Law 21/1984 concerning Special Regulations on Public Utility and the Disposal of Land, Official Gazette, Issue No 29, 8/11/1984.

9 This law was subsequently challenged on the grounds that by imposing such restrictions it prevented people from their right to litigation and so was unconstitutional; however, the Supreme Court concluded that this law did not prevent people from bringing cases; it only regulated this right. See <http://tinyurl.com/sjpgl-070>, accessed on 12 March 2013.

10 Law 7/1986 on Abolishing the Ownership of Land and Law 6/1986, Official Gazette, Issue No 14, 3/6/1986.



“annulment, restitution and compensation for any misapplication of revolutionary statements.”<sup>11</sup> Then, in 1992 it partially reversed this policy by disallowing the restitution of any houses expropriated under Law 4 and limiting such claims to compensation. The only exception made was in respect of claims for workshops; for restitution to be ordered a claimant had to prove that the workshop was his own, that he was using it when it was expropriated, and that it was not otherwise used in the interest of the society. He also had to promise to run the business himself, without “exploiting others.”

This period of ideological and legal uncertainty overlapped with Libya’s diplomatic and economic isolation. Property claimants’ negative assessments of the regime’s provision of some legal redress during this period is perhaps particularly informed by the fact that by 1998, the regime exacted a complete u-turn regarding property claims, disallowing them from being brought to court,<sup>12</sup> even if the property was vacant.<sup>13</sup> As a result, not only was restitution severely curtailed, compensation for any real property (whether a house or a workshop) became, once again, unobtainable.

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## 8.5 Decision 108/2006: Introducing State-Sponsored Compensation

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Throughout 2000 until the 2011 uprising, the regime, under the apparent direction of Saif Al-Islam Gaddafi, encouraged foreign investment and forged strong links with the international community. Some of the effects in Tripoli were a steady and steep rise in property prices. During this decade, the regime introduced significant legal and political changes permitting ownership of more than one property in several situations, allowing for restitution of, or compensation for, expropriated properties, and raising the possibility of an end to Law 4.

The first indication that the regime was altering its stance came with Law 3/2004. This legislation lengthened the list of the family members who could claim rightful ownership of family property, such as widowed daugh-

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11 Law 5/1988.

12 Law 7/1997 concerning the Amendment of Some Provisions of the Law 5/1988 on the Establishment of the People’s Court, Official Gazette, Issue No 10, 29/5/1997.

13 Law 10/1997 on Special Regulations of Ownership, Expulsion, and Eviction Lawsuits concerning Real Properties Expropriated by Society, Official Gazette, Issue No 2, 21/2/1998.

ters. It also allowed people to own more than one property if the purpose was to speculate on it or to temporarily rent it out as housing.<sup>14</sup>

The second, more important, change was brought in via Decision 108/2006 on the Procedures, Bases and Criteria Concerning the Completion of the Compensation for Properties Subject to Law 4/1978.<sup>15</sup> This decision enabled restitution of one property per person to pre-1978 owners and their adult sons, in the form of houses, workshops and plots of land if the property had not been registered as the residence of a Libyan citizen, but had been kept by the government.<sup>16</sup> If restitution was inapplicable, the decision allowed for compensation of the original owners. A committee was established, commonly known as the 2006 Committee, chaired by Judge Yousif Moloud Hanish, the head, at that time, of the Directorate of Law to oversee the implementation of Decision 108. Before the 17<sup>th</sup> February Revolution this committee ran 33 local offices across Libya and had direct access to government funds by which to make payment of compensation awards.

The committee stopped accepting applications for compensation in 2010, by which time it had gathered 25,000 claims, 8,000 of which, it currently states, it had settled by the outbreak of the 17<sup>th</sup> Revolution.<sup>17</sup> Its chairman argues that although the committee was largely prevented from ordering restitution in the majority of cases, nevertheless, it was able to bring about some justice for claimants by, in effect, providing them with the compensation they were promised in 1978. However, property claimants have several complaints about the way of working of the committee, most notably that it significantly underestimated the value of their property, that the process (particularly the survey and evaluation undertaken by local officers) was open to corruption, that many claimants felt compelled to accept compensation awards due to their financial circumstances, and that restitution orders were unenforceable. Most of the property claimants we spoke to in Tripoli said that many refused the committee's offers outright.

14 Renting houses had been prohibited since the issuing of Law 4. In response to increasing demographic pressures and a housing shortage, Law 3/2004 was passed which, after expressly prohibiting the payment of rent for housing, allowed Libyans and others to temporarily “benefit” from houses in return for payment. Libyans whose housing is provided through this method should be assigned ownership at the end of the contract since the payments they have made constitute purchase of the property. If the “beneficiary” leaves the house or flat before the end of the specified period, the payments already made are effectively forfeited and considered as having been made in order to occupy the house.

15 A *decision* differs from a *law* in the following respect. The term *law* is used to denote ordinary legislation, enacted by the legislature, e.g., Law 4/1984 is understood as the ordinary legislation that was enacted by the legislature under this name and number. A *decision*, on the other hand, is issued by the executive authority, e.g., Decision 108/2006 was issued by the executive authority (the former *al-lajna al-shabiya al-aama*).

16 Law 4/1978 although stipulating that properties expropriated were to be redistributed to those in need, permitted the state to keep some properties and to “manage” them in the interest of the Libyan people (Article 7:b).

17 Statistics received from the 2006 Committee in December 2012.

In the aftermath of the revolution the committee, nonetheless, remains a touchstone for property claimants in Tripoli and its office is visited daily by dozens of claimants, and occupants, of property affected by Law 4. Ironically, graffiti on the wall of the office in which the committee stores its files states that the building is itself the subject of a property dispute arising from the law.<sup>18</sup>

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## 8.6 After the 17<sup>th</sup> February Revolution: The Overthrow of the (Property) Regime?

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The 17<sup>th</sup> February Revolution of 2011 ending Gaddafi's regime opened the door to challenges to Law 4. The emergence of democratic government and the scope that this allows for protest and lobbying has made the *status quo* politically unsustainable, as property claimants demand justice. In the absence of a legislative review, property claimants have both pursued individual "self-help" in order to repossess property, and have organised collectively in order to demand legal reform.

The government's lack of monopoly on violence has given some families the opportunity to seize lost properties back by force. There are stories of militiamen forcibly evicting occupants since the revolution. Interviewees note, however, that other occupants cannot be evicted since there is considerable fear that they may be armed, or may have connections with groups that have weapons. Moreover, there are accounts of militias (many of them said to be opportunists who banded together after the revolution) taking properties for themselves, particularly after they have been abandoned by occupants allied to the old regime.

In this atmosphere of uncertainty about future government policy towards Law 4 and threats of violence by armed groups, the 2006 Committee continues to function. As said, despite the fact that it no longer accepts the registration of new claims, the committee is visited every day by dozens of claimants with enquiries about their disputes. The committee's staff says that they also receive enquiries from occupants, wanting to know if claimants have accepted compensation, and that they occasionally receive a request from a claimant together with an occupant to formalise an agreement they have reached between themselves.

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<sup>18</sup> The building in which the committee houses its records has been the object of a property claim from an alleged former owner. This claim has now, apparently, been settled.

Apart from attempts at self-help and mediation, some property claimants have formed civil society organisations in order to lobby for their rights to expropriated property. The highest profile of these, the Association of the Owners Harmed by the Ruling of the Tyrant (*Rabitat al-Mulak al-Mutadarariyn min Hukm al-Taghyat*) states that it has 1,300 members, maintains a Facebook page and has frequently appeared in the media. A women's association of property claimants has also recently been established in Tripoli. These groups are well-connected: the *Rabitat* maintains regular contact with the head of the 2006 Committee and within the GNC, and has been active in lobbying the Ministry of Justice.

In response to increasing pressure to deal with the property issue, Decision 13/2012 was issued by the Prime Minister, announcing the formation of a committee under the leadership of the Minister of Justice. This 2012 Committee has produced a new draft law, which is due to be debated in the GNC. It makes two proposals regarding claimants: that workshops, vacant plots inside urban planning areas and agricultural land on which establishments have not been built, be subject to restitution regardless of the occupants' status; and that housing be returned, except in three cases, namely if the claimant has already been compensated, if he prefers compensation over restitution, or if there is reconciliation between himself and the occupant. Claimants could also demand compensation to make up the difference between that paid out by the 2006 Committee and that which is fair, taking also into account lost earnings.

The proposal regarding occupants is more opaque. Article 5 of the draft law states that if restitution is ordered, and it happens that it is occupied by a Libyan family, and it is unattainable to provide them with a state owned house, then the state shall allow them to stay in the house for a maximum of one year, but that they must find alternative accommodation within this time and will be obliged to pay rent during their stay, the cost of which will be borne by the state if they cannot afford it. In seeming contradiction, Article 9 states that if restitution is ordered and the occupant does not have another property, then he shall be allocated a state-owned property with the obligation to pay a mortgage on it. Alternatively, an occupant can be given adequate compensation. It seems on first reading that Articles 5 and 9 may not be reconcilable: however, one reading might be that the stipulation in Article 5 would follow on from that in Article 9, meaning that a family would be evicted and given a state owned house, if there is any; alternatively, they would remain in the property for up to a year and pay rent. Within this year, they have to find an alternative house or risk being evicted

at the end of this period. A lack of clarity in the phrasing of the draft apparently leaves it open to other interpretations.

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## 8.7 Concluding Remarks: Thinking about “Justice” in Post-Revolutionary Libya

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Whereas individual former owners such as Naima (see 8.1) remain uncertain about the timing of the restitution of their property, or the amount of compensation they may receive, two years after the 2011 uprising began, the property claimants’ lobby is reasonably confident that its basic case of entitlement to restitution of, or compensation for, their property has been established. There is, however, considerable frustration about the time it is taking to reform the law and what the fine details of future legislation will be.

After the coercion, contradictions and corruption complicating property ownership since 1978, the issue of contested property has become highly politicised in the aftermath of the revolution. Law 4 is irrevocably associated with Gaddafi and his ideology, and therefore easily denounced. Property claimants consequently clearly identify themselves as victims of the past regime. Their demands for justice, and their definition of the form this should take, is largely reflected in the draft law to be debated in the General National Congress. It can be argued, therefore, that a dominant political norm has emerged in support of restitution or full compensation of expropriated property, which has come close to being enshrined in legislation. What is notable about the process by which this norm has been produced is that the opinions and experiences of the occupants of contested properties have been absent. More generally, the conception of egalitarian justice, which underpinned many redistribution schemes in the 1960s and 1970s, including Law 4 and land reform laws in neighbouring Egypt, seems to be absent from the current public debate in Libya. During our own research we have had particular difficulty interviewing occupants of disputed properties; people have told us that they would be too ashamed to talk to us, that they came from “outside” Tripoli (such as from Tarhouna) and that they have acted against Sharia, a view that was supported by a recent fatwa from the Grand Mufti al-Ghariani.<sup>19</sup>

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<sup>19</sup> Several fatwas have been issued by al-Ghariani in his capacity as the Grand Mufti regarding Law 4, which are available on the Dar Al-Ifta website. For example, fatwa No 1201 on 30/4/2013, <http://tinyurl.com/sjpgl-071>. There was also a fatwa issued by the whole Fatwa Council on 25/11/2012 urging the government to issue a law returning properties to their rightful owners, <http://tinyurl.com/sjpgl-072>, accessed on 26 June 2013.

However, recent experience in Libya has demonstrated that compensation programmes in the aftermath of the revolution can be politically contentious, even for claimants powerfully associated with the overthrow of Gaddafi's regime. Public opposition to compensation Law 50/2012 for victims of the ex-regime's political prisons, which would have awarded claimants LYD8,000 for every month they were imprisoned, was so strong that the legislation has not been implemented. Other conceptions of justice as they will finally be embodied in legislation, are also likely to be contested as Libya's democratic government establishes policies to address a raft of injustices resulting from the Gaddafi period in a context of public scrutiny.

The current draft law would place an enormous financial burden on the state given the projected cost of a programme of full restitution or compensation.<sup>20</sup> Moreover, full compensation for large property owners, or complete restitution of their property, will reinstate an extremely wealthy property owning elite. The political sustainability of such a policy is questionable. While property claimants clearly have a claim, their complaints regarding disenfranchisement under Gaddafi are not unique. Moreover, justice requires that the voice of the other party is also at least heard.

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## 8.8 Recommendations

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Analysis of interactions between the government and property claimants illustrates that conceptions of justice are not fixed but are socially produced in Libya. The argument about what would constitute a just solution to property claims resulting from Law 4/1984 have consequently been evolving, first under Gaddafi and now in post-revolutionary Libya. While property claimants are well-positioned to have their arguments acknowledged, the financial costs of bringing them justice will have an impact both on funding for Libya's chronically under-funded infrastructure and on wealth distribution amongst the population.

We make two recommendations with respect to forthcoming government policy on the issue of Law 4. The first is that far-reaching political and legal decisions on the problem of Law 4 deserve a proper knowledge base. Therefore solid socio-legal and policy research should be done into

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20 Already the government's current commitments to the construction of housing and the infrastructure is estimated at \$100 billion: "Libya's Housing and Infrastructure programme to Cost More Than \$100 Billion: US Consultant Working on Recalibrating Major Housing Programme." *Meed*, 9 June 2013, <http://tinyurl.com/sjpgl-073>, accessed on 19 June 2013.

- The opinions and experiences of both property owners, occupants and the general public;
- The projected social outcomes of any adopted policy, including the comparative perspective of similar property claims in post-Soviet Eastern-Europe, and in post-conflict situations such as Kosovo and Iraq;
- The viability of different housing schemes in the Libyan context;
- The financial cost, and its implications for other policies, including housing, health, education, welfare etc.
- Institutional and legal implications of different political solutions such as which fora will have authority to adjudicate cases and on the basis of which normative standards.

We suggest that the general public be informed that such research is being undertaken, and that interim findings are carefully disseminated to inform people that the research is progressing.<sup>21</sup>

In addition to the conduct of research, we would also recommend that Law 4 be integrated into the issues addressed in any future efforts towards transitional justice. The animosity that has been created by the aftermath of state expropriation and redistribution of property might be decreased by including both former owners and current residents of disputed properties in a future process of “truth telling.” During our interviews with property claimants we always asked people what a just solution would be for occupants of contested properties and how long they expected that it would take for the property issue to be resolved by government. Although our interviewees remained hostile towards the occupants involved in their own disputes, all of them readily conceded that people could not simply be made homeless and that resolving the situation would take anything between two to ten years. Moreover, everyone who spoke to us highlighted the fact that security was the preeminent national priority, but also usually added that Libya faced many other challenges including an underfunded education system and a chronically inadequate health system.

Much of the fury and frustration they expressed was directed against the government, in particular the GNC, which was accused of being partisan, slow to act and corrupt. It might be that more transparency and inclusivity in government policy would go some way to ameliorating this perception, while allowing all voices involved in Law 4 disputes to be heard in the tran-

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21 During our fieldwork it has been most property claimants' perceptions that they are not being listened to and that the government is not doing enough to deal with their claims.

sitional justice process may help in forging a consensus about a just solution in property disputes.<sup>22</sup>

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22 It is not very clear, however, when this debate will take place. On 16 June 2013 the GNC issued a statement asking claimants to be patient and promising to draft legislation ending unjust laws and to solve the problems that these laws had caused. However, it did not say anything specific about the draft law already submitted to the GNC. On 19 June 2013, the *Rabitat* issued a statement replying to the GNC and stating that: 1) they have already given the GNC more than once the time it is asking for, and that the result has been more abuse of former owners' properties; 2) they are concerned because of the state's clear weakness in both legislative and executive roles, and 3) they have agreed on a certain date (they did not say when) to re-occupy their land and to reclaim their rights and properties, and they hold the GNC, the Council of Ministers, the Councils of Wise Men all over Libya responsible for any drop of blood that may be shed as a result of their complacency.



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# 9 Compensation for Unlawful Detention under Gaddafi's Regime

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*Jazia Gebril and Mohammed El-Tobuli*

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## 9.1 The Case of Mohammed

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Mohammed, who is now in his mid-fifties and working as a teacher, vividly recalls the events of 19 January 1989: the day on which he began ten years of extra-judicial detention on the mistaken assumption that he had been involved in political opposition to the former regime.<sup>1</sup> He returned from work that day to have lunch with his mother, his wife “who was pregnant at the time” and his younger brother, when he was arrested by Muammar Gaddafi's security forces. He remembers that his older brother, who lived in the apartment upstairs, came down to tell him that the secret police were trying to get in to the house. He went outside to talk to them. He was immediately arrested without being allowed to change his clothes, or to talk to either his wife, or his mother who, he recalls, were very frightened. He adds that he didn't even get the chance to hold his baby son before they took him away.

Mohammed subsequently disappeared into the regime's security system until he was released on 21 June 2000. He says that throughout his detention he was never formally charged, “although I was challenged with vague accusations which weren't related to anything obvious.” He doesn't remember having done anything that would result in his arrest, saying that his only “crime” was to pray in a nearby mosque where young people were monitored by the secret police on suspicion that they might have been involved in Islamist opposition to the regime.

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1 The regime began a concerted policy of mass arrests of suspected opponents in January 1989. Human Rights Watch (2006, 15) commented that this was in response to the return of Islamist fighters from Afghanistan raising the regime's fears of a violent overthrow.

Gaddafi's response to increasing Islamist resistance from the 1980s was to take "extraordinary efforts ... to stifle opposition and to protect himself and his regime" (St John 2011, 70). Mosques were monitored and religious leaders considered to pose a political threat to the regime were targeted. However, Mohammed says he wasn't really interested in politics and that at the time he didn't have any "political vision." Throughout his detention he was never able to contact a lawyer and was never brought to court.

