

ATTACKS ON CIVIC SPACE: PROPOSED REVISIONS TO DECREE 88 ON ASSOCIATIONS

QUESTIONS
& ANSWERS

June 2022

1 CONTEXTUAL OVERVIEW

Since 2011, Tunisian civil society organizations have enjoyed one of the [most progressive](#) legal frameworks relating to the right to freedom of association in the Middle East and North Africa.

Eleven years later, however, there are strong indications that President Kais Saied is set on amending this framework to limit the scope of the work that civil society organizations can lawfully undertake, curtail their access to financial support and, in so doing, weaken one of the last lines of defence against his one-man-rule.

This Q&A briefing aims to provide a concise overview of these planned amendments and assesses them in light of international human rights law (IHRL) and standards. It answers the following questions and provides a set of recommendations for amendment and reform:

- (i) What are the proposed amendments to Decree 88?**
- (ii) Would these amendments meet domestic and international standards on the right to freedom of association?**

- (iii) What would be the impact of the amendments on the separation of powers, the independence of the judiciary, rule of law and on democracy and human rights more generally?**

(iv) Recommendations

Historical context for the proposed amendments

1987 – 2011

Under President Ben Ali (1987-2011), the activities and funding of civil society associations were severely restricted. In 1988, just a few months after assuming the Presidency, Ben Ali [promulgated](#) Organic Law 88-90 granting the Ministry of the Interior broad powers to dissolve an association, if their existence was 'contrary to public order or morals' or where an 'activity of the association had a political nature', with little judicial oversight (Art. 24). In 1992, the President [introduced](#) greater restrictions, obliging associations to engage exclusively in a finite list of 'approved activities', such as education and sport or face dissolution. As a result, Ben Ali was able to effectively shut down Tunisia's civic space, and

to drastically restrict the ability of independent civil society to act as a check on his one-man-rule.

2011

Following the revolution in 2011, the transitional authorities approved a transformative legal framework regulating associations.

[Decree-Law 2011-88](#) (herewith ‘Decree 88’) repealed the 1959 Law (Art. 46) and dispensed with other laws and restrictive measures adopted under Ben Ali. In its first article, Decree 88 proclaims a two-fold objective: to ‘guarantee the freedom to constitute, to belong to, and to undertake activities within associations’ and ‘to strengthen the role of civil society organisations, their development and respect for their independence’. Decree 88 removed the restrictions on registration (Arts. 10-12) and on the scope of permissible activities (arts. 3-7), and authorized associations to receive foreign funding without prior authorization (art. 35). However, in order to exist as an association, pursuant to Articles 3 and 4, associations must demonstrate respect for ‘the rule of law, democracy, plurality, transparency, equality and human rights’, and must not ‘incite violence, hatred, intolerance or discrimination on religious, gender or regional grounds’, carry out ‘for-profit’ activities for the interest of their members, to

evade tax’ or undertake political fundraising activities.

2012 -2022

The essence of Decree 88 resonates in Article 35 of the [2014 Constitution](#), which guarantees ‘the freedom to constitute [...] associations’ on the condition that associations ‘strive to respect the provisions of the Constitution and the law, as well as financial transparency and rejection of violence, in their activities and statutes’.

Notwithstanding the 2014 Constitution and Decree-law 88, other laws and practices have whittled down the protections of the right to freedom of association.

First, certain practices developed by the General Directorate of Associations (GDA), which was [established](#) in 2012 within the President’s Office to oversee the registration and governance of associations, have obstructed registration for certain associations. While Decree 88 establishes a ‘declaratory’ system of registration, [civil society associations](#) have reported that they are required to take additional steps to register as associations, beyond those required by the law. These include an informal requirement to meet with the GDA before registration, and the Official Journal’s refusal to publish the notice of registration without the GDA’s confirmation.

Second, in 2018, [Law 2018-52](#) placed an additional requirement on associations in order to lawfully operate (Art 7), namely, to register with the National Registry of Enterprises. On receipt of the registration request, the Registry can issue a ‘reasoned’ refusal decision or a confirmation of registration via receipt (Art. 21). CSOs have [reported](#) that the Registry has failed to issue receipts for several associations, placing them in limbo. This creates an obligation to register, contradicting the ‘self-declaratory’ system provided for by Decree 88.

Third, laws detailing complex conditions for associations’ access to public funding have been published. [Decree 2013-5183](#), for example, sets out requirements that associations must meet to access public funding, such as financial and administrative health checks and detailed processes by which this funding is allocated. Organizations [have reported](#) that these are ‘complex procedures that most organisations are not able to complete’, thus blocking access to resources.

Since President Kais Saied’s rise to power in 2019, Tunisia has seen efforts to revise Decree 88 in ways that would consolidate

in law the above-mentioned problematic practices and establish them as barriers to effective exercise of the right to freedom of association. In early 2022, a government source leaked draft amendments to Decree-law 88 to civil society. The content of the leak prompted civil society organizations to respond *en masse*, [calling](#) for these amendments to be withdrawn. On the 24 February 2022, President Saied fuelled CSOs’ fears when he [announced](#) that a law would be passed to ‘prevent [the provision of] foreign funding to associations’ because he refused to ‘permit such funding to come to associations from States [who intend to] mess around with the Tunisian State or with Election Campaigns’.

