

**REPORTERS
WITHOUT BORDERS**
FOR FREEDOM OF INFORMATION

RECOMMENDATIONS
ON THE CONSTITUTIONAL
AND LEGAL FRAMEWORK
IN LIBYA

I. GUARANTEEING FREEDOM OF EXPRESSION AND INFORMATION IN THE CONSTITUTION

A constitution establishes the bases of fundamental guarantees and should be long lasting, committing future generations. It forms the core of the rule of law. Freedom of expression must be guaranteed, not only as a fundamental right but also as the pillar of other rights [1].

The content of Libya's new Constitution, especially those parts concerning freedom of information, opinion, association and expression and all other fundamental rights, must be drafted in consultation with the members of civil society.

1. A “constitutional core” to guarantee fundamental rights that are eternal and inviolable

Fundamental rights must stand at the heart of the Constitution. Some of these rights necessarily concern the right to information and those who provide it:

- The right to life,
- The right to safety,
- Such leading principles of criminal law as the presumption of innocence, the legality of charges and sentences, and strict respect for the principle of non-retroactivity in criminal law,
- Freedom of expression and the right to information via all communication media (newspaper, broadcast media and Internet),
- Freedom of association.

2. Guaranteeing the effective exercise of freedom of expression and information

2.1. Guaranteeing freedom of expression :

- This freedom must apply to all persons, regardless of status, age or nationality [2].
- It must be protected everywhere, regardless of frontiers [3].
- It must be protected in every kind of media. Online content must also be protected [4].
- It must be defined in the fullest sense. It must include the right to impart and receive news and information, as well as ideas that shock or offend. And it must include the right of access to information.

- Restrictions must not be drafted in a broad and vague manner, as article 19 of the International Covenant on Civil and Political Rights says: *“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

a) *For respect of the rights or reputations of others;*

b) *For the protection of national security or of public order, or of public health or morals [5].”*

- The Constitution's provisions must precisely define the conditions that justify limiting freedom of expression, namely:

a) Restrictions provided by law: the law must be sufficiently clear and precise.

b) Protection of legitimate interests: the four grounds cited in the Covenant are exclusive.

c) Necessity: the restriction must satisfy an overriding social need and must cause the least disruption possible. It must also be proportionate to the objective sought.

- **Absolute protection for the right to hold opinions** must be guaranteed.
- **The state must respect freedom of expression.** This is essential. Freedom of expression must be respected by the executive, legislature and judiciary, by all state officials and state agents, by the entire public sector and by all state agencies. This obligation has two aspects, one passive (non-interference), one active (obligation to protect).

2.2. Guaranteeing freedom of information:

- This fundamental freedom is enshrined in article 19 of the Universal Declaration of Human Rights, which defines it as the **freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.**
- Prohibiting all prior censorship is essential.
- The **confidentiality of news providers' sources** must be guaranteed.
- **Media independence** must be protected. This includes guaranteeing the independence of the state-owned media and the media regulatory authorities.

3. Judicial guarantees and right of appeal

- 3.1. **Recognition of the force of the international human rights instruments ratified by Libya. These international human rights instruments must, at the very least, be recognized as having a legal force and direct effect, so that they are incorporated into the body of applicable laws and judges are required to apply them.**
- 3.2. **Creation of a constitutional court and a constitutional control mechanism that is accessible to the public**
- 3.3. **Guarantees of judicial independence and impartiality**

¹ Paragraphes 26 et 27 de l'Observation Générale n° 34 du Comité des droits de l'homme

² Résolution de l'Assemblée générale des Nations unies 66/168 du 11 avril 2012 sur "Élimination de toutes les formes d'intolérance et de discrimination fondées sur la religion ou la conviction"
http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/168&Lang=F

4. A judicious Constitution

The guarantees accorded in one place in the Constitution must not be eliminated by the provisions to be found in other places. The Constituent Assembly members must take great care not to include provisions that have the effect of suppressing freedom of expression.

The Constitution must not include any reference to religious law or to the concepts of sacrilege and blasphemy, as this would be liable to create confusion between laws and religious morals. Such references limit in-depth public debate and open the way to laws that criminalize expression. The UN General Assembly decided to drop the concept of defamation of religions in a 19 December 2011 resolution on *“Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief.”*

Provisions about states of emergency and threats to internal security must conform to international standards [6].

Reporters Without Borders hopes that the new Libyan state will give firm undertakings to respect freedom of expression and information in the new Constitution, as stated in article 14 of the Constituent Covenant for the Transitional Period of 19 March 2012:

“The state shall ensure freedom of opinion, freedom of speech for individuals and groups, freedom of scientific research, freedom of communication, freedom of press, media, printing and distribution, freedom of movement and freedom of assembly, demonstration and peaceful sit-in so long as it is not contrary to public order.”