Although he doesn't dwell on the circumstances of his detention, the conditions endured by Mohammed and other illegally detained prisoners in Gaddafi's parallel prison system are well known since they have been widely documented (see 9.4) (Human Rights Watch 2006, 15; Amnesty International 2010).<sup>2</sup> Other men we interviewed for this report described torture, neglect of serious medical problems, malnourishment, severe overcrowding and deaths during their detentions. Mohammed also makes it clear that he was held outside of the prison and court system in appalling conditions. This, he says, denied him his "basic rights," although he only mentions the absence of family visits or the right to study. He stresses that neither his detention, nor his release, had any basis in legality. He thinks that he and others were eventually released because of relentless pressure from their families combined with national and the international awareness of their cases.<sup>3</sup> The regime, he believes, was bent on improving its international image, not on seeing justice done.

Mohammed is now married with three children and has managed to rebuild a life for himself since his release. However, his family has been irrevocably changed by the former regime's policy of arbitrary, prolonged detention; his younger brother, who was arrested along with him, was subsequently a victim of the Abu Salim massacre.

Since his release, Mohammed has pursued a legal case for compensation; however his claim remained in court throughout the Gaddafi period and has still to reach a ruling. Although the National Transitional Council (NTC) passed legislation that would have compensated Libyans who were imprisoned in the former regime's security prisons, this law has yet to be implemented. In the period following the revolution, during which both the NTC and the subsequent democratic government have been faced with a succession of governance challenges, cases of those arbitrarily detained

2 See also <http://en.libya42.org>.

3 Amnesty International (2010) noted that the regime began a policy of releasing small groups of arbitrarily detained prisoners in 2000.

under Gaddafi seem to have lost momentum. Mohammed acknowledges that the current government has many responsibilities, but he wonders when justice will be done for Libyans such as himself.

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## 9.2 Methodology and Aim of the Research

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The basis of this chapter, which analyses access to justice after arbitrary detention under the former regime, consists of four in-depth interviews with individual justice seekers in Benghazi. We also gathered information from a lawyer and a judge, who have both been involved in cases such as Mohammed's, and civil society organisations concerned with the case of the victims of Abu Salim, in particular the Association of the Families of the Abu Salim Martyrs. In addition, online media reports were consulted on the subject of justice seeking by the previously arbitrarily detained.

The four men who spoke to us had all been arrested and arbitrarily detained for long periods. They all stated that they had done nothing to undermine the former regime. Mohammed is the eldest of our interviewees. Said is in his forties, works as an electrical engineer and was also arrested in 1989 and released in 2000. He says he was detained along with several of his co-workers after an assassination attempt had been made on Gaddafi which allegedly involved a colleague. Tariq, an aeronautical engineer in his forties, explained that his arrest was the result of a mix-up of names. He remained in prison for four years. Finally, Zeid, in his mid-forties and working as an electrician, was also imprisoned from 1989 until 2000, and could pinpoint no reason for his detention.

During our interviews, justice seekers were asked in what way(s) they had sought justice through either formal or informal means, what difficulties they had faced, and how satisfied they were with the actions that have been taken by the government with regard to their cases.

The main objective of this study is, therefore, to analyse the extent to which law and legal practices, both before and since the 17<sup>th</sup> February Revolution, have affected or facilitated access to justice for men unlawfully imprisoned<sup>4</sup> by the Gaddafi regime. We will assess how these men's definitions of justice have evolved during their attempts to make their grievances heard and to gain redress, before and after the revolution, as successive

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4 The definition of arbitrary detention and unlawful imprisonment can be used interchangeably when describing what happened to these men.

governments have responded to their claims. In particular we draw attention to the relationship between compensation and justice for these men in the context of the amounts they have been offered, by whom and in what circumstances in which they have been offered payment.

In conclusion, an assessment will be made of the future prospects for settlement of these claims.

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### 9.3 Legislation Regarding Detention

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Despite the development and maintenance of the previous regime's parallel security apparatus and its use by the regime to exert control over the population, Libya's state legal system including its criminal law and criminal courts, were in place and dealing with cases brought before them throughout the Gaddafi era. The criminal legislation which was in force at the time and continues to be so until today, explicitly prohibits unjustified imprisonment, the maintenance of unsuitable prison facilities and unsupervised detention. In addition, Libyan law entitles prisoners to register complaints about the circumstances of their detention and mandates authorities to follow them up. In principle, this criminal law should have applied to arbitrary detentions and imprisonments such as Mohammed's.

The Penal Code forbids both unlawful arrest and unlawful detention. Article 433 states that unlawful arrest of people is a crime, punishable by imprisonment of up to three years. This norm is further emphasised in Article 434, which defines keeping a person in a penal institution contrary to the orders of the competent authority as a crime, classifying it as a misdemeanor punishable by imprisonment of up to three years in addition to a fine.<sup>5</sup>

The Criminal Procedure Code provides legal mechanisms for the prevention of unlawful detention and the monitoring of the conditions of imprisonment. Article 30 of the law makes it clear that no one should be arrested or imprisoned except by the order of a legally competent authority. Article 31 states that it is not possible to incarcerate someone except in prisons designated for the purpose. It adds that it is forbidden for a prison official to detain anyone unless by order of a competent authority and specifies that such imprisonment cannot exceed the designated period. The inspection of prisons should be ensured under Article 32, which mandates

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5 The amount of this fine has not been increased and remains at LYD50, or about €30 Euro.

both prosecutors and judges from the courts of first instance and appeal to visit prisons in their jurisdiction, in order to ensure against unlawful detention.

Inspections should include the prison's records, including documentation of arrest warrants and periods of detention. Powers include the right to photocopy documents together with interviewing prisoners to hear their complaints. The director of the prison and its staff are required to provide the inspectors with any assistance they need and to provide the information they require. Article 32 also gives prisoners the right to make a complaint directly to the judicial authority. It is not required that this is written; it is enough that complaints are made orally.

Cases submitted to the prison warden must be accepted, registered, and should be reported by the prison to the competent authority. Article 33 of the Criminal Procedure Code adds that anyone who is aware of an unlawful imprisonment, or that someone has been imprisoned in a place not intended as a prison, must notify the public prosecution or a competent judge. This information should result in an immediate investigation and, if found proved, the release of the person who is unlawfully detained. The investigation should be undertaken by a member of the judiciary, or by someone "on behalf of the judge." The investigation, the procedures undertaken, and the outcome should be written down in a report.

The rules on the duration for which someone suspected of offences "against the state" under the Gaddafi regime could be held, varied according to whether their case was being overseen by the Department of Public Prosecution in the regular criminal courts, or by the special courts. However, even the courts which had the widest powers to keep suspects in detention without trial, could only remand suspects in custody for up to seven days before being transferred to specialised prosecution authorities. There they should be interrogated within 14 days and an order issued for their release or detention. The detention order would be valid for 45 days, subject to extension by the prosecuting authorities for up to 90 days (see also Chapter 6). Any further extensions, for 45-day periods, had to be approved by the competent court, until the end of the investigation (Amnesty International 2010, 32).

## 9.4 The Reality of Arbitrary Imprisonment Described by Justice Seekers

In a report published in 2010, ten years after Mohammed was finally released from captivity, Amnesty International documented the reality of arbitrary detention under the Gaddafi regime, in which the Penal Law and the Code of Criminal Procedure played little part. Amnesty international noted that:

*Even the limited safeguards provided for in Libyan law are routinely flouted by members of the ISA [Internal Security Agency] from the moment of arrest, particularly in cases involving alleged offences “against the state.” Most arrests are made without warrants. After arrest, individuals find themselves completely outside the protection of the law and cut off from the outside world for long periods. Some are held for prolonged periods without charge or trial. Those who are eventually charged and tried are brought to courts after long periods of incommunicado detention in the custody of the ISA, which renders them vulnerable to torture or other ill treatment. They are frequently not aware of the charges brought against them before they are brought to court, where they see their court-appointed lawyers for the first time in flagrant violation of their right to an adequate defence.*

(Amnesty International 2010, 39)

In the late 1980s and the 1990s, suspects could be tried in a variety of special courts, notably the people’s court (established by Law 5/1988 to try economic, political and security crimes and abolished in 2005). However, during this period many, such as Mohammed, were held indefinitely without ever being formally charged.

The specific abuses suffered by prisoners suspected of political “crimes,” particularly in the Abu Salim and Ain Zara prisons, have been well-documented (Amnesty International 2010; Human Rights Watch 2006; Martinez 2011). Our interviewees described harrowing conditions in which they had been deliberately starved, kept in the dark in extremely cramped conditions with no medical care or access to showers with the result that they suffered from diseases including scabies, hepatitis and tuberculosis. Two interviewees described violent inquisitions involving torture. Zeid, who was kept in Abu Salim for part of his imprisonment, explained that, “I almost lost my life. I was beaten almost to death every day for three months from 10.00 am to 2.00 pm continuously and forced to sleep while standing.” After a year in prison, he was questioned, then was subsequently kept in deten-

tion without charge for a further five years. Eventually, “They investigated me for connections they thought I had with an individual who used to work in the same place as me. He was accused of attempting to kill Gaddafi, but I didn’t know anything about it.”

The severity of abuse suffered by Zeid was common during arbitrary detentions, although it was forbidden by law.<sup>6</sup> In 2005, Human Rights Watch noted that the regime refused to give the causes of deaths of prisoners held in illegal detention, often withholding the news from prisoner’s families (Human Rights Watch 2006, 45).

Interviewees’ release from detention also seemed to have been initiated outside of the law. Together with Mohammed’s explanation of the ending of his imprisonment as provoked by international and domestic pressure, our interviewees attributed their releases to the whims of Gaddafi, the intervention of their tribe or other personal connections. The regime is documented as releasing groups of detainees, each numbering in tens or a few hundreds, throughout the 2000s. However in January 2010, Mustafa Abdul Jalil, the Minister of Justice, resigned partially on the grounds that three hundred people remained arbitrarily detained “without any legal basis” (Amnesty International 2010, 47). His own criticism of the practice of arbitrary detention followed a report from Saif Al-Islam’s Gaddafi Development Foundation in 2009 which had openly “criticized the failure of security agencies to respect the rule of law and release those who had been cleared by the courts and those who have served their sentences” (Amnesty International 2010, 47-8).

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## 9.5 The Regime’s Attempt to Silence Claimants

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In the decade following Mohammed’s release the regime was under increasing pressure to acknowledge and address claims such as his, as Libya entered a period of ostensible liberalisation and rapprochement with Europe and the United States. In conjunction with the human rights section of Saif Al-Islam’s Gaddafi Development Foundation, the General People’s Congress created a Committee for Legal Affairs and Human Rights, although Libyan lawyers complained to Human Rights Watch in 2006 that it was a “cosmetic creation rather than a legitimate body to promote and protect human rights” (Human Rights Watch 2006, 4). There was a particular

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6 Article 2 of the Green Charter for Human Rights; Articles 337, 341 & 435 of the Penal Code (see 9.3).

focus on the demands of the families of the victims of the Abu Salim massacre. Indeed, the force of these justice seekers was so strong that they were to trigger the start of the 17<sup>th</sup> February Revolution.

The regime's strategy for dealing with justice seeking by those who had been unlawfully imprisoned was to offer compensation without fully admitting past abuses (see Chapter 10). During the 2000s, the Libyan government entered into international agreements to compensate the families of victims of terrorism. In 2003 agreements were made for compensation for the Pan Am and Air France bombings, and in 2004 for the Berlin nightclub bombing. As the decade progressed there was increasing pressure to also address national demands for admission of past outrages, notably the massacre at Abu Salim (see Chapter 10).

Programmes were established in 2007, 2009 and 2011 which made provision for compensating ex-detainees on the condition that they accepted payment without any admission of the regime's responsibility. Some of our interviewees accepted these payments, while others refused to engage in the process. Said told us that when he was released he was given a letter from the Internal Security Agency allowing him to return to his former employment and to settle his financial affairs. He later received compensation based on a "decision of national reconciliation" in 2009, receiving "a thousand dinars" per month, which he took since "it is better than nothing" and because he "became frustrated with judicial justice" after failing to have his case dealt with in court.

Tariq resisted the regime's project of "national reconciliation," preferring to pursue a court case. He had been told not to speak about his experiences in prison on his release and was under constant surveillance after being freed, including having to report to a military base every week. In 2009 he went to see a well-known lawyer, who brought a claim for compensation of LYD676,000 for material damage to himself and his family during his detention. The court ruled that each family member should receive LYD50,000, however he has yet to receive payment. His case was still in the court against the Ministry of Justice and the General People's Committee, when the revolution began. Mohammed's own legal case has never reached a ruling.

On the eve of the overthrow of the regime, none of our interviewees felt that justice had been done. Even if they had received compensation, there had been no official recognition of the circumstances of their arrest or detention, and no ascription of responsibility for their suffering.



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## 9.6 The Revolution: Openness, Slow Progress and Political Wrangling

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The success of the 17<sup>th</sup> February Revolution enabled justice seekers who have endured arbitrary detention finally to speak openly about their experiences. However, despite the notoriety of their suffering, the post-revolutionary period has not brought them a resolution, notwithstanding initial indications that their demands would be met. Moreover, as time passes it seems less and less likely that they will be a political priority by either the General National Congress, or in public discourse.

Following the outbreak of the revolution, several civil society groups were set up to lobby on behalf of ex-detainees such as Mohammed, including the Association for the Prisoners of Abu Salim. These organisations have pressed for investigation and truth seeking on behalf of both ex-detainees and their families.

The National Transitional Council's immediate response to the claims of ex-detainees was to issue Law 50/2012, which set out the conditions for compensation of political prisoners. The content of this legislation was brief. It stated that its provisions applied to anyone who lost their liberty through imprisonment due to their opposition to the former regime, whether they were members of the military or civilians, from 1/9/1969 until 15/2/2011 (Article 1). Compensation was set at LYD8,000 per month, after the deduction of previously paid amounts of compensation (Article 2). However, the law leaves the specification of who will benefit and the procedure by which compensation will be paid to a future directive from the Council of Ministers. At the time of writing this directive has yet to be announced.

There was significant public opposition to this legislation. Criticism was voiced that the compensation scheme might be exploited through corruption. There were also complaints that the privileging of political prisoners was to the detriment of other groups who had grievances against the Gaddafi regime, and that the enactment of the law was likely to strengthen "political Islamism" through financially supporting its proponents.

An interesting aspect to the phrasing of Law 50/2012 is that it did not explicitly apply to the cases of ex-detainees who did not actively oppose the former regime.<sup>7</sup> These cases might fall under Law 17/2012 on National Reconciliation and Transitional Justice (hereafter Transitional Justice Law,

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7 Article 1 of the legislation refers to people "who were jailed because of their opposition to the ex-regime."

TJL), which refers more broadly to “violations” committed under Gaddafi (Article 1). The TJL commits the government to providing compensation for victims and their families (Article 3) and the appointment of a Truth and Reconciliation Commission. However, to date this body has also not begun work and Law 50/2012 is yet to be implemented. As a result claimants have found themselves waiting under the shadow of the suspended promise of compensation under Law 50/2012 and the prospect of a transitional justice process. They might hope to turn to the courts; however, this option requires more research. There is explicit provision in the TJL for the rights of individuals to independently seek justice in the form of reparations (Article 12). However, it may be that courts might be reluctant to pre-empt decisions by the Truth and Reconciliation Commission, or that claimants themselves are waiting to see what this process brings.

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## 9.7 Four Victims, Four Definitions of Justice

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Mohammed and the other ex-detainees who shared their stories with us for this report each had their own perspective on the responses of post-revolutionary governments to their claims. In the year and a half since the ending of the revolution, much of the political and social momentum to achieve justice for ex-detainees seems to have been lost as Libya has faced a succession of new challenges. Moreover, ex-detainees themselves disagree as to what justice means in post-revolutionary Libya.

When asked, Mohammed didn't think that the current government is being too slow to respond to his case given its numerous responsibilities. In his opinion, people's senses of justice have changed after the revolution. His own definition, in regard to his own case, “would be to have institutions that guarantee human rights,” including an end to the sort of imprisonment that he and others experienced. Although his own perception of justice is wider he, nevertheless, believes that other ex-prisoners' perspectives on justice is that it would be related to “fair compensation.”

Said echoes that evaluation in his feeling that, “Compensation is our right. We suffered, and were harmed during the previous regime, especially when our cases are compared with the amounts of money that has been wasted since the revolution.”

This pessimistic appraisal of post-revolutionary governance, in which both the NTC and the subsequent General National Congress (GNC) are regarded as having missed opportunities to improve Libya, is shared by Tariq. Reflecting on the effect that the 17<sup>th</sup> February Revolution has had on

his and other ex-prisoners' situations, Tariq expressed the opinion that nothing has really changed. He added that the current government is too slow to take action and that the judiciary is impeding justice. Interviewed before the recent passing of the Political Isolation Law, he felt that old faces from the previous regime were still politically powerful. His definition of justice would be "prosperity for the country" and he added that he would give up his compensation if this will lead to improvements in the state's infrastructure, education, justice, and the judiciary system.

Finally, Zeid told us that his conception of justice had been profoundly affected by the outcome of the revolution. He said that when he saw the capture and beating of Gaddafi: "I felt that justice had been accomplished. I was one of those who went out to the court [in Benghazi at the outbreak of the revolution]. I told my friends that it's enough now for us to tell the world that we Libyans have stood united against the dictator."

Since we interviewed these men, in June 2013, the GNC has been asked to approve an allocation of compensation of around LYD700 million for former "prisoners of conscience" during 2013.<sup>8</sup> Media reporting of the issue noted that this proposal has provoked debate both on social media and within the GNC given expectations that the full bill for compensation could reach LYD2.5 billion by 2016.

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## 9.8 Recommendations

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Two years after the ending of the revolution, many ex-detainees such as Mohammed are still awaiting justice. Much has changed in Libya since the fall of the Gaddafi regime and the complexity of current demands for justice is perhaps reflected in our four interviewees' diverse feelings about their situations and the prospect of resolutions to their claims. Moreover, other claims regarding arbitrary detention, for example at the hands of post-revolutionary militias, have emerged under the NTC and democratic government, which have provoked additional calls for justice. As a result, the claims of Mohammed, Said, Tariq and Zeid seem to have lost their impetus in the public sphere given matters of more urgent priority, such as demands for federalism, the plight of internally displaced persons (such as

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8 "Compensation in the Millions for Libyan Prisoners," Khalid Mahir, *Al Jazeera* 17/6/13, <http://tinyurl.com/sjpgl-074>, accessed on 1 July 2013.

the Tawerghans) and the continued existence of informal prisons under the control of militia.

