

New law urgently required to protect freedom of association Libya:

Nothing can be gained by turning back to Gaddafi-era law

Legal Commentary



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Introduction:

The right to free association in Libya is at a critical juncture. On 21 March 2023, the Government of National Unity headed by Abdul Hamid Dbeibeh issued a Decree (No. 7/2023) that allows local and international civil society organizations (CSOs) in Libya to continue working temporarily while recognizing their (temporary) legality until they can conform to Law 19/2001 to regulate civil society organizations.¹ Law 19/2001, issued under the previous Gaddafi regime, is annulled and invalid according to the 2011 Constitutional Declaration.

¹ This is a refutation of what was stated in General Decree No. 5803 issued on March 13 by the External Cooperation Department of the Tripoli government, which recognized the illegality of all national and international associations operating in Libya; registered after 2011

That same day 21 March, members from the House of Representatives proposed amendments to Law 19/2001. The decision to return to this Gaddafi-era law represents the executive authority's exploitation of the political vacuum in Libya; since 2011, there has been no legal framework regulating civil society and protecting the right to free association. The amendment of Law 19 is just the latest in a series of encroachments by the executive authorities upon the jurisdiction of the legislative authorities. From 2016 to March 2023, governing authorities in east and west issued four decisions and administrative regulations that flout the freedom to form local and international associations, especially targeting and restricting human rights organizations that expose violations.

In this legal commentary, CIHRS examines the evolution of the legal framework regulating civil work in Libya, and the extent of the constitutionality and legitimacy of its legislation, decisions and executive regulations and their compatibility with Libya's international obligations. We underscore the danger represented by the absence of national legislation affirming the right to association in accordance with international² and constitutional standards. We re-introduce the draft law on civil society proposed by Libyan human rights organizations and submitted to the House of Representatives in June 2021 as an alternative to the current Law 19 of 2001. The memorandum further examines the criteria in both international and national law for exceptional

² Freedom of Association is a fundamental right within the civil and political rights guaranteed by all international conventions and treaties. It is also a basic guarantee for people to enjoy their cultural, economic, political and social freedoms. It represents an essential element of democracy because it enables individuals to "express their political opinions, participate in literary and artistic works and other cultural, economic and social activities, and participate in the practice of religious rites and other beliefs". The right to freedom of association is guaranteed under Article 20 of the Universal Declaration of Human Rights, Article 22 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the International Convention on the Rights of the Child, Article 7(c) Convention on the Elimination of All Forms of Discrimination against Women, articles 26 and 40 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 15 of the 1951 Convention Relating to the Status of Refugees, Article 24(7) of the International Convention for the Protection of All Persons from Enforced Disappearance, and Article 29 of the Convention on the Rights of Persons with Disabilities.

cases or circumstances under which the fundamental right to freedom of association can be restricted, including the judicial precedents in Libya’s legal system that guarantee the protection of this right even in times of exception; under the following headings:

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1. Law 19 of 2001: Repressive Gaddafi-era legislation

Freedom of association was historically a constitutionally protected right in Libya, under Article 26 of its 1951 constitution. Yet by the time the country's authoritarian leader Muammar Gaddafi was assassinated in 2011, his dictatorial regime had essentially eliminated freedom of association as a right enshrined in the nation's constitution and laws. The 1969 Constitutional Declaration issued by Gaddafi omitted reference to the right to freedom of association, thus erasing the recognition afforded to this right in the preceding constitution. Shortly thereafter, the legal framework regulating freedom of association was updated by the General People's Congress under Gaddafi, which issued Law No. 111 in 1970. The law abolished the articles (64-68) regulating free association in the 1953 Civil Code.

Then in 2001, Gaddafi's General People's Congress issued Law No. 19, which only recognizes civil society organizations that provide social, cultural, sports, charitable, or humanitarian services and placed these organizations under its own strict supervision. According to this law, the establishment of associations is contingent upon executive approval; executive authorities must approve the organization's activities, its statutes or regulations, and its membership. The Executive can annul the decisions and policies of the organization, and it has the right to close, dissolve, or merge the organization with another; or assign a temporary management committee to run the organization - all of this without judicial authorization. Any and all of the organization's fundamental operations - whether it be obtaining funding, engaging in an activity, or holding a meeting - is subject to the supervision, attendance, and approval of the General People's Congress.