The Constitution must guarantee freedom of expression, not just as a fundamental right but also as the pillar of other rights.

Provisions guaranteeing freedom of expression and freedom of information must be enshrined in the Constitution. There should be a direct, enforceable requirement for the state, non-state actors and all other parties to comply with these guarantees, which must also prevail over local laws in cases of conflict.

The leading principles affecting the media – freedom of expression and information, right of access to information, media pluralism and media independence – must be enshrined in the Constitution. The details should be left to individual laws.

The following guarantees for the media should be spelled out in a more explicit manner in the Constitution:

- There must be no prior censorship.
- The issuing of licences and registering of print media must not be controlled.
- There must be no system of issuing licences to individual journalists. The right to work as a journalist must not be subject to any prior conditions.
- The independence of all relevant authorities must be guaranteed for all the media. This includes state media regulators.
- The right of journalists to protect the confidentiality of their sources and information must be guaranteed.
- Journalists must be free to choose whether or not they join any professional organization.

Information may be restricted on public order grounds only when:

- The information is about a subject of legitimate concern that is specified in legislation,
- Revealing the information could cause considerable harm to the subject of these concerns,
- The harm to the subject of these concerns is greater than the public interest in obtaining this information.

Criminalization of sacrilege

While respecting Libya's values and traditions, Reporters Without Borders firmly believes that, if the Constitution contains any reference to “protecting sacred values,” it should clearly define the authorities that determine these values and their legal basis, and should include a precise definition of a “sacred value.” A violation of these values must never be treated as a crime, offence or civil wrong and should be explicitly decriminalized. There is a real danger that including such protection in the constitution would open the way to censorship of all forms of legitimate expression.

Real guarantees of freedom of expression and information are essential in the Constitution. The lack of real guarantees would undermine hopes of establishing independent media and guaranteeing the right to information and respect for news providers, while the inclusion of real guarantees would send a strong signal to the authorities and civil society. To be effective, these general principles need a clearly established political will and respect for Libya's international obligations.

II. INTERNATIONAL TREATIES AND CONVENTIONS CONCERNING FREEDOM OF EXPRESSION AND INFORMATION THAT HAVE BEEN RATIFIED BY LIBYA

Reporters Without Borders urges the Libyan authorities to respect the 1969 Vienna Convention on the Law of Treaties by giving “supralegal” force to the international conventions that have been ratified by Libya.

A. International Covenant on Civil and Political Rights (ratified in 1970) – Article 19:

- 1 Everyone shall have the right to hold opinions without interference.
- 2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- 3 The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order, or of public health or morals.

B. African Charter on Human and Peoples' Rights (ratified in 1986) – Article 9:

Every individual shall have the right to receive information.

Every individual shall have the right to express and disseminate his opinions within the law.

On 29 November 2003, Libya also ratified the Protocol on the African Court on Human and Peoples' Rights, thereby accepting its jurisdiction.

C. Arab Charter on Human Rights, amended in 2004 (no real legal obligation) – Article 32:

The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.

Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

III. ADOPTING MORE LIBERAL LAWS

A. Existing laws

Laws enacted by the former Gaddafi regime that clearly violate freedom of information and/or expression and are still in effect must be repealed.

They include:

– **Article 195 of the penal code**, which says: *“Any person making what could be regarded as an attack on the Great Al-Fateh Revolution or its leader will be punished with imprisonment (...) The same sentence will be applied to any person who insults the people's authority or a judicial, defence or security body.”* The penalty is 3 to 15 years in prison for insulting or attacking state institutions.

– **Article 178 of the penal code**, which provides for a sentence of life imprisonment for disseminating information regarded as intended to *“tarnish [the country's] reputation or undermine international confidence in it.”*

– **Article 205 of the penal code**, which says: *“Any person publicly insulting the Libyan state, the national flag or emblem of the nation is punishable by a sentence of up to three years in prison.*

“In the penal code, the expression ‘national flag’ includes the official flag of the nation and all other flags that display national colours.

“The provisions of this article also apply to any other person publicly insulting all the colours that symbolize the national flag.”

– **Article 206 of the penal code**, which says: *“Any person calling for the creation of any assembly, organization or body banned by the law, or undertaking its creation, organization, management or financing, or preparing any place for it to meet, or any person joining it or inciting it to action by any means whatsoever, or offering assistance of any kind, or any person offering or obtaining money or advantages of any kind, directly or indirectly and by any means whatever, from any person or source, with the intention of creating any banned assembly, organization or body, or facilitating its creation, is punishable by death, this penalty being applicable to the leader and his or her subordinates, whatever their level in this assembly, organization or body or anything resembling it, regardless of whether its headquarters is inside or outside the country.”*

– **Article 297 of the penal code**, which says: *“Any person who promotes, inside the country and in any manner whatsoever, theories or principles calling for change in the fundamental principles of the constitution or society’s fundamental systems, or the heart of the state’s political, social or economic systems, or for the destruction of any of society’s political systems by using violence or terrorism or any other illegal method is punishable by death.*

“And any person possessing books, publications, cartoons, slogans or any other thing promoting the above-mentioned actions or having promoted them in any way whatsoever is punishable by life imprisonment.