If these justice seeker's claims are not to be forgotten, more effective means must be made available to them to pursue their demands for information, support and compensation. We suggest that bringing justice to these ex-detainees will involve several components: financial compensation both for loss of income and damages, formal recognition of their suffering, reinstatement of previous professional or educational status, and provision of psychological and physical rehabilitation. Not all ex-detainees will require this in full. However, in order for justice to be done they should have the facility to make claims for this support in part or in full.

The setting of financial compensation would be best achieved through the courts, which have powers and capacity to make assessments in individual cases of losses in terms of salaries and other damages. The state should take on responsibility for the provision of rehabilitation services through medical and psychological care. While this type of support has been offered to revolutionary fighters, it has yet to be extended to ex-detainees.

In addition, justice requires the recognition of the crimes perpetrated on justice seekers such as Mohammed via public apologies to the victim. Although the former regime financially compensated some of these men, this was instead of an apology or formal recognition of what they had suffered. Following the revolution, a formal apology from the state is still forthcoming. While the NTC and interim governments have been quick to blame the Gaddafi regime for its wrongdoings, it has yet to ensure ex-detainees the full justice they require: the truth, recognition and adequate financial compensation.

# 10

## From Forced Reconciliation to Recognition: The Abu Salim Case in Historical Perspective

*Amal Obeidi*<sup>1</sup>

### 10.1 The Abu Salim Massacre: 1996

One of the most serious, single incidents of human rights violations perpetrated by Gaddafi's regime was the mass killing of around 1,200 prisoners on June 28 and 29 of 1996. The families of the victims of the Abu Salim massacre are still searching for the truth and seeking justice for their relatives in 2013 (see Chapter 9 for claims by the formerly illegally imprisoned).

Abu Salim was to become symbolic of the former regime's capacity for brutal repression of any opposition. This maximum-security prison on the southern outskirts of Tripoli was used to detain suspected opponents of Gaddafi during the 1980s and 1990s when the regime was "arresting anyone with the slightest connection to the Islamist movement (Pargeter 2012, 165)." The massacre is understood to have begun when prisoners seized a guard bringing them their food and hundreds subsequently escaped from their cells. The prisoners are believed to have been protesting against restricted family visits and poor living conditions, which had deteriorated after some prisoners escaped the previous year. They are also believed to have been demanding the right to have their cases heard before a court, since many prisoners were being detained without trial (Human Rights Watch 2009, 46-47).

Six prisoners and one guard died in the initial riot, during which the prisoners demanded to speak to Abdullah al Sanusi, the head of the

<sup>1</sup> With special thanks to Bruno Braak (VVI) for his editorial assistance.

regime's Internal Security Agency and Gaddafi's brother-in-law (Hilsum 2012, 108). Sanusi initially seemed willing to accommodate some of their demands, and the prisoners agreed to go back to their cells. Some 120 wounded and sick prisoners were brought to buses, "ostensibly to go to the hospital" (Human Rights Watch 2009, 46-47). The next morning, the security forces moved hundreds of prisoners into different courtyards before opening fire on them with heavy weapons and rifles for more than an hour.

These events were later described by a former inmate to Human Rights Watch as, "A constant shooting started from heavy weapons and Kalashnikovs from the top of the roofs of the prison [...]. The next day security forces removed the bodies with wheelbarrows. They threw the bodies into trenches 2 to 3 meters deep, 1 meter long, that had been dug for a new wall."<sup>2</sup> The bodies of the dead were allegedly buried inside the prison, but removed a few years later and reburied in a mass grave outside the prison walls. However, the remains have never been found. The location of the bodies remains unknown.<sup>3</sup>

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## 10.2 Aims and Methodology

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The events during the massacre at Abu Salim are well-documented. My subsequent assessment, consequently, combines material gathered from the reading of international reports on these events and their aftermath, with information gathered during interviews I held with people who were personally involved, and analyses of relevant documents. The interviews were conducted in Benghazi, since this is where many of the victims' families live, in the spring of 2013.

The remainder of this chapter will investigate how the relatives of victims of the Abu Salim massacre have sought to obtain justice, and how the former regime responded to their demands. The initial section discusses Gaddafi's regime's strategy of denial followed by grudging acknowledgment. The second section discusses an eventual government pledge to investigate the events of June 1996 in Abu Salim. The third section briefly discusses how the former regime attempted to deal with increasingly vocal demands for justice by attempting to avoid challenges to its official denial that a massacre had taken place. The strategy adopted was to offer compensation to

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2 For more details about the massacre as described by witnesses see Human Rights Watch (2009, 46-48).

3 "Libya: Abu Salim Prison Massacre Remembered After 16 Years Chance for Justice," *Human Rights News Release*, <http://tinyurl.com/sjgpl-075>, accessed on 22 April 2013.

the victims' families in return for them forfeiting their calls for truth and justice. In the final section before the conclusion, the role of popular social leaderships is investigated as an example of the state trying to incorporate non-state actors and systems. This policy, aimed at reconciling the victims' families with the state through coerced brokerage by the popular social leadership, is analysed and evaluated based on interviews with both members of the leadership and a family member of a victim of Abu Salim.

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### 10.3 Denial and Grudging Acknowledgement: 1996-2008

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In the summer of 1996, as surviving prisoners were released (Hilsum 2012, 111), some stories about the Abu Salim massacre began to filter out. However, the details remained scarce, and the government initially denied that an incident had taken place. After five years of silence, denial and intimidation, regime officials first acknowledged that something had happened at Abu Salim in 2001 when they started issuing death certificates to some families of inmates (Human Rights Watch 2009, 52). At this time, neither the bodies of those killed nor the specific circumstances of their deaths were given (Hilsum 2012, 112). According to the same Human Rights Watch report, between 2001 and 2006, the Libyan authorities gradually notified 112 families that their families had died. To further add to families' distress, many did not know whether their relatives had been detained in Abu Salim prison, since it was impossible for them to remain in contact with detained relatives.

As a result in the first few years following the massacre, the families of most of the victims could not be entirely sure of what had happened in the prison, nor of whether it had involved their fathers, husband, sons and brothers. In 2012, during an interview marking the anniversary of the massacre, the sister of one of the victims remembered that, "every few months my family would take food and cloths and travel to Tripoli in order to visit my brother, but we weren't able to see him. On every visit we were asked to leave the things at the gate with a promise from the prison guards that they would deliver them to him. All the time we thought that he was safe. We didn't know that he was dead."<sup>4</sup>

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4 An interview with a sister of the Abu Salim's victims in a special coverage, marking the 16th anniversary of Abu Salim's massacre, Libya al-Hurra TV, 29 June 2012.

The first public acknowledgment came in April 2004 when Gaddafi stated during a speech that the killings had taken place in Abu Salim, and that the prisoners' families had the right to know what had taken place (Human Rights Watch 2009, 49-50). This did not, however, herald a change of policy on the part of the regime. Although the government continued to make sporadic admissions that some prisoners from Abu Salim had died, the contents of death certificates remained oblique and no bodies were handed to relatives.

Admission remained piecemeal until the late 2000s. By April 2009, during an interview with a researcher from Human Rights Watch, Mustafa Abdel Jalil, the then Minister of Justice, stated that, "the government had informed the relatives of some 800 to 820 victims of their deaths and issued them with death certificates" (ibid., 52-53). On the death certificates that I have personally seen during my fieldwork or that were described by some of the relatives who I have interviewed, the dates of deaths are given as June, July, September and October 1996 in Tripoli. In one case the place of death is listed as Tripoli Central Hospital.<sup>5</sup> For some families, the death certificates were the first confirmation they received that their relatives had been held captive in Abu Salim, as many prisoners had simply disappeared at different stages between 1989 and 1995.

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#### 10.4 The Announcement of an Investigative Panel: 2008

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Years of relatively little action followed until 2008, when Gaddafi's second son Saif al-Islam, as part of an effort to open up Libya to the world, gave a speech entitled "Truth for All." Saif publicly called the Abu Salim massacre "the biggest incident and most tragic problem and incontestably very, very painful" (Amnesty International 2010, 78). He went on to announce that, "investigations [into the massacre] are complete and have been submitted to prosecution ... It won't be long before the file goes to court and sentences will be pronounced." However, despite this announcement, there was no official account of the events at Abu Salim prison and there was no evidence that any investigation into the events ever took place (ibid., 50). In January to March 2009, the Libyan government issued death certificates to some further 351 families.

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5 Interview with Al-Sanusi Al-Zirbi, Benghazi, 2/2/13. One of the death certificates seen by the author contains the following information: Tripoli Central Hospital-Tripoli, 24 October 1996. Some other certificates list the dates of June and July 1996.



This may have been in response to pressure from the victims' families who began to organise themselves, including by taking their cases to court. Fathi Terbil is a lawyer who was central to campaigning for the Abu Salim families. Having lost a brother, a cousin and his brother-in-law in the massacre, he is adamant about the pursuit of truth and justice. In an interview for this report, Fathi listed some of the many actions that the victims' families and he had taken.<sup>6</sup> In 2008, the families established the Coordination Committee for the Families of the Victims of Abu Salim to put forward their demands. The families asked Fathi to represent them in a court action. To put further pressure on the Libyan authorities, the families began demonstrating in Benghazi every Saturday from June 2008. Defying Libyan laws curtailing freedom of assembly and association they would carry posters of their missing family members, and demand to know the truth about the fate of their relatives.

In March 2009, the committee published a list of demands, which were further circulated by international human rights organisations such as Human Rights Watch, calling upon the authorities in Libya to (Human Rights Watch 2009, 57):

- Reveal the truth about the fate of their relatives;
- Prosecute those responsible;
- Hand over remains to the families or reveal burial place;
- Issue proper death certificates with the correct dates and place of death;
- Make an official apology in the media;
- Release all other arbitrarily detained family members of Abu Salim victims;
- Increase the compensation to that offered to Lockerbie victims.

On 6 September 2009, Libyan authorities established a seven-judge investigation panel, headed by Mohammad Bashir al-Khadhar, a former judge in a military court, to conduct an investigation into the events in Abu Salim's prison on 28 and 29 June 1996. At the time Al-Khadhar was reported as saying that, "he held many documents about the incident, in which he said up to 1,200 people died, including more than 200 guards, at the prison run by the country's internal security agency."<sup>7</sup> The panel's final report was due in March 2010. It remains unpublished until this date.

6 Interview conducted by the author with Fathi Terbil, Benghazi, 22 January 2013.

7 "Libya Appoints Judge to Probe 1996 Prison Massacre," *Reuters* 06/09/2009, <http://tinyurl.com/sjpl-076>, accessed on 4 January 2013.

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## 10.5 The Offer of Compensation: 2009

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While truth remained elusive for the victims' families, the Gaddafi regime adopted a policy of attempting to settle these justice seekers' claims with offers of compensation. These offers came with "strings attached [expecting that] the families must give up any further legal claims" (Human Rights Watch 2009, 55). In 2009, families were offered "120,000 dinars (\$95,000) for a bachelor or 130,000 dinars (\$103,000) for a married man" (Hilsum 2012, 115).

Having formally organised themselves, the families became increasingly active. The Committee for the Families of the Victims of Abu Salim organised its biggest demonstration yet on June 2009 in Benghazi, to mark the 13<sup>th</sup> anniversary of the massacre. The amount initially offered in compensation increased to LYD200,000 (US\$164,300) during 2009: a sizeable sum that many families nonetheless refused to accept. Mustafa Abdel Jalil, Minister of Justice, told Human Rights Watch in 2009 that "around 30% of the families who had so far been informed of the death of their relatives have accepted the offer of compensation, 60% have refused because they think the amount is insufficient and 10% have refused on principle" (Human Rights Watch 2009, 55). In particular, offers of compensation were refused by families in Benghazi, who continued to push for criminal accountability. Those who accepted compensation had to relinquish any further legal claims at the national or international levels (*ibid.*, 55).

In the same period, those who accepted compensation were offered special services such as the provision of medical treatment to family members abroad: some members of victims' families consequently received medical care in France. In addition, some family members were sponsored by the regime to go on hajj (pilgrimage to Mecca). The acceptance by some of these privileges caused problems between relatives, which became apparent after the 17<sup>th</sup> February Revolution. Some families have been identified as having accepted compensation and negotiating with the regime. As a result, according to one of my interviewees, families who are perceived as having cooperated with the former regime now find themselves marginalised, "the Ministry of Martyrs and Injured [which was newly established after the 17<sup>th</sup> February Revolution] has offered families of the victims some services such as medical treatment abroad, support to go on hajj and other assistance, but all of this has been distributed by giving priority to those who did not accept compensation from Gaddafi's regime."<sup>8</sup>

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8 Interview with relative of a victim, Benghazi, 22 January 2013.

## 10.6 The Role of Popular Social Leaderships: Negotiation and Reconciliation

As the government grappled to find ways of dealing with the persistent grievances of the Abu Salim families, they called on non-state institutions. Local police stations and internal security offices had initially shouldered the burden of informing the relatives of deceased Abu Salim prisoners (ibid., 2009, 53). However, from 2008 onwards, local popular social leadership was increasingly utilised both to inform families of their relatives' deaths and to try to broker a resolution.

This farming out by the regime of the difficult task of dealing with the consequences of the Abu Salim massacre instrumentalised the tribe through the use of the regime-sponsored institution of *popular social leadership* (see Annex II). This institution was formed from the heads of families, tribal leaders and other important persons in each region including some of the regime's elites whom were recycled into a parallel tribal leadership. This was defined as a national organisation with an emphasis on incorporating tribal leadership into national decision-making. In reality, the main task of popular social leadership was to maintain social stability and control through preventing opposition by family members and tribal members.

In the late 2000s, with the former regime under considerable pressure from the Abu Salim families, the popular social leadership was tasked with negotiating with the victims' families with a view to facilitating reconciliation.<sup>9</sup> This institution was consequently given responsibility for not only informing families of deaths, but also for negotiating the acceptance of compensation payments.

Mohammed's family lost 17 of its members in the massacre. He recalled in Spring 2013 that, "We were informed of this gradually. And the notifications of the deaths of all of our relatives came through the popular social leadership of Ijdabiya in 2009."<sup>10</sup>

"We were forced to accept reconciliation with the regime," he further explained. He added, "There was pressure from some members of the social leadership. I was not satisfied." Mohammed was asked to attend several meetings with the representative of the social leadership. "These meetings were usually with the so called 'committees of reconciliation,'

9 Interview with F.B., a member of the popular social leadership who took part in the negotiation between the families and the regime, Benghazi, 23 January 2013.

10 An interview by the author with a second relative of a victim of Abu Salim, 1 February 2013.

which contain five members, one of whom was a member of the social leadership.”<sup>11</sup> In these meetings, Mohammed and other victims’ relatives were encouraged to accept the offered compensation as well as to reconcile with the regime. However, he remembered, many families refused any negotiation with members of the social leadership, especially when the dual goals of compensation and reconciliation were discussed.

One member of the popular social leadership, who agreed to be interviewed on the condition of anonymity, explained the awkward position that the institution occupied between the regime and the general public. His feeling is that the popular social leadership tried its best to represent the demands of the victims’ families to the government. He explained, “We tried to convince the government to raise the amount of compensation from LYD120,000 to LYD200,000. We told the government that LYD120,000 was insufficient, because they had paid US\$10 million for the Lockerbie victims and, in the cases of children infected by HIV/AIDS in Benghazi, they had paid LYD1,300,000. We felt that the families of the Abu Salim prison victims consequently deserved more.”<sup>12</sup>

The role of the popular social leadership in justice seeking for the families of the victims of Abu Salim is, therefore, ambiguous. They were clearly employed by the regime to inform the families of deaths during the massacre and in negotiating with the families in order to encourage them to accept compensation and “reconciliation” with the former regime. However, they may have attempted to negotiate with the government in order to raise the amount of money offered as compensation to the victims’ families.

According to a brother of one of the victims of Abu Salim, “The regime asked the tribal leaders of each family to negotiate with the victims’ families. In my case, as a member of the Warfala tribe in Benghazi, it was one of our tribal leaders in Benghazi and an active member of the social leadership, who played a crucial role in negotiations between the families of the victims of Warfala tribe and the regime.”<sup>13</sup>

Whatever the truth of the matter, it is clear that the symbolic and actual authority of tribal affiliation was used tactically by the former regime in their attempts to silence the Abu Salim families.

11 Interview with a relative, Benghazi, op. cit.

12 Interview with F.B., a former member of the popular social leadership who took part in negotiations between the families and the regime, Benghazi, 23 January 2013.

13 Interview with Ebraik Al-Tobuli, Benghazi, 22 January 2013.

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## 10.7 Concluding Remarks

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In the early morning of 15 February 2011, Fathi Terbil was arrested in a violent raid on his family home. He had been representing the families of the victims of the Abu Salim massacre for four years. Although he was apparently not arrested for his work as a lawyer, the victims' families were quick to organise themselves. They gathered in front of the general security directorate in Benghazi to protest against his arrest (Pargeter 2012, 220). The families were first joined by lawyers and later by other demonstrators. Three days after Fathi's arrest on 18 February, "the young and old, Islamist and liberal, the comfortably off and the poor – all united by the desire for change and all sensing the first, tantalizing taste of freedom – thronged into the streets to call for an end to tyranny" (Pargeter 2012, 221).

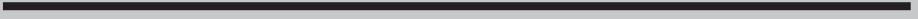
This case study investigated how the relatives of victims of the 1996 Abu Salim massacre had long sought to obtain justice, and how the former regime reluctantly responded to their demands. Terbil's arrest and the outrage it provoked came at the end of a 15-year long struggle for the families of victims of Abu Salim.

There are many lessons to be drawn from this struggle. However, the instrumentalisation of the tribe, through the vehicle of popular social leadership is a little studied aspect of the former regime's response to the demands resulting from its actions in Abu Salim.