In addition to Law No. 19, the Gaddafi regime used Law No. 80 of 1975 amending and repealing provisions of the Penal Code to facilitate the repression of free association through the use of vague wording defining types of behavior punishable by law, and which can bear penalties up to capital punishment (article 206)³, for instance, acts that seek to “change the basic rules of the social structure by illegal means”. These “rules” and “means” are not specified or precisely defined by the law and are thus vulnerable to broad interpretation and overreach. Law No. 80⁴ contravenes international agreements ratified by Libya, especially articles 6, 7, 15, 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights.

2. Legislative vacuum since 2011 as executive authorities encroach upon jurisdiction of House of Representatives

In 2011, the right of individuals to freely form an association was guaranteed by Libya’s newly issued constitutional declaration: its Article 15 guaranteed the right of individuals to form civil society organizations under the regulation of a law to be issued by the nation’s legislative authority. Thus, the Constitutional Declaration of 1969 came to an end, and with it, all legislation, decisions and laws of the Gaddafi regime and its executive bodies. Moreover, Article 6 of Law No. 29 on transitional

3 Article (206) Unlawful Organizations and Formations: “ Anyone who calls for the establishment of or founds, organises, manages, funds, or prepares a meeting place for any assembly, organisation, or formation prohibited by law, and anyone who joins or incites the same in any manner, or provides any assistance thereto, and anyone who receives or obtains directly or indirectly in any manner money or benefits of any type from any person or entity with the intent of establishing a prohibited assembly, organisation, or formation or prepare for the establishment thereof, shall be punishable with the death penalty. Superiors and subordinates shall receive the same penalty, regardless of their rank in the assembly, organisation, formation, or the like, and regardless of whether the assembly is located domestically or abroad”.

4 Particularly Articles 206, 207, 208

justice, issued in 2013, established⁵ the illegitimacy of unjust legislation issued before 2011. This fully applies to Law No. 19 of 2001 on the freedom of association, and Law No. (80) of 1975 amending and repealing provisions of the Penal Code, which criminalized the exercise of freedom of association with harsh penalties, up to death (Article 206).

The legislative authority was expected at the time to issue a new law regulating the work of civil society organizations in compliance with Libya's 2011 Constitutional Declaration. This new law was to comply with Libya's international obligations regarding freedom of association, even in exceptional cases, and to be consistent with the basic principles required in any national law regulating the work of CSOs, which were endorsed by the United Nations Special Rapporteur on the freedom of association in his 2012 report, including:

- Civil Society organizations should be able to register with the competent administrative body through a declarative non-authorization process.
- If a CSO commits any violation, executive authorities, including security institutions, should contest the registration before an impartial judicial authority and cannot refuse the registration without judicial oversight.
- CSOs should have the right to open a bank account without authorization from the executive authority, this bank account cannot be frozen unless there is a judgement from the judicial authority.

⁵ Article (6) Invalidity and Illegitimacy of Unjust Legislation: "The obstruction of constitutional life in Libya is an injustice and an aggression. The legislation issued by the former regime as an expression of its desires and without any legal or constitutional basis is unjust and shall be considered invalid and unconstitutional as of its drafting. Such legislation may not be used against established rights. The negative effects of such legislation on individuals and on society must be addressed."

<https://security-legislation.ly/en/law/34617>

- Authorities should not ask CSOs to register again if they have already registered; the obligation of renewing the registration violates freedom of association.
- Authorities should allow CSOs to meet with domestic and international communities without prior approval.
- Authorities cannot suspend or dissolve a CSO without a judgment from the judiciary respecting a fair trial.

Libya ratified the International Covenant on Civil and Political Rights (ICCPR) in 1970 and the African Charter on Human and Peoples' Rights in 1986; Article 10(1) of which guarantees freedom of association. Libya's international obligations supersede any national legislation, as affirmed by constitutional appeal 57/01 on 23 December 2013 reaffirming that "the international convention ratified by the Libyan legislative authorities is superior to national law. If there is a contradiction between national laws and international conventions, the latter [international convention] should be applied directly before the national courts".