“Similarly, any person who has received or obtained, directly or indirectly and by any means whatsoever, money or advantages of any kind or from any person or source whatsoever, whether from inside or outside the country, with the aim is of promoting what is identified in this article, is also punishable by life imprisonment.”

B. Recommendations

Transparency is essential in any democratic society for combatting corruption, and journalists have a fundamental role to play in this regard. The judicial system and public figures must accept and tolerate a great deal of criticism as they are at the heart of public life and matters of public interest.

It is therefore very important that all the laws concerning freedom of expression and information and media freedom still in force in Libya are carefully reviewed and are repealed if they violate these freedoms.

It is absolutely essential that the Libyan transitional government should draft laws protecting freedom of information, expression and opinion in accordance with article 14 of the Constituent Covenant and article 19 of the International Covenant on Civil and Political Rights.

These future laws must enshrine freedom of communication in all its forms. Any provision restricting this freedom must be clearly stated and defined by the law in accordance with international standards. Prior censorship and pre-publication vetting of newspapers must be explicitly prohibited. Prison sentences for media offences and the criminalization of offences against the president, public decency and public order must be abolished.

When addressing the Internet and new media, the future laws must respect international standards in order to protect online freedom of expression and information.

Freedom of expression must be protected in all its forms, including electronic and online forms of expression, as the UN Human Rights Council stressed in its resolution of 5 July 2012. It said people have the same rights online as offline, in particular freedom of expression, which must be protected regardless of frontiers and the form of media used. The resolution also calls on all countries to promote and facilitate Internet access and international cooperation aimed at developing media and communications.

As regards online expression and bloggers, legislators should be guided by the general principles expounded in the UN Human Rights Committee's General Comment No. 34 on article 19 of the International Covenant on Civil and Political Rights :

"States parties should take account of the extent to which developments in information and communication technologies, such as Internet and mobile-based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto." (Point 15)

"Any restrictions on the operation of websites, blogs or any other Internet-based, electronic or other such information dissemination system, including systems to support such communication, such as Internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government." (Point 43)

"Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere." (Point 44).

Finally, the complexity of the chain of responsibility on the Internet (which includes various kinds of service providers, hosting companies and other technical intermediaries) and the diversity of Internet platforms and content require precise, technical regulation in order to take account of this multiplicity and to protect the rights of its various participants.

Similarly, it is vital that the government should quickly create an independent body to regulate the broadcast media, so that they can operate properly and effectively in the new Libya.

IV. COMBATTING VIOLENCE AND IMPUNITY

Libya should value and respect journalists and other news providers, and the work they do, and should end the physical and verbal violence to which they are often subjected in the course of gathering and imparting information. The arbitrary detention, abduction and threats to which they are constantly exposed in Libya must also end.

Reporters Without Borders strongly condemns the repeated use of violence against media professionals and demands that it stops. It also calls on the authorities to deal firmly with those responsible for this violence in order to combat the impunity it enjoys, and to do everything in their power to ensure that media professionals can work safely without fear of being threatened, attacked or kidnapped.

Those who attack journalists and those who obstruct the right to news and information must be prosecuted in accordance with the law, regardless of their status and/or the reasons that lead them to perpetrate such acts of violence. The authorities should also enact legislative provisions that specifically criminalize physical violence against journalists in the course of their work.

As articles 31 and 32 of the Constituent Covenant say, the independence of the justice system must be guaranteed and affirmed. It is up to the authorities to carry out the necessary reforms so that the justice system's credibility and authority, and the judiciary's independence and professionalism are beyond dispute.

Article 31:

"No offence may be established or penalty inflicted unless based on a provision and the accused shall be presumed to be innocent until proved guilty in a fair trial at which he has the guarantees necessary for exercising his right of defence and everyone shall have the right to recourse to the courts in accordance with the law."

Article 32:

"The judicial power shall be independent; it shall be exercised by the courts in different types and levels; it shall have judgments in accordance with the law; the judges shall be independent and in the administration of justice they shall be answerable only to the law and to the conscience.

"There shall not be any emergency courts."

[1] UN Human Rights Committee, **General Comment No. 34**, paragraph 2: "Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions."

[2] **Article 19 of the Universal Declaration of Human Rights (UDHR)**: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[3] **Article 19 UDHR**: "regardless of frontiers".

[4] **Article 19 UDHR**: "through any media".

[5] Article 19, paragraph 3 of **the international Covenant on Civil and Political Rights**.

[6] See the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.