The Gaddafi regime promised compensation, truth and justice. Although some families accepted the compensation that it offered, truth and justice remained elusive. The General National Congress (GNC) adopted a resolution on 30 June 2013, announcing that a four-member committee would be formed to investigate the Abu Salim massacre.<sup>14</sup> If the resolution is enacted and the work of the committee is pursued in earnest, it could make an inestimable contribution to national reconciliation by forever closing the books on one of the worst traumas of the Gaddafi era.

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14 "The cry that launched the revolution is finally heard," Ahmed Elumami. *Libya Herald* 30 June 2013, <http://tinyurl.com/sjpgl-077>, accessed on 4 July 2013.



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# People's Problems, Practices and Patterns of Justice Seeking: Towards a National Knowledge Base

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*Jessica Carlisle and Jan Michiel Otto*

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## 11.1 From Case Studies and Interviews to a More Comprehensive Analysis

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The case studies conducted to date by the AJIDIL research team have begun to provide in-depth information about access to justice in Libya, and a tantalising insight into the complexity of justice seeking and state and non-state institutional responses to potentially legal problems.

Two years after the success of the 17<sup>th</sup> February Revolution, Libyans can be seen trying to resolve three categories of injustices (see 2.4), i) those resulting from the politics of the Gaddafi regime, including disputes over the ownership of property expropriated under Law 4/1978 (see Chapter 8), compensation claims from the illegally detained (see Chapter 9) and the demand for truth and compensation from the families of the victims of Abu Salim (see Chapter 10); ii) those which occurred during and as a result of the 17<sup>th</sup> February Revolution, for example, cases of dismissal by the Integrity and Patriotism Commission (see Chapter 5); and, iii) “ordinary” injustices, such as criminal trials (see Chapter 6) and family disputes arising from divorce (see Chapter 7).

AJIDIL's research on these case studies started to evaluate the work of several state and non-state institutions: the courts, the public prosecution, people's and private lawyers, the police, government-sponsored compensation committees, tribal councils, civil society, militias and the family. Our findings have begun to provide some detailed information both about the interactions between justice seekers and these institutions, and between the institutions themselves during a post-revolutionary period.



The clear advantage of continuing to pursue the case studies approach is the opportunity this gives the AJIDIL team to further contribute concentrated research into issues that are of concern to policy-makers, contributing information about justice seekers' behaviours and institutional responses with regard to potentially legal problems.

Projected case studies are likely to include a focus on victims of theft and assault, employment disputes, the scope for justice in cases of gender-based violence, and the problems encountered by migrants as a result of their legal status. Future research will also consider the work of institutions such as police stations, prosecutors' offices, the administrative and civil courts, local councils, and the Council of Wise Men (*majlis al-hukuma*), a body of tribal leaders which has played an important role in conflict resolution since the end of the revolution.

However, although the detail resulting from the case studies will continue to provide analyses that will be valuable to policy-making, in order to obtain a broader overview of justice seeking in Libya and to contribute meaningfully to policy discussions, the AJIDIL research plan for 2013-4 will also include a quantitative nation-wide survey regarding access to justice.<sup>1</sup>

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## 11.2 National Access to Justice Survey (NAJS)

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The NAJS survey will broadly ask: What are the potentially legal problems that respondents have experienced in the last ten years, and what percentage of the population has experienced them? How and where did people try to resolve these problems? What then happened: what were the barriers, how were respondents treated, what were the outcomes? The survey will also ask about Libyans' perceptions of the legal system. It will be conducted by the Benghazi Centre for Research and Consulting of Benghazi University in co-operation with the Van Vollenhoven Institute of Leiden University.<sup>2</sup>

The NAJS survey will be the first of its kind in Libya and will be broadly modelled on the UK "Paths to Justice" survey and the subsequent Dutch "Paths to Justice in the Netherlands" survey.<sup>3</sup> The purpose of the NAJS is to

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- 1 This survey is being developed under direction of Dr Fathi Ali as a project funded and supported by the Libyan government (see 1.5.2).
  - 2 The design of the research will be the result of the combined expertise of the BRCC/BU AND VVI/LU. It will also draw on input from international advisers with specific experience in conducting access to justice surveys, lessons learnt from similar surveys that have been done in other countries, and the support of an academic advisory committee.
  - 3 Genn (1999); for a presentation of the aims, methodology and results of the "Paths to Justice in the Netherlands" survey see <http://tinyurl.com/sjpgl-078>.

provide useful data regarding the use and perceptions of state and non-state institutions by justice seekers in order to assess the specific circumstances of justice seeking in post-conflict Libya. The NAJS findings will consequently provide information about the advantages and disadvantages of using the state legal system (the police and courts) and non-state institutions (such as tribes and militia) from the perspectives of people who have had potentially legal problems over the past ten years. This information will then be available to inform policy decisions in the justice sector.

The survey will be conducted by means of around 40 minute-interviews with 2,050 people across Libya who will be asked about problems they themselves have experienced. The sample will largely reflect the demographics of the nationwide population (gender, age, location); it will also take into account the need to capture the views of communities perceived as being pro-revolutionary or loyalist on important transitional justice issues. However, it has been agreed that it is beyond the scope of the survey to accurately represent the opinions of minority groups such as the Tebu and Amazigh populations, or of migrants. A further study specifically targeting such groups in Libya may be commissioned in the future, if this is necessary.

NAJS will specifically ask people when their problems began and for a full account of which state and non-state institutions have become involved in them. This will allow us to consider respondents' and institutions' behaviours, both before and after the revolution. The survey will further ask about the conclusions, or continuation, of these problems and respondents' levels of satisfaction with these outcomes. The survey will additionally explore respondents' levels of trust in various institutions and their sense of what constitutes justice.

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### 11.3 Landscape of People's Problems

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Our work on NAJS is presently at a developmental stage, in order to ensure that the survey will include the widest range of potentially legal problems, institutional responses and likely outcomes to problems; that the wording of the questions are appropriate; and that there will be comprehensive memory prompts encouraging interviewees to maximise recall and reporting (Genn 1999, 15). We anticipate that in order to design a survey that reflects the complexity of behaviour in the field of potentially legal problems across Libya, this developmental stage will take several months of extensive gathering of data in the field. Focus group discussions and in-

depth interviews will consequently be held in, and in the towns around, Tripoli, Benghazi and Sebha.

We expect that the focus groups will lead to the documentation of categories of problems (e.g. family, criminal, employment), specific types of problems (e.g. assault, car crash, theft), state and non-state institutions (e.g. family, court, tribe) and conclusions (e.g. court ruling and enforcement, no action, self-help). The most important categories and types will be selected for inclusion in the survey.

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## 11.4 Where Libyans Go with their Potentially Legal Problems

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The final list of “institutions” people might use when they have a problem will be finalised based on information gathered during the focus groups. However, drawing on the expertise of the AJIDIL research group so far, we currently have a working list of a dozen: family and social networks, tribe, religious leaders, local government, police, militia, civil society organisations, private and people’s lawyers, the courts, the national human rights institution, national government and bureaucracy, and parliament and ministers.

We anticipate that people are likely to use more than one of these institutions while trying to have their problem dealt with, either going from one to another in succession, or appealing to more than one simultaneously as they “forum shop” for a resolution. Moreover, the NAJS will enable the AJIDIL team to analyse the extent to which people feel free to choose which institution they wish that becomes involved in their problem, and how satisfied they are with the outcome.

The *family* and *social network* is often the first source of support and help to which disputants turn. There are some forms of dispute, such as failing marriages or arguments about the raising of children, which seem obvious problems to attempt to settle within the family (see Chapter 7). In addition, the family – together with friends and acquaintances – can become involved in all forms of disputes in an attempt to resolve problems swiftly and according to the disputants’ sense of justice. The importance of family and social networks has remained constant throughout the Gaddafi regime, the 17<sup>th</sup> February Revolution and into the democratic period. However, a lack of family support, or its active opposition to making a claim, may have an effect on what resolutions are regarded as realistic, or whether claims are made at all.

The influence of the *tribe* might equally facilitate, or impede, the resolution of a problem to a justice seeker's satisfaction (see Annex 11). The tribe can provide collective support in dealing with problems through demonstrating solidarity. Tribal affiliation is often reinforced by members' contributions to a collective fund – into which payment is made on a regular basis – which can be used to financially settle claims. However, when problems are resolved between tribes this may involve the imposition of standards of “justice” upheld by the tribe's leadership that do not reflect those of the justice seeker.

The role of *religious leaders*, namely imams and sheikhs, in addressing problems has not much featured in the AJIDIL research findings yet, but we anticipate that it may nevertheless be significant. It may be that this involvement is limited to certain types of problems – such as within the family – but this should not be assumed.

The influence of *local government* on people's attempts to access justice is also of interest to the NAJS. In the immediate aftermath of the 17<sup>th</sup> February Revolution, local council members reported people bringing them justice problems of all types.<sup>4</sup> More recently, council members in the main cities have expressed their frustration about lack of support and funding (see 2.3.6).

The involvement of the *police* is critical if people want to take problems such as theft, assault, murder, traffic accidents, and many others, to court. Alternatively, justice seekers might prefer to utilise *militias* in order to get their problems resolved, or both. This decision might be informed by confidence in the legitimacy or efficiency of either institution, by having personal connections with members of either, or by force of circumstances, depending on what kind of problem someone has.

Since the revolution, hundreds of *civil society organisations* (csos) have emerged, advocating for particular groups and problems, and sometimes filing legal claims. Csos are actively involved in all three categories of injustices as distinguished in this report (see 11.1) in different sorts, and at various stages, of justice seeking.

As a new democracy, Libya recently established a *national human rights institution*, the National Commission for Public Freedoms and Human Rights. This commission receives, records, and investigates complaints about human rights violations; it is likely to be included in the national sur-

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4 This was illustrated during a discussion between members of the Benghazi local council and the AJIDIL research team in July 2012.

vey in order to assess to what extent and for what purposes such institution is actually known and used by Libyan justice seekers.

The use of *lawyers*, both members of the private bar and the people's lawyers, are linked to use of the *courts*, although some problems might be concluded in lawyers' offices and not all court hearings require lawyers (see 7.3). NAJS will provide information about why justice seekers chose to be represented by private or people's lawyers, whether this choice is informed by the type of problem they have or their financial situation, and how satisfied people are with the work that each do on their cases. In addition, the data will be a rich source of information about the perceived efficiency, fairness and failures of various court circuits across Libya.

An alternative avenue that justice seekers might take could be to seek political measures and interventions towards the resolution of their problems through appealing to members of the *national government and bureaucracy*, or to representatives in *parliament* or government *ministers*. The importance of personal connections in the use of these institutions and the types of assistance that they bring will be of interest when considering the equity of current access to justice in Libya.

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## 11.5 Three Different Stories

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This section illustrates the preferences and circumstances shaping justice seekers' use of these institutions for their disputes by some of the fieldwork data that the AJIDIL team have already gathered during their research over the past year.<sup>5</sup> These accounts indicate the importance of time and position to the choices that people make in trying to get justice; they also describe change and continuity in justice seekers' behaviours before and after the 17<sup>th</sup> February Revolution.

Such fieldwork experiences should also help the AJIDIL team, when analysing the mass, nationwide data provided by NAJS, to identify differences and commonalities in access to justice across regions, between genders and for each generation. For, the NAJS is also intended to track changes in people's behaviours over time by asking which institutions they preferred in different periods, i.e. under the former regime, during government by the NTC and since the election of the GNC.

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5 The following accounts were gathered by Dr Carlisle during her fieldwork in Tripoli throughout mid-2012 to mid-2013, and Dr Ibrahim, Dr Gebril, and Dr Carlisle during focus groups in Benghazi in Spring 2013.

### 11.5.1 Tales from two cities: views of disputes in Benghazi and Tripoli

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The middle-aged and older generations have experience of problems that may have run on for decades. The stories that these generations have told the AJIDIL research team illustrate how justice seekers often have attempted to resolve a problem using a number of institutions, assessments of institutions' relative strengths and weaknesses, and reflections on how justice is situated within Libya's social and political realities.

### 11.5.2 Opportunities to use force in property disputes: 1979 and 2012

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Fuad's story took place during the Gaddafi period. He offered to tell his story as an illustration of the effects of the former regime's policy of expropriating and distributing property. His vivid telling of what had happened to him provides an interesting example of how resourceful justice seekers may attempt a succession of strategies to achieve what they want. It also offers a detailed description of his navigation through the institutional maze of the late 1970s.

He was a young man and living in the United States with his young family when Law 4/1978 was passed. At that time he was renting out his house in Tripoli, the only property he owned, to a doctor who had, in turn, sublet it. By the time Fuad returned in 1979, his original tenant had died and the remaining tenants had stopped paying rent to his cousin, who Fuad had left in charge of his affairs. His cousin had tried to collect payments via the committee with responsibility for locally overseeing the implementation of Law 4 (see 8.3), but these had been erratic and so he had given up. Moreover, the inhabitants refused to leave the house, even though he threatened them. His neighbours told him that one was a doctor and the other a pharmacist and that both were Egyptians. Under the terms of Law 4 Fuad should, therefore, have had a strong case for restitution of his property since it was his sole residence and the occupants of it were foreigners.

However, in the late 1970s Fuad faced successive obstacles in having his legal right enforced. When he went to complain to the local committee in charge of implementing Law 4, they offered to allocate him a new house. He retorted that he did not want a new house; he wanted his own house back. The committee then agreed that they would find a new house for the current occupants. He went back to the committee every day for two to three weeks, but nothing came of it. He then discovered that a close friend from his youth had become the head of implementing Law 4 at the national level and managed to meet him after a six-month wait. This was clearly a

very emotive exchange. The head said he would make sure Fuad's situation was brought to the attention of the General People's Congress and asked him to, "Be quiet, be calm."

The GPC passed information about his case back to the local level. However, this resulted in Fuad again being offered another house. This made him very angry and he threatened to take the house back by force. At this point, however, Fuad still had connections established before the Gaddafi regime, which he thought might be able to help him, in particular an old friend who was then the chief of police in Zawiyah. This old friend sent him to see the chief of police in Tripoli where he gave a statement. Finally, Fuad seemed to be on the right track. The chief of police wrote an instruction to the local police station instructing them, "If what he says is true, you should eject the Egyptians because they are single [unmarried]." However, when Fuad took this to the head of the local Law 4 committee he was told, "put it in the water." Fuad again complained to the police who told him that this exchange was inevitable; any such a command was in reality worthless. The police officer he spoke to had himself lost his home under Law 4. Fuad recalls that this policeman was also upset and suggested that he should respond with violence to get his property back.

Fuad says that he felt that he had come to the end of the line as far as securing any kind of help, "No government, no law, no one would help me. What could I do for myself?" He decided to take matters into his own hands and to try to eliminate the main tenant. "I thought about ways to kill him. I wasn't sleeping. I decided to do it by car."

He subsequently waited for the man to drive out of the house before ramming into him with his own car. Fuad very badly damaged the other man's car and said that the man saw who it was and tried to run away. Fuad attacked him in the street. He then went back to the small cafe where he had been waiting earlier and claimed to have been there all along when the secret police came looking for him. The owner knew him well and vouched for him. He was held by the police for four to five hours but then released after speaking to someone with connections to the regime. The police could not find sufficient evidence, so this matter was not pursued. However, the occupants remained in his house.

Fuad remembers talking to people and being widely encouraged to use violence in order to conclude his problem. At this point it seems that he felt that every state institution that might have been of any assistance had failed him; he does not seem to have considered going to court. Eventually he met a taxi driver who had joined a revolutionary committee and was expecting to be given priority in land distribution after registering for an

allocation. Fuad explained that the revolutionary committees “had the most power” during this period. The taxi driver took Fuad to his branch of the committee where he gave a speech in support of evicting the Egyptians from the house. Fuad said that the doctor initially refused to be relocated because the new house did not have a telephone, but the revolutionary committee eventually moved him out. Fuad and his family have remained in the house ever since.

Fuad’s story about using his connections to get back his property is echoed in what people often say about what happened in property disputes after the 17<sup>th</sup> February Revolution. The government’s lack of monopoly of violence given the continual presence of militia on the streets, and the weaknesses of the army and police, has given some families the opportunity to seize lost properties back by force. There are numerous stories of militia forcibly evicting occupants since the revolution.

A widow in her early 60s, Samia explained in early 2013 that her family lost nine villas as a result of Law 4/1978. Samia said that this property was the bulk of her and her siblings’ inheritance: her father had meant to leave them to his children. Samia has been struggling financially since her husband died. The cost of living is rising steadily in Tripoli and she felt the need for more income. After the revolution an opportunity arose via a friend of her son who was involved in a militia. He arranged for the reclaiming of two of the nine villas by force. Samia has since become involved in an organisation lobbying for former property owners’ rights in order to organise the return of the remaining seven properties. She notes that some people cannot be forcibly evicted from occupied properties since there is considerable fear that the occupants may be armed, or may have connections with groups that have weapons.

Fuad’s and Samia’s stories are interesting accounts of the extent to which determined justice seekers may “forum shop” their way through a number of institutions in order to reach their aims. It is also a salutary reminder that force, whether embodied in institutions allied with or against the state, may be the most effective route to a settlement.

### 11.5.3 State and tribal justice in dealing with murder: 2008 and 2012

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Access to justice for the victims of violent crimes may equally be sought through non-state institutions, in cases in which the victim’s family may face a choice between tribal or court intervention.



Sawsan recalled a murder case that occurred in Benghazi before the 17<sup>th</sup> February Revolution, which the victim's family felt has not resulted in justice, although the perpetrator was imprisoned. The murder, she remembered, was motivated by robbery and the murderer was a neighbour of the victim. She recollected that the offender's family tried to resolve the problem "traditionally" by approaching the dead man's relatives directly. Such an attempt at reconciliation between families would usually be brokered by the offender's tribe. Senior representatives of the tribe – all middle-aged or older men – approach the aggrieved family and try to bring about reconciliation between the two families by arranging a meeting at which an apology will be offered and a sum of "blood money" paid in compensation to the victim's family. If an agreement is reached this may mitigate the legal penalties imposed on the murderer in the criminal courts (see 6.1).