According to Article 4 of the International Covenant on Civil and Political Rights, the right to freedom of association is not considered absolute; in exceptional cases, restrictions may be placed on it, provided they are legal and necessary in democratic societies. The UN Human Rights Committee's 1999 General Comment No. 27 on freedom of movement notes: "The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded". In other words, there are conditions that must all be met when States wish to limit this right, and any limitations must be justified on the basis of one of the limited interests referred to above (legal and necessary). The exception must have a legal basis (i.e. to be created by law or by a time-bound amendment to a law), be formulated with sufficient precision, and provide the necessary justifications. For example, according to the International Labour

Organisation (ILO)'s jurisprudence⁶, decisions to dissolve labour organizations “should only occur in severe cases; such dissolutions should only happen following a judicial decision so that the rights of defence are fully guaranteed”.

The Commission on the African Charter on Human Rights has found that any blanket restrictions on who can form associations are essentially illegal. There is no further provision on how or when this right may be restricted, as stipulated in Article 10 of the Charter and the Guidelines on Freedom of Association and Peaceful Assembly issued by the African Commission on Human and Peoples' Rights at the 60th session of the Commission in Niamey, Niger, from May 8 to 22, 2017.

The prolonged absence of a new law on civil society, required by the Constitutional Declaration ten years ago, has opened the door for the executive authorities to encroach upon the jurisdiction of the legislative authorities in regulating civil work and forming national and international civil society organizations. From 2016 to March 2023, governing authorities in the East and West of Libya issued four decisions and administrative regulations that violate the right to form local and international CSOs, especially targeting human rights organizations that expose violations. These regulations and decisions, which are indicative of the persistent executive overreach seeking to undermine the fundamental right to association, are;

- Regulations 1 and 2 of 2016 issued by the head of the Eastern Government, Abdullah Al-Thani
- Decree No. 286 of 2019 issued by the Presidential Council in Tripoli headed by Fayez al-Sarraj
- Resolution No. 5 of 2023 of the Civil Society Commission affiliated to the Presidential Council in Tripoli, headed by Muhammad Al-Manfi

⁶ Summary of ILO Decisions and Principles (2006), para. 699, you can find it on the following link: https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/WCMS_090632/lang--en/index.htm

These decrees circumscribed local and International organizations' operation and restricted individuals' freedom to form civic associations by instituting a licensing regime requiring approval from administrative authorities (the Civil Society Commission) instead of a notification system. When they register, organizations are requested to sign a pledge that they will not enter into communication with any embassy or international entity without prior authorization from executive authorities. These regulations and decisions also give the executive-led administrative authority the right to storm and ransack the headquarters of CSOs, temporarily suspend their activities or dissolve them, and freeze their bank accounts, all without a court ruling. CSOs must obtain the approval of the Civil Society Commission to receive any funding for their projects, or to implement any of their activities. Egregious overreach by the Commission into the work of CSOs is facilitated by these executive regulations, to the extent that victims of rights violations can be put at grave risk if they interact with civil society. An organization can even be compelled by the Civil Society Commission, as the administrative authority, to disclose the names of victims of violations, violating their privacy and jeopardizing their safety.

These executive decisions and regulations are entirely invalid because they are issued by the Executive, which is not the competent authority. The conclusion of Administrative Appeal No. 39/37 of 1991 issued by the Libyan Supreme Court, applies to these executive acts: the “executive act loses its correctness and validity” and is considered null if the act exercised belongs “under the jurisdiction of the legislature or judiciary”. Similarly, Administrative Appeal ruling 49-163 /2005 by the Libyan Supreme Court considered that: “the executive decision, if tainted by the defect of lack of jurisdiction, is null for the reason of a severe defect and can be challenged without time limit”. In sum, the executive-issued administrative decisions regulating CSOs are invalid because such legal decisions fall under the jurisdiction of the legislative authority, not the executive authority.

The same assessment was concluded by the Urgent Matters Department of the South Benghazi Court on 18 July 2022, which approved the suspension of Decree 286 of 2019 issued by the Presidential Council of the Government of National Accord, which regulates the work of the Civil Society Commission. The decree's suspension followed an appeal against the decree by organizations of the Libya Platform⁷, human rights coalition established in 2016 currently comprised of 14 human rights organizations.