However, Sawsan explained, this wronged family angrily refused the offer of settlement, demanding that the law should take its natural course and that the offender should be given the severest possible sentence. In 2008, the perpetrator was sentenced to life imprisonment. By 2011 he was out again having been freed from prison during the 17<sup>th</sup> February Revolution. He subsequently joined a revolutionary militia and has since been untouchable. Sawsan described the victim's family's feeling that the man who killed their relative had "only" been in prison for three years. She said that they are unrepentant about the route they chose to try to achieve justice, but they now feel abandoned by the state, since it allows the killer to remain at large.

#### 11.5.4 Traffic accidents as a daily event: continuity before and after the revolution

The avoidance of tribal involvement in problems and the failings of the legal system were a central theme during a conversation amongst a group of women in Benghazi in early 2013. The topic under discussion for part of this meeting was road traffic accidents. Libya is reported as having the highest number of traffic fatalities in the world, with 2,728 deaths recorded for January to November 2012.<sup>6</sup> Dealing with the implications of these deaths, or the serious injuries that can result from incidents on the road, may involve both the claims for compensation, and criminal charges. In

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6 "New Statistics Show Libya's Roads as Most Dangerous," *Libya Herald* 7/1/13, <http://tinyurl.com/sjpgl-079>, accessed on 3 July 2013.

a room of around 15 participants during the meeting in Benghazi, three women volunteered stories about serious incidents on the road.

During the discussion, Nahda complained that traffic policemen are always biased against female drivers. In support of this statement, she described having been involved in a serious accident in which a large truck ploughed into the side of her car, wrecking it completely. The driver of the truck was speaking on his mobile phone when the accident happened and eyewitnesses agreed that he was at fault. Nahda was shaken, but uninjured, and wanted to press a complaint. In the end, however, she said that she was forced to give up her claim after the truck driver made use of contacts he had within the Benghazi police force.

Other women nodded in agreement. One added that she knew of a similar story in which only one of the drivers involved in a three car pile-up was forced to take responsibility for the accident, although it was known that the driver of one of the other cars involved – a man who had connections with the police – had been just as culpable. A third participant noted that some wealthy families prefer to pay out compensation when their members are involved in traffic accidents, regardless of who was to blame. This is to try to avoid the involvement of either the police or tribes in resolving the resulting problem.<sup>7</sup>

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## 11.6 Towards a National Access to Justice Survey

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The three stories above demonstrate that interviews and focus group discussions may alert us to people's problems, practices, and patterns of justice seeking. They form part of the developmental stage of the NAJS, which is estimated at eight months in total. Focus group teams in different regions are still to be trained, a great number of justice-seekers and justice-providers are still to be interviewed, individually and in groups, before we have enough material to start designing the questionnaires. The transcription and analysis of data from the group discussions and personal interviews will also take time.

These data will be discussed in a workshop with a technical expert in questionnaire development and international experts in quantitative socio-legal studies. As soon as the survey is designed and the machine-read-

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7 See Chapter 6 for an analysis of being subject to the criminal justice process after car accidents involving fatalities; Annex II for tribal involvement in concluding disputes following a death.

able questionnaires are completed, interviewers will be trained for approximately one week. Then piloting will start in different regions, before the NAJs can finally be conducted, and the interviewers will go out and visit the homes of their randomly selected respondents.

We anticipate that after extensive preparations the data which NAJs will finally produce will be valuable for Libya's burgeoning community of socio-legal scholars, for Libya's policy-makers in the justice-sector, for legal professionals, and ultimately be helpful in improving people's access to justice in Libya. It is hoped that the anonymised data can also be made available to international actors who aim to provide rule of law assistance in Libya and are eager to learn more about their target groups.

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# 12 From Problem of Knowledge to Responsibility to Learn

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*Jan Michiel Otto*

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## 12.1 Expansion of International Rule of Law Assistance

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Over the last 20 years international projects in support of law and justice in developing and transitional countries have steadily been on the increase. Their advance, usually under the heading of “rule of law,” was remarkable in itself. For legal dimensions had been missing on international development agendas for decades. Even the Millennium Development Goals had little reference to rule of law. Today, however, the international community perceives a well-functioning legal system as a precondition for constitutional and political stability, for security, for investment and trade, and for social justice.

As a consequence of this trend, all over Asia, Latin America, Africa, and Eastern Europe thousands of international rule of law projects have been designed, carried out, and evaluated. Both in recipient and donor countries the number of institutions and experts involved in such projects has multiplied. Participants have come to speak of a “rule of law industry.”<sup>1</sup>

Through all those projects, in the recipient countries an immense number of judges, lawyers, law teachers, legal aid providers, legal drafters and others has received additional legal training. Many legal texts have been discussed, reviewed, drafted, and improved; many legal institutions and processes were mapped and assessed, and efforts were made to make their procedures and practices more efficient and effective.

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1 The institutions involved in this massive expansion include international bodies, such as the UN and its specialised agencies, World Bank and IMF, the regional development banks, intergovernmental organisations such as the International Development Law Organisation (IDLO), national government agencies including ministries of justice, sectoral ministries, and departments of foreign aid, police institutions, judiciaries, bar associations, law firms, consultants, non-governmental organisations in fields such as human rights, justice, legal aid, development, and peace-building, think-tanks, academic institutions, such as law-schools, and ad-hoc consortia.

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## 12.2 The Problem of Knowledge

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The sponsors of this research mentioned in the initial deliberations about the project that they hoped that the research would contribute to a “knowledge-based” rule of law assistance (see Preface). At first sight, this may seem self-evident. Yet, the City of The Hague and The Hague Institute put their finger on a real problem, which has plagued much international rule of law work. It has gained some notoriety among practitioners and academics as “the problem of knowledge.” To put it simply, many “legal reform experts” who were actually trained to be qualified experts in their own laws or institutions, find themselves at work in other countries advising about legal systems of which they know fairly little. In 2006 Carothers and others devoted a book to this problematic phenomenon: *Promoting the Rule of Law Abroad: in Search of Knowledge*.

In this work, critiquing the unbridled expansion of rule of law assistance, Carothers (2006, 25-27) identified five obstacles which in his view constitute the root cause of the problem of knowledge: (1) rule of law is an area of great conceptual and practical complexity; (2) the legal systems in the recipient countries, especially their functioning, are of great particularity; (3) aid organisations are not adept at the task of generating and accumulating the sort of knowledge that is needed; (4) neither are political science departments and law schools of universities filling the knowledge gap; (5) lawyers, who dominate the operational side of rule of law aid are not oriented toward the empirical research necessary for organised knowledge accumulation.

The problem of knowledge is most keenly felt by consultants accustomed to signing donor contracts that oblige them to help “fix” the rule of law somewhere (Channell 2006). The staff of aid organisations too will get little time to accumulate knowledge on the many aspects of legal development, and their relevant contexts. The AJIDIL research group, in contrast, consists of academics whose main job it is to analyse the “conceptual and practical complexity” of rule of law. The “great particularity” of the legal system of, say, Libya, is not exactly a surprise for the Libyan legal scholars of the Benghazi Centre for Research and Consulting of Benghazi University, nor for the researchers of the Van Vollenhoven Institute of Leiden University. In fact the AJIDIL research partners see Carothers’ obstacle (4) as a common challenge, and aim to fill at least partially the existing knowledge gap.

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### 12.3 A Broader Critique and a Changing Field of International Rule of Law Assistance

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The abovementioned problem of knowledge, however, has not been the only issue hampering international rule of law assistance. The “Libya moment”<sup>2</sup> in international legal assistance comes at a time when global rule of law assistance is much valued but also subject to critical questions. Is rule of law assistance effective? Has rule of law assistance contributed to development? Are project interventions well suited to the objectives policymakers want to achieve? Well-informed observers such as Golub (2003), Davis and Trebilcock (2008), and Tamanaha (2009) have raised such questions and mostly concluded that the relevant empirical literature is inconclusive about whether rule of law programmes have actually achieved the intended objectives. Or as a leading practitioner put it recently, international rule of law assistance is “in crisis” (Khan 2013).

Several strands of critique about international rule of law assistance stand out. First, it is pictured as foreign-imposed, it would not reflect domestic norms, so it would lack legitimacy, and would therefore be ineffective (Tamanaha 2009). Second, while it costs a lot of money and effort, there is little conclusive evidence of its effectiveness (Davis and Trebilcock 2008). And third, it focuses too much on rules and institutions rather than on the end-users of legal systems, those who are actually seeking justice (Golub 2003, Khan 2013).

There are more reasons for “the rule of law sector” to consider the need for innovation, since in recent decades major changes have redefined the field.

This author has been involved in international rule of law assistance projects since the mid-1980s. At that time, there was much less international legal education, and there was no Internet to make legislation and case law of all jurisdictions accessible. Since then, the target groups of international rule of law projects in recipient countries, have become significantly better-informed about foreign and international approaches to law and justice, through domestic learning, international education and training, with the support of new information technology and through practical work-related experience. For, in contrast to the 1980s, today the legal messages of rule of law, democracy and human rights are well known

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2 This term paraphrases Newton (2008) who identifies several key “moments” in the history of international legal assistance.

and developed in many recipient countries. Human rights activists, legal scholars and progressive thinkers in the legal profession have made these themes into focal points of domestic governance, from New Delhi to Nairobi, from Bandung to Benghazi.

Ironically, at the same time, a late recognition by the donor community of the importance of the legal dimensions of development, has prompted the rapid expansion of a global donor-funded rule of law “industry” with many foreign and international organisations – public and private – and practitioners offering readymade packages of programmes and projects. Yet, due to economic crises in the West many budgets for foreign aid have begun to shrink, which has put the sector under pressure and increased competition among private and semi-private “providers” of rule of law assistance.

Moreover, another trend is that foreign aid in general, and rule of law promotion in particular, have increasingly been directed to peace building in post-conflict situations. Legal consultants have thronged to Kosovo, to Kinshasa, to Kabul, to help donors carrying out programmes, spending the funds which were pledged at high-level conferences. Obviously, the challenges in post-conflict settings are huge: insecurity, gross human rights violations, impunity, fragmentation and incapacity of military and police forces, general lawlessness and corruption. Such problems have proven hard to solve even with years of external interventions and assistance, as we have learned from experiences in Cambodia (Plunkett 1998, 64) and more recently in Afghanistan and Iraq.

Over the last years several speakers on conference panels of the International Law and Society Association noted that reconstruction of the rule of law in Afghanistan and Iraq involved few innovative ideas, as much of the work was to promote law codes and institutions that are well developed in Western societies. The international community has made too little use of southern countries’ expertise and capabilities such as expertise from Arab countries. Unfortunately the vast majority of international reports published about rule of law in fragile states has paid little attention to the views of domestic academics and legal practitioners, and those from the region.

With all these criticisms of international rule of law assistance, the question has now become: what can be done about it? Are there ways to continue rule of law promotion while taking the criticism seriously? Is there a new approach that would possibly avoid making the mistakes of the more “traditional” approaches?

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## 12.4 Rule of Law Assistance in Fragile States: A Responsibility to Learn

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This report proposes one element of such a new approach to rule of law assistance in fragile states, namely a *responsibility to learn*. The international community has recognised its *responsibility to protect* the Libyan people against the serious violation of their rights, and many have also advocated a *responsibility to assist* fragile states after a military intervention. We propose that the international community also has a *responsibility to learn*.

Such learning, in relation to access to justice and rule of law in fragile states, should:

- Take a long-term perspective as it contributes to long term processes of knowledge generation;
- Support the evaluation and design of both domestic policies and laws, as well as international project assistance;
- Build bridges between domestic knowledge bases and international knowledge bases;
- Develop a research agenda which departs from domestic and local problems rather than from foreign and international norms and policy plans;
- Address the local social realities of law and justice, and therefore be interdisciplinary, notably use socio-legal concepts and methods;
- Aim for public knowledge sharing in the public interest, rather than follow the pressures for short term gains;
- Be primarily entrusted to qualified capable domestic academics, possibly in the context of international teams;
- Be bi-lingual, aiming at domestic publications in the domestic language and international publications in English; and
- Be ready to invest in mutual language learning, editing and translating.

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## 12.5 “The Libya Moment” and the Responsibility to Learn

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While international discussions about the rationale and effectiveness of international rule of law assistance are ongoing, the case of Libya has presented itself in 2012-2013 as a new challenge. Donors have already pledged massive support for rule of law assistance to Libya (see 3.1). Embassies have promoted rule of law training programmes in their home countries, and



teams of foreign consultants have visited Tripoli to offer their rule of law project packages.

How will Libya respond to these offers? To what extent will there be an interest in a new approach as sketched above?

The country, troubled as it is by security problems, seems somehow to be open to making a fresh start. During Gaddafi's rule (1969-2011) Libya was kept rather isolated from the rest of the world, ideologically, politically, and scientifically. Yet, there are legal scholars and legal practitioners who have exercised and maintained a remarkable degree of professionalism in their work, and are well placed to apply such approach. At the outset of the 17<sup>th</sup> February Revolution Libyan lawyers and judges played a pioneering and leading role. The revolution was conducted in the name of "justice," "rule of law," and "human rights," so it would perhaps make sense for domestic and international academic experts to contribute to these goals by participating in a *responsibility to learn*-approach, as proposed above (see 12.4).

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## 12.6 The AJIDIL Project Piloting a New Approach in Libya

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In fact, the AJIDIL research project is both a plea for and a pilot of such a *responsibility to learn*-approach. On a modest scale, it wants to provide a sustainable and cost-effective way of collaborative production and dissemination of knowledge for strengthening the justice sector in Libya. Whereas the Libyan government must daily address crises and urgent matters, Libyan academia could, and indeed should, use its time to help expand a socio-legal knowledge base on law and society.

Whether the international community wants to support such an approach remains to be seen. The political and economic realities of international rule of law assistance demonstrate that donors and aid organisations, as soon as they have identified a certain need, shift into high gear and open a budget line for "practical interventions." Academic researchers, on their part, have often been reluctant or unable to address the concerns of policy-makers and practitioners. The latter have little time or interest, it seems, in waiting for the outcomes of lengthy research projects. Therefore researchers, such as those in the AJIDIL research group, can best orientate some of their research activities to the agendas of other rule of law projects in order to support them with up to date information, running in parallel and being complementary.

In retrospect, the AJDIL research group has already intuitively tried to practice what the *responsibility to learn*-approach advocates. As described in Annex IV, it is a Libyan knowledge institution, in this case the BRCC/BU, which has been the institutional focal point of the project, with VVI/LU as a foreign academic partner engaging in long-term cooperation. After forming a joint research group, the researchers began discussing major instances of serious injustice in Libya. These instances were first looked at bottom-up, from the perspective of victims and justice seekers, then top-down, from the perspective of legal professionals and the state legal system. We took these instances as first entry points to understand the justice sector, in order to be attuned to real-life, and thus to be policy-relevant.

The group has set out to describe in those instances the actual views and behaviours of individual actors as well as the broader legal, political, and historical context. In the process, the group began identifying what types of knowledge are required for such analysis. This ranges from detailed legal knowledge, to quantitative survey methods, from socio-legal concepts to policy analysis. Efforts have been made to pool the relevant knowledge already available, with an emphasis on domestic bodies of knowledge. In the process, the group tried to map rapidly evolving national policies and legislation, as well as the involvement of the international community. All of these inputs had to be fitted in an overarching conceptual socio-legal framework.

The actual research involved initiating local case studies about people's justice seeking and about how justice institutions work. To broaden the information base, the group has begun to conduct focus group discussions and in-depth interviews about what justiciable problems people have, whether and how they have sought advice and assistance from a wide range of informal, non-state and state institutions, whether and how their disputes were solved, whether they achieved their objectives, and to what extent legal professionals and institutions were helpful.

Moving from qualitative to quantitative data-collection, the group is developing, on the basis of knowledge thus obtained and in collaboration with the national government, a national survey on "paths to justice," in order to understand what a representative cross-section of the population thinks about the abovementioned questions. Whereas existing international models for such a survey are used as a major reference (see 11.2), the national survey is developed to suit the situation in Libya. From the perspective of Libyan academia, the project should enhance socio-legal research capacity through international academic cooperation. This type of research is an ongoing process. At any time, certain subjects can be

selected for further research, which is expected to contribute significantly to national and local policy- and law-making. Workshops of researchers, practitioners, and policy-makers are foreseen to present and discuss the research findings and recommendations.

This approach fits the ambitions of the BRCC/BU, which has a history of involvement in research projects exploring possibilities for reform. In the 2000s such projects were made possible because of their association with reform policies promoted by Saif-al-Islam, Gaddafi's eldest son. Political censorship, however, posed severe limits. Building on this research experience, in the first weeks and months after the uprising in Benghazi in February 2011, researchers of Benghazi University produced policy-oriented academic reports from all relevant disciplines about the new Libya.

Its international partner, vvi/LU could contribute to the research by virtue of its background in the study of law, governance, and development (LGD). The history of this academic domain goes in part back to the work of Cornelis van Vollenhoven, a renowned socio-legal scholar *avant la lettre*; the 80<sup>th</sup> anniversary of his death (1933) coincides with the 100<sup>th</sup> anniversary of the Hague Peace Palace (1913) of which he was a strong supporter.

Over the last decades LGD studies in Europe, North America, Asia and Australia have gradually developed as an interdisciplinary subfield of socio-legal studies, focusing on the formation and functioning of legal systems in developing countries, on the contributions those systems make to good governance and development, and on the use of external interventions. LGD studies have drawn from a broad range of (sub-)disciplines: law, legal history, comparative law, area studies, linguistics, (legal) anthropology, sociology (of law), public administration, governance studies, religious studies, development studies, and, in the case of fragile states, also from conflict studies.

Engaging in such interdisciplinary studies has been a long-term endeavour. Mono-disciplinary reservations about such an approach have and will always be there, at universities in any country (Banekar and Travers 2004). Policy-makers have long since recognised the multi-faceted nature of justice problems, and are consequently appreciative of interdisciplinary approaches. The AJIDIL research group has been responsive to these views. In doing so, it was supported by The Hague Institute and the City of The Hague, and by university and faculty administrators in Benghazi and Leiden.

# 13 Conclusions

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*Jan Michiel Otto and Suliman Ibrahim*

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## **13.1 International Rule of Law Assistance and the Need for Legal and Socio-Legal Research**

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This report presents the first results of a socio-legal project on “access to justice and institutional development in Libya” – the AJIDIL project – established by a small team of Libyan and foreign scholars. The initial request for this research required the AJIDIL project to explore new approaches that could be relevant in the context of international rule of law assistance.

The international community has pledged massive support for the rule of law in Libya and has initiated many projects towards this end. However, the situation in Libya is very complex. An international actor such as the United Nations Support Mission In Libya (UNSMIL) is continuously on the ground, knows much about the complexities, and acts as a well-informed adviser when it comes to Libya’s justice challenges. The International Crisis Group has done extensive research and produced an insightful report about the vicious circle of insecurity and injustice that currently plagues Libya.

International needs assessment reports do not always demonstrate a historical perspective and in-depth knowledge about both the law in force and the social and political realities (see Chapter 3). It should be noted, though, that the rule of law is not “a product that can be delivered effectively” without a deep knowledge of law and context. Foreign advisers should therefore assume their *responsibility to learn* and make efforts to provide tailor-made advice and training. In order to obtain the knowledge required with a view to the long-term needs of Libya’s legal system, both the national government as well as the international community might consider commissioning legal and socio-legal research about major challenges and aspects of the justice system.

**BOX 3**

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**The Five Initial Questions of the AJIDIL Project**

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1. Which are major justice-related concerns that Libyan people are facing today, after 42 years of Gaddafi's rule?
2. What are the strategies and practices by which Libyan justice seekers try to solve their potentially legal problems?
3. How do the legal and administrative institutions of the Libyan state respond, and are those responses deemed satisfactory?
4. What are the roles of non-state norms and mechanisms, notably of a religious and customary nature, in processes of justice seeking in Libya?
5. How is Libya's justice system affected by wider governance issues?

Source: this report (see 1.2)

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**13.2 Governance Context of the Justice System**

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The last of the project's five initial research questions (see box 3) deals with governance, i.e. with state-society relations, in Libya. On the governance context of justice issues in Libya, based on our research, the following conclusions could be drawn.

The Libyan government has managed to gain a considerable degree of legitimacy at home and abroad thanks to three factors, i.e. its democratic character, its compliance with the rule of law, and its balanced, peaceful and patient approach to major problems.

Meanwhile, the Libyan state, and especially the justice sector, is severely constrained, if not incapacitated, by three other factors. The first one is insecurity: the process of reconstructing the army and police proves to be difficult and progress is slow. As a result state security forces are still unable to ensure the state's monopoly on the legitimate use of violence. Meanwhile, tens of thousands of men have formed armed groups (militias, brigades) which too frequently take justice into their own hands, are not being brought to justice, and have been able to frighten parts of the state, especially the justice sector, into inaction. This has frustrated the administration of justice in many individual cases. As argued by the International

Crisis Group (2013) breaking this vicious circle of insecurity and injustice is of the essence.

The second constraining factor lies in the social and political cleavages in society (tribes, cities, East-West, pro-anti Gaddafi a.o.), which have a worrying effect both on society and within state institutions. After 42 years of a regime practising divide-and-rule, most people identify strongly with their tribes and cities; alongside these social identity markers, society is divided by a number of political markers (see 2.3.4).

The third factor is constituted by the weaknesses and stagnation in institutional development, especially of the bureaucracy. However sound the policies of the new ministers and top officials may be, old deeply engrained patterns of administrative behaviour render the work of most state institutions less effective. This is also the case with legal institutions. Chapter 5 shows how opponents describe the institution of people's lawyers as suffering from inefficiencies. It may be true that members of this profession come to work only once or twice a week, and handle only few cases. This critique, however, applies to many other parts of the state apparatus. The rebuilding of Libya's state institutions is further complicated by uncertainties surrounding the outcomes of vetting processes for higher civil servants, who are regarded as Gaddafi loyalists.

The extent to which insecurity can have an indirect, negative impact on justice issues can be illustrated by what happens to the claims of former house owners who were dispossessed by Gaddafi's Law 4/1978 (see Chapter 8). A pragmatic solution for thousands of disputes could be reached by new housing construction. However, foreign construction firms have been hesitant to come to Libya because of the insecure environment.

Due to its incapacity the state has not yet been able to solve the security problem by disbanding the militias, nor could it address many of the pressing demands for justice. With regard to the latter, some justice demands from society are being met, but many serious concerns have remained.

It is important to point out that definitions of justice are contested. We have encountered this in a variety of cases. The Supreme Court in its polygamy ruling of 2013 has opted for an interpretation of Sharia-based justice with which many women's groups will disagree (see Chapter 4). The former owners of property dispossessed by Law 4/1978 have conceptions of justice, which markedly differ from those of present occupants. Gaddafi-era technocrats and "true revolutionaries" may well disagree about standards for vetting administrators and judges, and also within both groups opinions on the subject differ.

Many demands for justice also imply demands for legal reform. People engage in all sorts of demands for such reform, of different types and on different levels.

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### 13.3 Main Justice Concerns and Institutional Responses

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Referring to the five research questions which reflect our “abstract” research planning, this section will reply to question 1 about people’s justice concerns and at once to question 3 about the responses of institutions to those concerns.

The research found in the first place that the main justice concerns of people in Libya fall into three categories:

1. Justice concerns of victims of the Gaddafi regime (transitional justice);
2. Justice concerns of victims of the post-Gaddafi conflict;
3. Justice concerns about “ordinary” cases.

Our research has begun to explore the realities of access to justice through a number of cases in each of these categories. Often justice seekers were frustrated in the process as their efforts did not yield satisfactory results. In other cases the justice system can boast some successes.

#### 13.3.1 Transitional justice for victims of the Gaddafi regime

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Satisfaction for justice seekers was achieved when, on 30 June 2013, the Libyan state finally recognised the suffering of the families of the Abu Salim Prison massacre. In 1996 an estimated 1,286, mostly political, prisoners were killed in this prison in Tripoli. The institutional responses during Gaddafi’s regime went through various phases, from outright denial to offering compensation, to exerting pressure on the families to accept payment without truth (see Chapter 10). The present GNC (parliament) finally established a committee to seek the truth about what happened, and to offer compensation to the families of the victims: the beginning of justice, at last.

No satisfaction for justice seekers could be recorded from our case study about several middle-aged men from Benghazi who during Gaddafi’s regime had arbitrarily been imprisoned for years, under horrific conditions and without access to justice. After all those years they are still waiting for truth and justice, one and a half years after the liberation (see Chapter 9).

A sense of serious dissatisfaction is also prevalent among the tens of thousands of former owners of property who were dispossessed under Gaddafi's infamous Law 4/1978 (see Chapter 8). They have now framed their claims for restitution in terms of having been victimised by the Gaddafi regime and its policies. Many of the claims were already decided upon by the so-called 2006 Committee in the late years of the Gaddafi regime. However, many former owners were not satisfied and rejected the offers. A draft law to fulfil their demands is currently pending in parliament. Our research finds that little is heard in the public sphere from the present occupants of the contested property. Hearing their voices and histories as well would satisfy the need for balanced resolutions.

### 13.3.2 Justice for victims of the post-Gaddafi conflict

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Dissatisfaction has also prevailed due to the lack of institutional responses to the killings of dozens of senior officers who served with the army, police, or other security forces of the Gaddafi regime and were assassinated after the 17<sup>th</sup> February Revolution. A telling example of such failure is the case of the commander in chief of the revolutionary army, Abdel Fatah Younis, who was killed in 2011 under mysterious circumstances (see Annex III). He was distrusted by some revolutionary groups and accused of not being loyal to the revolution. His family is still seeking the truth, to restore his reputation, and for justice, to see those who killed him prosecuted. Institutional responses have been very slow and not transparent.

The AJDIL research group project initiated two other case studies of victims of post-Gaddafi conflicts. One study addresses a case of failure to stop militias from unlawful imprisonment and torture of someone most doubtfully pictured as a Gaddafi loyalist, while the other case study discusses ways to seek justice for women who were raped during and as part of the conflict. These case studies have not yet been completed.

### 13.3.3 Justice in "ordinary" cases

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In contrast to the absence of justice in the abovementioned cases, the family circuit court in our case study was "packed with lawyers and litigants" (see Chapter 7). "A day with Judge Maha" provides the observer with useful insights into the Libyan justice system. The judge appears to be professional, thorough, and dedicated. The stresses on the Libyan family are brought to her simple office, a predominantly "female space," by many lawyers and litigants, whom she deals with in a respectful and encourag-



ing way, aiming for reconciliation, where possible. The biggest problems in these courts are the legal consequences of divorce: do fathers pay the obligatory child maintenance to their divorced wives, and are the latter indeed allowed to remain in the house to raise their children, as the law prescribes. Judge Maha obviously does what she can to apply the law.

How just personal status (broadly, family) law is for women, is not the result of family circuit court decisions alone, but decided by the legislature, or, in cases of constitutional review of legislation, by the Supreme Court which can declare laws unconstitutional. In its 2013 polygamy ruling, this Court used its power of constitutional review to strike down Article 13 of Marriage Law 10/1984 which used to make the conclusion of a polygamous marriage dependent of the first wife's consent. To this end the Court had to make a decision about the content of Sharia. This research deems the Supreme Court's interpretation of Sharia unsatisfactory, since it failed to sufficiently address the questions involved in this matter (see Chapter 4). Such decisions could destroy laws that preserve important social gains such as the positive role of female judges, as demonstrated above.

People's lawyers constitute the state's branch for free legal aid which could be observed "at work" (see Chapter 5). Our informants indicated that people's lawyers are widely used, especially by poorer people, in family cases, criminal cases, and also in administrative cases. Judges often recommend that their clients seek legal information and assistance from a people's lawyer. Much of the casework done by the profession is on low status cases that rarely feature in international policy discussions about the rule of law.

International and national institutions seem to be highly critical of the institution, as (a) it does not fit the prevailing neoliberal ideology of the day, and (b) it is associated with Gaddafi. Common criticisms are incompetence, inefficiency, and lack of independence. Our preliminary observations and interviews suggest that the criticisms are not shared and in fact dismantled by a considerable number of insiders, including judges, lawyers and prosecutors, who favour the institution.

It was also noted that many people's lawyers are women; we observed that female people's lawyers handle many family disputes before the family court of first instance. Some female people's lawyers opt for the profession because it can easily be combined with their role as mothers. Male people's lawyers are said to take up more criminal cases, and in general to be more ambitious, and strive for positions as judges or prosecutors.

In common criminal cases, as observed and discussed by this research (see Chapter 6), the justice system functioned unsatisfactorily in that the accused did not get a fair treatment due to legal and institutional factors. These factors have caused structural imbalances of power between police and prosecutor on the one hand, and defence lawyer and the accused, on the other. Especially in the pre-trial phase the accused has often lacked proper information and support so that the evidence collected in the case file by police and prosecution may be biased against him. Pre-trial detention has often been very long, and the decisions allowing pre-trial detention often did not meet the standards of due process.

The legal provisions allowing criminal defence lawyers a level playing field have not systematically been observed in practice so that in reality they have had difficulty in ensuring that the investigation is fair.

During the trial, though, the accused and his lawyer have usually been able to present their case to a neutral judge who takes his responsibility seriously. However, the judge has often relied on a case file that was composed at earlier stages. The accused's understanding of the case brought against him could be hampered by formality of terms and procedures.

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### 13.4 Overhauling the Legal System?

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The legal system of Libya is a civil law system with a reasonably sound basis in terms of law codes, laws, legal institutions and legal professionals. This foundation was established in the Kingdom era (1951–1969). During Gaddafi's rule, the legal system was left largely intact. In all cases in this report, there are continuities and changes to which attention should be paid. Several of the injustices dating from the Gaddafi era were later addressed by laws and measures during that era. During the last decade of Gaddafi's rule, for example, important legal and institutional reforms enabled thousands of former property owning claimants to obtain at least some compensation for their dispossessed property; those mechanisms are still in place.

Since the 17<sup>th</sup> February Revolution took place in 2011, Gaddafi's actions, including his policies and laws of the whole period from 1969 to 2011, have understandably been condemned. A number of our informants, however, noted that not every policy, every law made during Gaddafi's regime was bad, and caused injustice. Some parts of his heritage may even be worth preserving. The fact that family courts operate with so many female judges and lawyers, may help gender justice; in this regard, Libya may be looked

upon by many as one of the pioneers in the Arab world. The availability of free professional legal aid in every court, through the office of people's lawyers, could be seen as a very important asset for Libya in confronting the huge number of justice demands, even if it goes against a prevailing neoliberal trend.

This is not to deny that a major review of legislation is needed, as indicated in this report (see 2.3.5). There is a serious danger, however, that legal solutions will emerge as a result of heavy political pressure without proper balancing of different interests, as justice requires. Thus, before making major changes in the legal system, it would be preferable to undertake solid investigations into past and present functioning of the legal system, rather than to hastily remove laws, institutions and staff under pressure of opinions mainly informed by ideology or political pressure.

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### **13.5 Strategies of Justice Seekers, Towards State and Non-State Institutions**

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Returning to the five research questions, this section will provide a reply to question 2 about people's strategies, and include considerations concerning question 4 about the use of non-state norms and mechanisms, including those rooted in religion or tribal authority.

Five main strategies were frequently mentioned by justice seekers. Employing the first strategy, people address their problems by making direct use of the legal system and its institutions. They go to the courts, the police, the public prosecutors, or to quasi-judicial institutions. When needed, they invoke legal assistance from people's lawyers or private lawyers.

We have seen this strategy "at work" in several of our case studies. The families of Abu Salim victims went to lawyers and courts (see Chapter 10). Victims of arbitrary detention under Gaddafi also filed lawsuits (see Chapter 9). The family of Abdel Fatah Younis, the assassinated army leader, also saw the case being brought to prosecution and the court (see Annex III). For marital affairs, litigants frequent the family courts (see Chapter 7), in one case a litigant even accessed the Supreme Court with an unconstitutionality claim (see Chapter 4). To claim their property rights, former owners also resorted to courts, as well as to special quasi-judicial committees (see Chapter 8). People's lawyers take in new cases all the time (see Chapter 5). Police and prosecution bring cases for the crimi-

nal court, at present especially minor cases (see Chapter 6). We also visited the National Council for Public Freedoms and Human Rights, and found that dozens of complaints are being brought every month to this guardian of human rights.

Using the second strategy, justice seekers lobby, through collective action, for a new law, or for a particular implementation of a law. In doing so, they resort to the GNC, the government, political parties, local government, and the media.

This also seems quite a common strategy. It is what the association of families of Abu Salim victims did (see Chapter 10). Victims of arbitrary arrest and imprisonment under Gaddafi did the same, resulting in Law 50/2012 on the compensation of former prisoners (see Chapter 9). Former property owners too have established associations to lobby for their claims, now that they can express discontent with the rulings of the 2006 Committee (see Chapter 8).

By the third strategy, justice seekers try to obtain support and advice from religious institutions.

With regard to matters of religion, which include problems of marriage, divorce, inheritance, we were told that Libyans often resort to religious institutions and individual religious scholars; no case study on this topic has been initiated yet. After the revolution a state office for religious advice, or Dar al-Ifta, headed by the Mufti, was re-instituted by law. This institution is very active in providing fatwas to those asking for it. In the case study on property claims of former owners, we have seen how their association requested a fatwa from Dar al-Ifta in order to strengthen their case. This strategy would contribute to the ongoing reshaping of the relations between law and religion in post-Gaddafi Libya.

Adopting the fourth strategy, justice seekers approach their tribal leaders for support. Perpetrators are often called to order by their tribal leaders, who establish contact with the leaders of the tribe of the victim.

The bonds between tribe members are said to be generally stronger in eastern Libya than in the western part in and around Tripoli. Here, people rely in times of trouble heavily on their tribe rather than on the state. The state is often perceived as being tardy, inefficient, perhaps corrupt, and generally ineffective. To enable the tribe to act and protect them, members pay regular contributions or tribal taxes to tribal funds. However, we have not heard about tribal courts, comparable to those customary courts

in parts of Asia and sub-Saharan Africa which settle most community disputes regarding marriage, divorce, inheritance, and land tenure in general.

In the Abu Salim Prison case during the later years of Gaddafi's rule the state made use of tribal authority, gathered in the so-called *popular social leaderships*, to put families under pressure to accept the state's offer of compensation (see Chapter 10).

According to our informants, tribal leaders play an important role in cases of murder and homicide, including death resulting from traffic accidents. Peaceful negotiation between tribes about the payment of blood money, may either substitute altogether for the legal process, or, if the case still reaches court, may lower the penalty.

The fifth strategy consists of resorting to one of the armed groups, militias, or brigades, which filled the power vacuum created when the new Libyan state could no longer realise its formal monopoly on the legitimate use of violence, which was lost with the fall of the previous regime.

From interviews, recorded by the AJIDL research group, it seems that this strategy has become not uncommon among the many justice seekers who are well-connected to these groups, which count tens of thousands. Notably among our respondents who fell victim to ordinary crimes, there seems to be a tendency to resort to such militia justice. This strategy was also used, for example, to reclaim property dispossessed under Law 4/1978. In some cases the "victim" seeks the help of an armed group, in other cases, the armed group urges someone to accept their offer to "solve" a problem by force. These voices "of the street" told us that, in general, they have little trust in police and courts, and that if you have a problem, you "must solve it yourself."

The prominence of the fifth strategy marks the transitional phase, in which Libya finds itself after a successful regime change. Having fulfilled a legitimate role in the early phase of the revolution and its aftermath, it is now essential that this option ceases to be considered as normal and acceptable. This will only happen if people consider the other "access to justice" strategies useful, i.e. leading to positive and effective responses from the law and the institutions which are supposed to apply their rules in fair and efficient ways.