The acknowledgment of the illegality of these decisions and executive regulations was the only acceptable aspect of the legal opinion issued on 7 March 2023 by the Libyan Department of Law⁸, which acknowledged the illegality of Resolution 286/2019 and similar decisions issued by non-competent executive authorities. The opinion included a statement that clearly threatens the freedom of association: "All organizations registered before the revolution according to Law No. 19 of 2001 are valid and their registration is still valid, while all local and international organizations and associations registered after 2011 are considered null and void."

Article 6 of the executive regulations for the creation of the Department of Law states that its legal opinion "is binding unless it contradicts the principles of the Supreme Court". In fact, the Department of Law's opinion regarding revoking the license of CSOs registered after 2011 contradicts the principles set out by the Supreme Court

⁷ For details, see Cairo Institute for Human Rights Studies: Libya: CIHRS supports Adala for All in its legal action against oppressive Decree 286 and urges respect for freedom of association ahead of elections <https://cihrs.org/libya-cihrs-supports-adala-for-all-in-its-legal-action-against-oppressive-decree-286-and-urges-respect-for-freedom-of-association-ahead-of-elections/?lang=en>

⁸ An administration that was formed during the Gaddafi era, pursuant to Law No. (6) of 1992. Its first article states that this administration follows the Secretariat of the General People's Committee for Justice and is considered a judicial body. Article 2 defines its competence. The text of the law can be found here:

in Constitutional Appeal 57/01 of December 2013⁹ It also contradicts the opinion of the United Nations Special Rapporteur on freedom of association, in Recommendation No. 96 of his report, which prohibits ICCPR signatory states from criminalizing the work of unregistered CSOs, even under national law, because the ICCPR takes precedence over national law, and Libya's executive authorities must abide by the international legal framework to which they are signatory.

On 13 March 2023, General Decree 5803 was issued, which stipulates that all CSOs established after 2011 are illegal and must stop working. CSOs that continue to work are subject to Internal Security raids of their headquarters and the prosecution of their members on charges of belonging to an illegal organization, through which they can incur severe penalties including a death sentence, as upheld by Article 206 of the Penal Code and the amended Law No. 80 of 1975.

On 21 March 2023, the Government of National Unity headed by Abdul Hamid Dbeibeh issued a Decree (No. 7/2023) that allows local and international CSOs in Libya to continue their work temporarily and recognizes their (temporary) legality until they can adapt and conform to the provisions of Law 19/2001 to regulate CSOs. Thus, this repressive law, contrary to international standards (and which has become unconstitutional and invalid since 2011), is becoming the legislative framework regulating the work of local and international CSOs in Libya once again, twelve years after the 2011 revolution.

3. Nothing can be gained by amending Gaddafi-era legislation: Formal amendments to a void law

⁹ Reaffirming “the international convention ratified by the Libyan legislative authorities is superior to national law. If there is a contradiction between national laws and international conventions, the latter [international convention] should be applied directly before the national courts”

It is unfortunate that the Libyan House of Representatives has failed once again to fulfill its constitutional obligation to enact a new law that guarantees the freedom and independence of civil society in Libya. Instead, it has turned back to Law 19 of 2001, merely proposing formal amendments to the law that essentially amount to changing the name of the administrative body that will be in charge of restricting civil society organizations. References to the General People's Congress or Committee are now replaced by references to "the General Commission for Civil Society", without any amendments significantly changing the nature of the broad, unconstitutional powers vested in this body.

According to the amendment proposed by the House of Representatives, this new Commission, which has a legal personality and an independent budget, will be subordinated to the legislative authority and its members are to be chosen by the Presidency of the House of Representatives. It will be allowed to unilaterally accept or reject the registration of an CSO, suspend or dissolve the CSO, veto the decisions of the organization's board of directors and issue new decisions, and pre-approve any activity or funding for the CSO. It will not be required to give any reasons or secure judicial authorization for any of this. The Commission will also have discretionary powers to grant all permits for activities and events and supervise legal and administrative procedures of local and international non-governmental organizations.