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# Annexes



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# Additional Report: Libya's Court Structure

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*Nasser Alghetta and Suliman Ibrahim*

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## **The District Court (*al-mahkamat al-juz'iya*)**

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This is the lowest court dealing, in principle, with less serious cases. It has only limited jurisdiction in civil, commercial, personal status, and criminal matters.

In civil and commercial matters, the district court principally hears cases that have a value of no more than LYD1,000, but it has also jurisdiction over several types of civil cases regardless of their value, e.g. compensation claims for damage resulting from misdemeanours and contraventions.

With regard to personal status matters, the court deals with certain cases such as maintenance, custody, inheritance and divorce. In criminal cases the court is responsible for trying those accused of committing misdemeanours and contraventions (or, "minor" crimes). In this capacity it is known as the Misdemeanours Court (see Chapter 6). The decisions of the court are subject to appeal before the primary court.

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## **The Primary Court (*al-mahkamat al-ibtida'iyya*)**

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The primary court has jurisdiction over all civil and personal status matters falling outside the jurisdiction of the district court. It hears cases both for the first time and as an appeal court.

As a court of first instance, the primary court comprises of a single judge (see Chapter 7). In this capacity, the primary court does not hear criminal cases. There are many primary courts in Libya. They are in all major cities and the capital Tripoli has four primary courts.

In addition to its powers to hear cases for the first time, the primary court has the responsibility to consider appeals against rulings from the district court. Decisions of the district court concerning minor crimes can



be challenged before the primary court. In this capacity the primary court is known as the court of appeals for minor crimes (*al-mahkamat al-junah al-must'nafat*) and is presided over by a panel of three judges.

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### **The Appeal Court (*al-mahkamat al-isti'naaf*)**

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To ensure the right of appeal and adhering to the principle of two trial stages, the appeal courts constitute the second layer of judicial proceedings. The appeal court in Libya is also a court of first instance in certain (major) criminal cases, and in administrative cases. There are seven appeal courts in Libya. This court comprises of a president and a number of senior judges.

The appeal court is overseen by a “general assembly” which consists of all of its judges. This assembly’s responsibilities include the determination of the number of chambers the court should have and the distribution of the caseload between the chambers.

The appeal court reviews the decisions of the primary court in civil and family cases and also hears administrative cases for the first time (see Chapter 5). The most serious criminal charges related to felonies (or “major” crimes), are also heard in the appeal court before the criminal division, which is called the assize court (see Chapter 6). The decisions of the appeal court are final and are not subject to an appeal. The only route to challenging the decision of the appeal court is through the Supreme Court.

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### **The Supreme Court (*al-mahkamat al-a'ala*)**

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The Supreme Court is Libya’s highest court. The main responsibility of the court is to ensure the correct and unified application and interpretation of the law throughout the country. Law 6/1982 on the Reregulation of the Supreme Court<sup>1</sup> mandates all courts to abide by the legal principles contained in the Supreme Court’s rulings. According to this law, the court has jurisdiction over the following:

1. Claims of the unconstitutionality of any legislation brought before the court by anyone, who has a direct, personal interest.

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<sup>1</sup> It was later amended by Law 17/1994 and Law 8/2004.

2. Any legally essential matter concerning the constitution or its interpretation, which arises during any case being heard by any court.
3. Conflict of jurisdiction between courts and any exceptional judicial authority.
4. Any dispute concerning the execution of two conflicting final judgements issued by a court and an exceptional judicial authority.
5. The changing of one of the Supreme Court's principles.  
(It must be noted that the Supreme Court deals with these cases [1-5, eds.] by its collective circuits.)
6. Any challenge against rulings of lower courts concerning civil, commercial, personal status, administrative, and criminal matters.

As an exception to its role as a court of law, the Supreme Court can, in some cases, act as a court of fact. For instance, in criminal matters when it decides to overturn the decision of a lower court, and the subject can be validly ruled on. However, the court has no jurisdiction over claims related to national sovereignty.

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### **Supreme Council for the Judiciary (*al-majlis al-a`ala al-qada*)**

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According to Article 1 of Law 4/2013 concerning the Amendment of the Law on the Judiciary, membership of the Supreme Council for the Judiciary consists of the following: a supreme court judge, the head of the Judicial Inspection Authority, a judge from each appeal court in the country, the General Attorney, a member from the people's lawyers (renamed public lawyers in this legislation), a member from the government lawyers and a member of the Directorate of Law. The law states that the council elects its president and his deputy from among its membership through a secret ballot.

The council meets on a regular basis and has a wide range of duties and responsibilities. In principle it is an organ established to oversee the judiciary, to ensure the effectiveness and integrity of the system, and to guarantee the highest level of independence of the judiciary from the influence of the executive.

According to Article 5 of Law 6/2006 concerning the Judiciary, the Supreme Council for the Judiciary oversees the function of the judiciary and is empowered to issue all decisions regarding the administration of justice including making recommendations to the legislature to adopt laws and legislation regarding the judiciary, issuing decisions to establish new

courts and determining their jurisdiction, and appointing judges, public prosecutors and members in the other judicial institutions. The council has the power to issue a decree of pardon. The council sits as a disciplinary court if a disciplinary action is brought against judges, prosecutors and others working in one of the judicial institutions.

# Additional Report: The Role of the Tribe in Libya: Making the Informal Formal

*Amal Obeidi*<sup>1</sup>

## The Concept of Tribe and its Characteristics

The tribe is still a major source of personal identification for the majority of Libyans<sup>2</sup> and one of the elements that have shaped contemporary Libyan political culture.<sup>3</sup> Historically it has had a role as a source of legitimacy, an agent of political socialisation and to some extent an alternative to a civil society, particularly under Gaddafi's regime. The tribe in Libya (*al-qbila*) can be defined as a social organisation that is bigger than a family, but not the same as a nation. It is tied together by complex bonds of kin and duty (Kuper and Kuper 1985, 869).

According to Al-Dawsari – writing about similar tribal formations in Yemen – the tribe is

*a social organisation that gains its legitimacy from a set of traditional rules that constitutes a social contract among the tribe's members as well as between them and their sheikhs and other tribes. (Al-Dawsari 2012, see also Obeidi 2001, 109-111)*

Drawing on Al-Dawsari's work, a number of tribal characteristics can be identified:

1. Solidarity among the membership;
2. Age as a determinant of roles within tribal hierarchy;

1 With special thanks to Bruno Braak (VVI) for his editorial assistance.

2 Other competing sources of identity include place of residence and the family. See Obeidi (2001, 86-107). See also 2.3.4.

3 For more details about political culture, tribe and tribalism in Libya see Obeidi (2001, 41-45, 108-135).

3. Customary law governs social relationships and protects common interests;
4. Loyalty and attachment to the tribe is widespread, even in urban areas;
5. Men have more status than women and the tribe is presented to the society as a whole as male;
6. Tribal funding, through the “tribe’s coffer” (*sunduq al-qabila*), provides economic support to members through each male head of household paying a “tribal tax” to the tribal fund. This money is commonly used to support individual members of the tribe, in cases of emergency or to compensate members of other tribes who fell victim to a member of the tribe, for example in cases of murder, homicide, or rape. The amounts are negotiated between senior, male representatives from either tribe. Women are excluded from paying the tribal tax. However, they might benefit from the tribal fund when needed.
7. Economic, political and social changes have had an impact on some tribal values.

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### **The Politics of Tribes: Gaddafi’s Popular Social Leadership and Current Attitudes**

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During government under the monarchy, from 1951, the tribe was one of the main elements of legitimacy and a significant source of elite recruitment. According to Salaheddin Sury (1980, 105):

*The political leadership of Libya in the period 1952-1969 was a combination of religious, tribal and family elements, of bureaucratic and of university graduates. It was dominated throughout the first decade and part of the second by conservative elements of tribal, family and religious background, most of whom were in powerful positions prior to the declaration of independence.*

The subsequent regime under Gaddafi, from 1969 until 2011, regarded the tribe as a source of social values, and a tool for education and socialisation. The regime was initially hostile to the importance of the tribe to social organisation during the period from 1969 until the end of the 1980s, when it attempted to eliminate tribal loyalties and attachments by restructuring the administrative boundaries that had been founded on *de facto* tribal lines. The policies pursued in these years included the dismissal of all local officials, including governors and mayors – most of whom had been tribal leaders –

and replacing them with new local administrators whose values and social origins were compatible with the new regime and its ideology.<sup>4</sup> Thus ideological loyalty was a new criteria introduced by the regime to recruit the new political elites.

Nonetheless, kinship and tribalism continued to serve as a mechanism by which access to state distributive networks could be guaranteed (Anderson 1995, 230). In this period, tribe as a source of recruitment of elites at local levels became an invisible actor in Libyan politics. Lisa Anderson has consequently observed that, “[d]espite its initial hostility to tribalism as the base of corruption, the regime eventually found itself a captive of precisely that organizing principle” (ibid., 230).

The Gaddafi regime overtly changed its policies in the 1990s, when the tribe became a significant source of political legitimacy of the regime, and one of the key factors in stabilising the internal situation, especially after the increase of external pressures through the imposition of sanctions in 1991. In addition, the tribe was used by the regime as a security tool to rid itself of opposition both within the country and externally, particularly from Islamists. This policy was pursued through encouraging tribes and their leaders to issue statements denouncing those from their membership who, according the regime, had “betrayed the country.” To this end, most tribes were encouraged to write a “Certificate of Allegiance” to prove their loyalty and attachment to the regime and its leadership.

The regime also established a system by which tribal leaders were held liable for the actions of their tribes’ membership. Any failure to punish wrong-doing on the part of individuals would lead to communal punishment for the whole tribe or family. This was implemented through use of the “Certificate of Honour” which was introduced by the regime in 1995. This certificate emphasised the notion of communal responsibility and communal punishment in cases where members of tribes had “betrayed the country and the regime” (Obeidi 2004, 6-7).

The former regime’s pragmatic instrumentalisation of the tribe was further apparent when the new institution of *popular social leadership* was created in September 1993. The membership of this institution constituted a new form of elite, through which the regime institutionalised the role of the tribe politically. The popular social leadership was tasked with the role of managing and controlling the population across Libya, through the exer-

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4 For more details see El-Fathaly et al. (1977, 92). See Obeidi (2008, 118-121).

cise of authority by regional tribal leadership. Several observations can be made about this institution's subsequent operation:

1. The popular social leadership was created in order to play a role in the question of succession within the Gaddafi family. This became evident in September 2009, when Muammar Gaddafi asked the Libyan people to find a formal position for Saif Al-Islam. He suggested that this should be as the general coordinator of the popular social leadership, which would serve as an equivalent to a head of state in other countries.
2. The majority of the coordinators of the popular social leaderships were military officers, mainly generals and colonels. Only four civilians were amongst the sixteen who were appointed as general coordinators of the popular social leadership.<sup>5</sup>
3. Women were excluded from the institution, and were usually present only temporarily when they were needed for a political campaign or to participate in ceremonial events. However, there were women acting as coordinators for women activists in every city.
4. The popular social leadership as an institution created a substantial number of regional "committees for reconciliation and good initiatives," with responsibility to lead processes of reconciliation between different groups. Some of the members of these committees were tribal leaders, while some were members of the Revolutionary Committees.
5. The popular social leadership played a crucial role in conducting the reconciliation imposed by the regime on the families of victims of the Abu Salim massacre (see Chapter 10).<sup>6</sup>
6. The institution played a crucial role in supporting Gaddafi's regime and it even became a source of the regime's legitimacy during the 17<sup>th</sup> February Revolution. Several meetings were held in Tripoli in order to demonstrate tribal support to the regime. These meetings were known as the Meeting of the Libyan Tribes. The composition of the popular social leadership changed following the uprising, since many tribal leaders defected and announced their support to the revolution, particularly those from the eastern part of the country.

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5 For more details see Obeidi (2008, 109-110).

6 Interview, Fathi Terbil, lawyer and the former chairman of the association of the families of Abu Salim's victims, Benghazi, 22 January 2013.

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## Social Attitudes towards the Tribe Facilitating Access to Justice

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Focus group discussions held in Benghazi after the success of the 17<sup>th</sup> February Revolution indicate that the tribe, free of political interference from the former regime, remains an important element in processes of justice seeking in Libya.<sup>7</sup> The results of these discussions in late 2012 and early 2013 demonstrate that the tribe is considered to be successful in solving disputes between individuals by acting as local arbiters and mediators. In particular, this form of dispute resolution is regarded as being beneficial in land disputes, family matters, such as marriage, dower disputes and inheritance, as well as crimes of rape or murder – after a protecting process at early stages, these cases are usually left to the legal system.

The involvement of customary law – under the aegis of senior tribal members – in these matters is normally to eliminate further dispute. For instance, in the case of rape the purpose of tribal interference is to protect women and to lead negotiations in order to reach a social or legal settlement of the case. However, women sometimes are victimised through being forced to marry their rapists. In the case of other crimes, tribal involvement may facilitate the transfer of the families of the perpetrators of a crime in order to protect them from any attack by the family of the victim. The tribe can also, through negotiation, eliminate any further clashes or disputes between those involved in these issues.

Tribal interference, therefore, is usually not seen as an alternative to the procedures of the state justice system or the formal institutions. Usually the role of the tribe here is more social mediation, rather than interference in the legal aspects. Moreover, participants agreed that tribal forms of arbitration and mediation are not an alternative to the state justice system.

The advantages of appealing to the informal institution of the tribe and its justice system, according to the focus groups, is that it is more accessible, quicker, more transparent, and less corrupt than the state courts. In addition, the tribal mediator, or sheikh, is felt to be better equipped to guarantee enforcement of tribal rulings. These rulings are closer to the collective beliefs of the communities and enforced with social pressure. This

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7 The findings mentioned here are largely the result of four focus group discussions held with postgraduates and undergraduates of the Faculty of Economics at the University of Benghazi. The participants in a fifth group were mainly academics, lawyers and civil society activists. Each group included eight participants. The discussions were conducted on 12, 13 and 23 December 2012, 6 January 2013 and 24 February 2013.



can be found not only in the rural areas, but also in the urban areas where the tribal attachment and loyalty is very strong.

It is important to indicate that women participants in the discussion groups agreed that women are usually prevented from getting access to justice, due to legal illiteracy and social restrictions of free movement. Moreover, in practice the tribal justice system usually discriminates against women.

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# Additional Report: Justice Seeking in the Case of Abdul Fatah Younis

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*Khalifa Shakreen*<sup>1</sup>

On 28 July 2011, during the height of the 17<sup>th</sup> February Revolution, the body of Major General Abdul Fatah Younis, the Commander-in-Chief of the Libyan National Army (LNA), was found mutilated and burnt on the side of a road in eastern Libya. A former member of Gaddafi's inner circle, Younis had defected to the revolution on 22 February 2011, and was subsequently appointed as the head of the revolutionary forces, the LNA.

Announcing his death on 29 July 2011, Mustapha Abdul Jalil, the chairman of the NTC, described him as one of the heroes of the revolution. However, Younis was a man with many enemies.<sup>2</sup> He was known to have been involved in the former regime's military campaign against Islamist resistance in the 1980s. Moreover, at the time of his death he was subject to an investigative enquiry that had been called by the NTC linked to accusations about his perceived poor military performance at the Brega front. Within hours of Jalil's announcement, rumours were circulating that Younis's death had not been at the hands of Gaddafi's army. It is now widely acknowledged that Younis and three of his companions were abducted, tortured and killed by members of the revolutionary forces. Two years after his death, only one of the eleven men named as suspects in his murder has been arrested and the case has yet to come to trial.<sup>3</sup>

As a result, this case has become a cause célèbre in Libya as it has passed through a succession of state and non-state institutions appointed to bring the perpetrators to justice under pressure from Younis's family, his

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1 This additional report is an abbreviated editorial version of a longer article which the author intends to publish in an academic journal.

2 "Libya Conflict: Younes Death Betrays Rebel Divisions," Shashank Joshi. *BBC News* 30/7/11, <http://tinyurl.com/sjpgl-080>; "Obituary: General Abdel Fattah Younes," *The Telegraph* 29/7/11, <http://tinyurl.com/sjpgl-081>, both accessed on 29 June 2013.

3 "Younis Murder Judge Orders Jalil to Appear in Benghazi Court," Maha Ellawati and Nihal Zaroug. *Libya Herald* 11/10/2012, <http://tinyurl.com/sjpgl-082>, accessed on 18 July 2013.

tribe, civil society organisations, the general public and several international human rights organisations. The struggle to get to the truth of what happened and to achieve justice for Younis and his family has involved well-connected members of the government, elicited conspiracy theories and public confessions in the media, and raised questions about the state's ability and commitment to face down powerful militias.

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## The Politicisation of Justice

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There are widely held suspicions that Younis's death was at the hands of members of an Islamist militia, who – it is understood – may not have trusted him. Some of his family have also directly accused members of the former NTC of having sanctioned or encouraged his murder, given Younis's former role as the Minister of Interior under Gaddafi.

Initial arguments about the circumstances and causes of Younis's assassination, consequently, as much centred on the veracity of accusations that he had been a traitor to the revolution, and pursuing apologies for this assertion, as they did on who had been directly or indirectly responsible for his death. The implications that Younis was not fully committed to the revolution have been fiercely contested by his family, and his right to justice has been clearly articulated through the politics of whether he could be counted amongst the revolutionaries. Younis's Obeidat tribe supported his family in spearheading the double claim that he should be exonerated from accusations of not being fully committed to the struggle against Gaddafi's regime and for the prosecution of his killers.

Soon after the death was announced, several members of the NTC are said to have entered into discussions with representatives of Younis's Obeidat tribe in order to exonerate themselves from any involvement. In addition, Dr Ali Issawi, the acting president of the Executive Bureau of the NTC at the time of Younis's death, appeared on national television following the success of the 17<sup>th</sup> February Revolution, to state that he had had no part in the murder.<sup>4</sup> In December 2011, a military prosecutor in Benghazi informed the press that Mustafa Abdul Jalil had been charged, during a court hearing regarding the Younis case, of offenses related to the creation of the Brega investigative inquiry committee, and the fact that the conse-

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4 Interview with Issawi uploaded to You Tube on 27 Nov 2011, <http://tinyurl.com/sjpgl-083>, Part 1; <http://tinyurl.com/sjpgl-084>, Part 2; <http://tinyurl.com/sjpgl-085>, Part 3, accessed on 12 July 2013.

quence of that decision could have resulted in tribal conflict and damage to Libyan unity at a critical period of the revolution.<sup>5</sup> Jalil subsequently vigorously denied any culpability and implicated militia in the murder.<sup>6</sup>

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## The Effect of Security Sector Failings on Access to Justice

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Possibly due to public indignation and protests in Tripoli about the accusation against the highly respected Jalil, the military court dropped this sensitive case altogether.<sup>7</sup> The legal case has subsequently been transferred to the civilian criminal courts, but with no tangible results yet. During different phases of the case's history there have been said to have been 29, 19 and then 11 suspects named in relation to Younis's murder. The failure of the state's security forces to arrest all of these suspects but one is symptomatic of the state's lack of monopoly over the legitimate use of force. During an interview in 2013, Adel Alhasi, an ex-revolutionary leader who voluntarily dissolved his brigade, provided a list of militant leaders he believed represented what he called a "de facto government".<sup>8</sup> Since the success of the 17<sup>th</sup> February Revolution, some militias have seemingly become too powerful to confront.

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## The Symbolism of the Younis Case

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The failure to effectively address the case has dragged on through the post-revolutionary period during which numerous incidents of violence have occurred in a security situation that has directly challenged the state (see Chapter 2 and Chapter 3). Amongst the numerous assassinations and assaults on military officers, members of the police, and legal professionals, Judge Jazwi, who was believed to have issued the warrant for Younis's ques-

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5 "Abdul Jalil Will Stand Trial "Very Soon" In Connection With Younis Murder," Mohamed Bujehah & George Grant. *Libya Herald* 16 December 2012, <http://tinyurl.com/sjpgl-086>, accessed on 13 July 2013.

6 "Islamists Killed Younis," Khalid Al-Maheer. *AlJazeera.net*, <http://tinyurl.com/sjpgl-087>, accessed on 13 July 2013.

7 "Abdel Fattah Younes case: Libya tribunal quits in Jalil row," *BBC News*, 20 December 2012. On 19 December 2012 the military court in Benghazi announced that it dropped the case. Shortly afterwards, the Minister of Justice, Salah Al-Marghani announced, referring to the accusations of Jalil, the amendment of a Gaddafi-era law, which would effectively ban the trial of civilians in military courts. "No more trials for civilians in military courts, Jalil included, says Justice minister," George Grant. *Libya Herald*, 19 December 2012, <http://tinyurl.com/sjpgl-088>, accessed on 14 July 2013.

8 Adel Alhasi in an interview with Rajab Blblu, Alminbar programme (A RERUN), LIBYA Alahrar 3 june 2013 10.00 AM.

tioning by the Brega investigative committee, was gunned down in June 2012.<sup>9</sup>

At the time of writing, there has still been no justice for the Younis family. The Younis case has subsequently become symbolic for many of the obstacles to accessing justice created by the current insecurity in Libya: both at the level of the day-to-day functioning of the legal system and in terms of the difficult politics of justice.

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9 "Libyan Judge Who Ordered Arrest of Qaddafi's Interior Minister Killed," *AFP Al-Arabiya News* 22/6/13, <http://tinyurl.com/sjpgl-089>, accessed on 13 July 2013.

# IV

## Chronology of the Formation and Activities of the AJIDIL Research Group

In the preparatory stages of this project, Prof Jan Michiel Otto (vvi/LU) and Dr Suliman Ibrahim of Benghazi University established contact. Mutual interest was established, and Dr Ibrahim helped to arrange Prof Otto's first visit to Benghazi in February 2012.<sup>1</sup> During this first meeting Dr Suliman introduced Prof Otto to other legal scholars and practitioners, along with Dr Fathi Ali, an economist, who directed the university's interdisciplinary Benghazi Research and Consulting Centre (BRCC/BU). At his request Prof Otto also met a number of social scientists, who included Dr Amal Obeidi from the Department of Political Science, and Prof Mohammed El-Tobuli from the Department of Sociology. In Tripoli Mr Khalifa Shakreen, a political scientist and director of international relations at Tripoli University (TU), also showed a keen interest in the project, and introduced Prof Otto to other scholars.

Mid-May three scholars from BU, Dr Suliman Ibrahim, Dr Fathi Ali, and Prof El-Tobuli came to Leiden, together with Mr Shakreen (TU) for further discussions.

In June 2012 the Van Vollenhoven Institute recruited Dr Jessica Carlisle, a socio-legal scholar with field experience in the MENA-region. Before her assignment began in September, Prof Otto and Dr Carlisle visited Benghazi and Tripoli in July to further prepare the project.

In October 2012 a workshop was held in Leiden to discuss the possible topics of case studies about "access to justice." The team was extended with Dr Nasser Algeitta, senior lecturer in public international law and criminal law at the Azzaytuna University, and Fathi Ageila, LL.M., lecturer in criminal law at Benghazi University. In late November, Prof Otto made a trip to

<sup>1</sup> On this first mission Prof Otto was accompanied by Dr Igor Cherstich, a social anthropologist with extensive field experience in Libya. At that time Mr Cherstich worked with SOAS (London) on the final stages of his PhD project on a Sufi community in Tripoli.

Tripoli and Benghazi, this time to do an initial mapping of donor activities in the rule of law field on the request of the City of The Hague.<sup>2</sup>

At the same time Dr Carlisle spent the first of three periods of fieldwork, each of approximately five weeks, in Tripoli, i.e. in November-December 2012. She would spend consecutive periods of field research in February-March 2013, and in April-May 2013, conducting field research, next to editing work and project coordination. A February 2013 workshop about the case studies was held in Tripoli amidst heightened security concerns. In March 2013 a workshop was held in Leiden and an expert meeting was conducted, jointly organised with the The Hague Institute in The Hague. In April, a coordination meeting was held in Leiden with Dr Fathi Ali, Dr Ibrahim, Dr Obeidi, Prof Otto, and Dr Carlisle. Dr Ibrahim continued to work in Leiden for most of April, where he also gave two guest lectures in a course on Sharia and national law in the Muslim world. In May, project meetings took place in Tripoli. In the beginning of July Libyan and Leiden researchers convened in Leiden to discuss the final draft of this report.

Through this series of meetings, alternating in Libya and the Netherlands, the research team made decisions step by step about all aspects of the research project. During meetings in Libya the vvi staff was introduced to relevant actors whereas during meetings in Leiden/The Hague Libyan researchers met a number of Dutch researchers and experts in the field. During and in-between these meetings the set-up of the research project gradually gained its shape and format.

In the AJIDIL research group the partners have tried to combine country-specific knowledge on law, governance and development in Libya with comparative expertise in LGD-studies (see 12.6).

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2 The mapping of donor activities in the rule of law field was done at the request of the City of The Hague. On this trip Prof Otto was assisted by Ms Zainab al-Touraihi with whom he authored a draft report, which was submitted to The Hague Institute in January 2013.

# V Policy Suggestions

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*Jan Michiel Otto and Suliman Ibrahim*

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## **International Community**

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- Engage with Libya as a long-term commitment, and support the state-building process.
- In doing so assume a “Responsibility to Learn” as a guiding principle, i.e. support the government of Libya in the justice sector on the basis of realistic, domestic, research-based analyses of the justice problems in society and state, rather than on foreign, supply-driven proposals, or impressionistic assumptions.

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## **Government and Parliament (GNC)**

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- Continue the balanced, democratic, peaceful and law-based approach to all justice issues, and focus on the mandate of managing the “transition” to a constitutional state.
- Prioritise improving security by dismantling the militias, and, where possible, training and integrating them into the regular state army, police, and other security forces.
- Reduce support for “militia justice” by publicising its undemocratic and unjust operations, in close collaboration with civil society organisations.
- Revitalise the transitional justice process and make all voices heard, thus aiming at justice, mutual understanding and reconciliation.
- Prioritise the draft law of transitional justice without further delay, dealing with victims of the Gaddafi regime as well as victims of real or perceived “revolutionary” militias.



- Incorporate the Law 4/1978-based conflicts into the wider frameworks of transitional justice.
- Use the upcoming process of constitution making to organise well-informed constructive dialogue about important and sensitive topics, in close collaboration with civil society organisations and universities.
- Consider reform of the Criminal Procedure Code to give more rights to defence lawyers and to enhance judicial supervision of police and prosecution in the pre-trial stage.

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### **Government/ Ministries of Justice and Higher Education**

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- Produce realistic analyses of justice problems in society and state.
- Commission Libyan universities to carry out policy-relevant research projects on access to justice and legal and institutional reform and encourage joint Libyan-international research groups in this area.
- Commission such research projects of three types, i.e. legal research, qualitative socio-legal research, quantitative research, including periodical national surveys.
- Establish a national research institute for law and society studies.

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### **Government/Ministry of Justice and Supreme Council for the Judiciary**

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- Increase the public confidence of the judiciary and quasi-judicial institutions by making their work more transparent and accountable.
- Ensure that judicial rulings on major socio-political issues are based on well-founded reasons, informed by available academic knowledge, notably from legal and social sciences.
- Apply the annual personnel assessments in the judicial services in ways that promote quality in all sectors.

- The practice of reappointing malfunctioning judges and public prosecutors as public (previously people's) lawyers should be ended.
- Retain the possibility of the state-led career system of "judicial institutions" to provide inter-professional career paths, for example to become first public lawyers, and later judges.
- Reduce frequent transfers of judges as this practice has been found to make the criminal justice system inefficient.
- Establish a systematic training programme for the legal professions, including joint training of judges and prosecutors with public (previously people's) lawyers, government lawyers, and private lawyers.
- Enable the Higher Judicial Institute to collaborate with law faculties in order to accumulate expertise and to offer quality courses in legal practice and theory, in all regions.
- Provide the police and all legal professionals with training in the field of human rights, due process and fair trial.
- Explore, through pilot projects and research, whether or not computerisation and certain applications of E-justice might lower the barriers faced by most justice seekers and/or help courts to deal more efficiently with the increasing and accumulating caseload.
- Respect and retain the crucial roles of female judges and lawyers in the legal system, with special reference to their roles in the family circuit courts.

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### **Universities and Research Institutions**

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- Renew the legal curricula to suit the practical needs of the justice system, with a focus on human rights.
- Engage in outreach activities, such as legal clinics staffed by students, supervised by academic staff, as well as training courses for legal professionals.

- Create a research environment for alpha and gamma-faculties, which rewards quality research that addresses important social, economic, legal, public administration, and political issues.
- Disseminate findings and interim-findings of such research, so that policy-makers may take the outcomes into account when preparing policies or enacting legislation.
- Encourage qualified Libyan researchers to engage in organised policy dialogues with domestic and international policy-makers.
- Initiate, support and execute research projects on access to justice and institutional development, to provide for a knowledge base for decision-makers. For example
  - a. Make an accurate assessment of the conflicting claims about the potential of people's (now public) lawyers through extensive empirical research;
  - b. Design and assess potential solutions for problems of dispossession of property related to Law 4/1978;
  - c. Study the actual practices of legal institutions, notably the police, courts, prosecution, and local councils;
  - d. Study justice-seeking practices in cases of theft and assault, and employment disputes;
  - e. Research potentially serious but "hidden" injustices, such as gender-based violence and the ways in which various groups of non-Libyan migrant workers (Africans, Egyptians, Tunisians, Bangladeshi, other Asians) are treated.

# About the Authors

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## Nasser Algehitta

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Nasser Algehitta is a lecturer at the Faculty of Law of Azzaytuna University, Libya, on subjects including international law, human rights, criminal law and justice. In 2011, he obtained his PhD in international human rights law from the University of Aberdeen, UK. Previously, he completed undergraduate and post-graduate studies in law in Libya, and holds master's degrees in international law (Oxford Brookes University, UK) and human rights and democratisation (University of Malta). Between 1997 and 2001, Nasser worked as a public prosecutor in South Tripoli Primary Court.

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## Jessica Carlisle

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Jessica Carlisle is currently the principal investigator on the “Access to Justice and Institutional Development in Libya” project at the Van Vollenhoven Institute, Leiden University. Previously, she has done socio-legal research on courts and legal practices in Syria, Egypt, Libya and Morocco. Her fieldwork has focused on the application of personal status law and the organisation of family life in the MENA, the practice of criminal law, narratives about corruption and property disputes. She holds a BA (Hons) in politics from the University of Leeds, an MA in Near and Middle Eastern studies from SOAS and a PhD in law from SOAS.

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## Jazia Gebril

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Jazia Gebril Shaiter is a criminal law lecturer at the Benghazi University Law Faculty where she is also the head of the criminal law department. She has a PhD in law from Ain Shams University (Cairo, Egypt). Her main interests are: sociology of law, psychology of law, criminal law research related to human rights and Islamic Sharia.

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### Suliman Ibrahim

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Suliman Ibrahim is a private law lecturer at Benghazi University Law Faculty where he is also the dean. He holds an LLB (Hons), LLM (Benghazi University), and PhD in law (Lancaster University). He previously worked as an assistant professor of private law at Bahrain University Law Faculty, and the managing editor of its legal studies journal.

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### Amal Obeidi

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Amal S.M. Obeidi is associate professor of comparative politics in the Department of Political Science, Faculty of Economics, Benghazi University, Libya. She served as dean of the Faculty of Economics at Benghazi University in 1999-2001. She was also the head of the Department of Political Science in 2006-2008. Her publications include *Political Culture in Libya*; *Security Policies in Libya*; *The Political Elites in Libya*; *The Impact of the Revolution and the Transitional Period on Women's Position in Libya*. She specialises in gender issues, public policies, and security issues.

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### Jan Michiel Otto

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Jan Michiel Otto is professor of Law and Governance in Developing Countries and heads the Van Vollenhoven Institute. He did his PhD research in an Egyptian village on interactions between people and state institutions. He directed and participated in research projects on law and governance in Asia, Africa, and the MENA region. Recent work includes *Sharia incorporated* (2010), a comparative overview of legal systems in twelve Muslim countries in past and present

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## **Khalifa Shakreen**

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Khalifa S. Shakreen is a lecturer at the Political Science Department of Tripoli University, and a member of the executive committee of the office for international relations. Between 2010 and 2012, he was the executive director of Tripoli University's International Relations Bureau. Previously (1988-1994) he worked for the Libyan Ministry of Petroleum as a researcher at the Department of International Relations. He holds a BA in political science (Columbus State University), an MA in international relations and an MA in global policy studies (University of Georgia, Athens, GA, USA).

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## **Mohammed El-Tobuli**

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Mohammed A. El-Tobuli is a sociology professor and the president of Benghazi University. Areas of interest are social change, research methodology, and development. Previously, he taught at Utah and Utah State Universities (USA).

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# Shortened URLs

The editors of this report have made use of TinyURL ([www.tinyurl.com](http://www.tinyurl.com)) to shorten lengthy website links referred to in this report. This list reflects the original links.

## <http://tinyurl.com/sjggl->

- 001** = <http://www.libyaherald.com/2012/05/03/libyan-minister-of-economy-expects-1-trillion-in-fdi>
- 002** = <http://www.politico.com/politico44/2013/03/obama-meets-with-libyas-new-leader-159219.html>
- 003** = <http://www.libyaherald.com/2013/03/28/zeidan-looks-to-uae-for-police-and-security-expertise>
- 004** = <http://www.libyaherald.com/2013/03/03/fresh-deadly-clashes-in-mizdah-army-moves-in>
- 005** = <http://www.reuters.com/article/2013/06/25/us-libya-army-idUSBRE9500JQ20130625>
- 006** = <http://www.libyaherald.com/2013/01/13/deserts-forgotten-worriers>
- 007** = <http://www.reuters.com/article/2013/06/08/us-libya-clashes-idUSBRE9570CY20130608>
- 008** = <http://www.libyaherald.com/2013/06/19/huge-explosion-flattens-benghazi-police-station-no-casualties-reported>
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# Colophon

## **Report of the AJIDIL research project**

*Carried out by:*

Van Vollenhoven Institute for Law, Governance,  
and Development, Leiden University and  
Benghazi Research and Consulting Centre,  
Benghazi University

*In collaboration with:*

The Hague Institute for Global Justice

*At the occasion of:*

The 100<sup>th</sup> Anniversary of the Peace Palace, The Hague

*Publisher:*

Van Vollenhoven Institute

*Editors:*

Jan Michiel Otto, Jessica Carlisle, Suliman Ibrahim

*Authors:*

Nasser Algeheita, Jessica Carlisle, Jazia Gebril,  
Suliman Ibrahim, Amal Obeidi, Jan Michiel Otto,  
Khalifa Shakreen, Mohammed El-Tobuli

*Assistant editor:*

Hannah Mason

*Design:*

De Kreeft, Amsterdam

*Cover photograph:*

© EPA/Sabri Elmhedwi

Libyan security guards stand next to a prisoner cage,  
in the newly opened appeals courthouse in Tripoli,  
Libya, 10 April 2012

ISBN 978-90-820998-0-5

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ISBN 978-90-820998-0-5

## Searching for Justice in Post-Gaddafi Libya

This report presents preliminary findings of the Libyan-Dutch research project “Access to Justice and Institutional Development in Libya (AJIDIL),” carried out collaboratively by the Van Vollenhoven Institute for Law, Governance, and Development (Leiden University) and the Benghazi Research and Consulting Centre (University of Benghazi).

AJIDIL explores people’s access to justice and the working of law and legal institutions in post-Gaddafi, post-conflict, democratic Libya. The report focuses on several specific concerns, such as doubts about home ownership, the practice of people’s lawyers, or judicial interpretation of Sharia. These case studies are placed in the wider context of law, governance, insecurity, and the role of international rule of law promoters in Libya.

The AJIDIL project has been commissioned by The Hague Institute for Global Justice and is part of a larger research project conducted by The Hague Institute on achieving sustainable peacebuilding, funded by the City of The Hague.