Once again, the broad and oppressive powers given to the Civil Society Commission by Law 19 of 2001 do not only jeopardize the freedom and independence of civil work, which are protected by Libya's Constitutional Declaration, they also violate the principles of freedom of association endorsed by the International Covenant on Civil and Political Rights, and the guarantees of freedom of association according to Article (10/1) of the African Charter on Human and Peoples' Rights. Furthermore, Law 19 fundamentally violates the basic standards required in any national law regulating civil

society activity, as contained in the report of the UN Special Rapporteur on freedom of association issued in May 2012.

In addition, this national law still lacks legitimacy according to the Libyan judicial authority, according to Constitutional Appeal No. 57/01 issued in December 2013, reaffirming that “an international convention ratified by the Libyan legislative authorities is superior to national law. If there is a contradiction between national laws and international conventions, the latter [international convention] should be applied directly before the national courts”.

In December 1991, Libya’s Supreme Court ruled that an “executive act loses its correctness and validity” and is considered null if the act belongs “under the jurisdiction of the legislature or judiciary”, according to Administrative Appeal: 37-39 /1991. Similarly, the Administrative Appeal ruling 49-163 /2005 by the Libyan Supreme Court states that: “the executive decision, if tainted by the defect of lack of jurisdiction, is null for the reason of a severe defect and can be challenged without time limit”. Accordingly, the executive-issued administrative decisions regulating CSOs are invalid because such legal decisions fall under the jurisdiction of the legislative authority, not the executive authority.

The court’s ruling effectively prevents the executive authority from interfering in the work of NGOs and civil society organizations in Libya and guarantees their independence, in support of Article 15 of the 2011 Constitutional Declaration. This ruling became binding on 18 July 2022, while the merits of the case remain under consideration by the competent court.

4. A new law is urgently required to protect the freedom of association in Libya

The Cairo Institute for Human Rights Studies considers that any national law regulating the work of civil society organizations in Libya should be based primarily

on the civil and political rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR), to which Libya acceded. It must also be consistent with the right to freedom of association guaranteed under Libya's 2011 Constitutional Declaration and with the interpretations of the Human Rights Committee of the Office of the UN High Commissioner for Human Rights. Special attention should be given to the nature of the restrictions or exceptions that may be imposed on freedom of association and the directives of the United Nations Special Rapporteur on freedom of peaceful assembly and association.

In this context, Libyan organizations have proposed the draft Associations Law, which would regulate the right to form civil society organizations in a manner guaranteeing their freedom and independence and restore the legislative authority's rightful jurisdiction over free association. The proposed draft law would provide legal protection against the current onslaught of draconian decisions and regulations issued by governing authorities in east and west, all aiming to suppress civil society and take punitive action against its members. The proposed Law was drafted by specialized committees of Libyan legal experts and civil society representatives, and subject to review and amendment several times over the past ten years by Libyan and international experts. It has garnered widespread support from Libyan organizations amid in-depth discussions of its merits with experts and other relevant officials. In June 2021, it was submitted to the Legislative Committee of the House of Representatives for discussion and approval in the plenary session. Nearly two years later, the civil society organisations that submitted the proposal have not received any response from Parliament.

The proposed draft law guarantees the right to establish civil society organizations with a simple notification system. It protects them from arbitrary dissolution and from interference by the state and security agencies in their work and guarantees their right to access funding or to communicate and cooperate with international and UN agencies, while setting appropriate regulations to ensure transparency and

accountability. The proposed law also provides for the formation of a “Civil Society Support and Welfare Commission,” which is an independent administrative and regulatory body that guarantees the independent and free exercise of the right to form associations, and to assemble peacefully. The proposed law also introduces the right to petition, tasking the Libyan authorities with responding to popular petitions submitted by organizations and citizens.

As the Cairo Institute for Human Rights Studies announces its support for the proposed draft law on civil society organizations, it calls on other Libyan civil society organizations to likewise join and support this initiative by reviewing the draft law, with the aim of improving it and advocating for its adoption by the Libyan legislative authorities. The legislative authorities must promptly enact a law that guarantees the freedom and independence of civil society work and the formation of associations. Otherwise, its constitutional obligation, set forth more than ten years ago by Article 15 of the 2011 Constitution Declaration, will remain unfulfilled. The absence of such legislation protecting the right to association in Libya for more than a decade, continues to leave civil society vulnerable to repression by governing authorities in the east and west of the country.