The ICJ has reviewed the proposed amendments to Decree-law 88 (summarised below in section I) and is of the view that they would, if adopted into law as presently formulated, present a direct and significant threat to the exercise of the right to freedom of association in Tunisia.

2 WHAT ARE THE PROPOSED AMENDMENTS TO DECREE 88?

The comparison table below highlights the main changes to the law, as proposed by the amendments subject of the leak.

Decree 88	Leaked amendments
Governmental Institution charged with oversight	
Secretary General of the government (as of 25 June 2012, this competency was <u>transferred</u> to the General Directorate of Associations and Parties under the President's Office)	Administration in charge of Associations (not defined) within the government [11,16]
Activities of Associations	
Broad: their statutes, activities and funding structures must demonstrate respect for 'the rule of law, democracy, pluralism, transparency, equality and human rights'[3] and must not 'incite violence, hatred, intolerance or discrimination on religious, gender or regional grounds', amount to 'for-profit' activities for the interest of their members' or to evade tax or engage in political fundraising. [4]	Restrictive: The current provisions of Decree 88 apply, and in addition the association must not 'threaten the unity of the State or its republican and democratic regime' or incite 'fanaticism', through not only its statute, funding and activities but also through the 'declarations and actions of its directors' [4] as determined by the administrative body in relation to registration decisions [10]. The right of associations to access to information is limited to those who have "an interest that's not against applicable laws" [5].
No political interference: 'public authorities must not directly or indirectly hinder or slow down the activity of associations'	Some interference permitted: Public authorities may hinder or slow down the activity of associations if 'there is a violation of applicable law'. There is a lack of clarity around how this procedure would work. [6]

Registration – national associations	
<p>Declaratory: the association submits a registered letter to the government with information about the founders, employees, objectives, financial and governance information [10]. Seven days after receiving confirmation of receipt of this letter (or after 30 days, if no confirmation is sent), the association’s representative notifies the Official Journal, which is obliged to announce the constitution of the association no later than 15 days after receipt [11].</p> <p>Then the association must submit the declaration, a copy of the statutes and a copy of the announcement to the government [27].</p>	<p>Approval required: The Administrative body responsible for associations is able to reject a declaration if it is incompatible with the provisions of the decree. [10] The rejection decision can be challenged before administrative courts.</p> <p>The administrative body is allowed to refer to a copy of the Association's statutes before the Association can be announced in the Official Journal. In other words, the administrative body has the authority to review and provide a tacit approval over the Association's statutes [11].</p>
Registration – international NGOs	
<p>Subject to refusal: if their activities fall foul of the framework set out above in ‘activities’. [22]</p>	<p>Higher chance of being subject to refusal: if their activities fall foul of the (more restrictive) framework set out above in ‘activities’.[22]</p>
Modification	
<p>Notification: Letter to the government informing them of any modification to the Statutes of the Association [16]</p>	<p>Notification: Letter to the Administrative Body informing them of any a) reform to the Statutes of the association b) a change in managerial structures c) any vacant posts [16]</p>
Dissolution	

On its own decision or by court order: The Court of First Instance is competent to order dissolution where the association has not complied with the terms of a suspension notice issued by the court in relation to infractions of certain articles of the decree-law, following an initial warning letter from the government or other interested party[33][45].

Judicial procedures governing dissolution are regulated by the provisions of the codes of civil and commercial procedure, and therefore the decision to dissolve an association would be subject to appeal by the court of cassation.

On its own decision, by court order or by the Administrative Body:

The Court of First Instance is competent to order dissolution ‘at the request’ of the relevant administrative body [45] in one of two situations: 1) where an association has not complied with the terms of a warning notice following ‘violation of any article of the decree’, and; 2) where the ‘association commits a grave infraction as determined by the administration or as revealed by different stakeholders, such as concerned governmental ministries, constitutional bodies, the National Centre for Anti-Terrorism, the Tunisian Centre for Financial Analysis and anyone else with an interest’[45].

The administrative body in charge of associations is also able to itself dissolve associations automatically if it takes the view that the association is no longer operative (automatic dissolution). [33. 45]

The amendments specify that automatic dissolution can be challenged before the administrative tribunal.

Foreign Funding

Restrictive: [35] prohibits associations from ‘accepting assistance, funds or donations emanating from States that do not have a diplomatic relationship with Tunisia or organizations defending the interests of these States’,

Very restrictive: As in Decree 88, and in addition it would be prohibited to ‘accept foreign assistance, funds or donations which are not authorized by the Tunisian Commission of Financial Analysis’ [35] It appears that the commission would have discretionary powers to grant such authorizations.

3

WOULD THESE AMENDMENTS MEET DOMESTIC AND INTERNATIONAL HUMAN RIGHTS STANDARDS ON THE RIGHT TO FREEDOM OF ASSOCIATION?



Since 2011, freedom of association in Tunisia has been largely protected by a robust domestic legal framework, chiefly Article 35 of the 2014 Constitution and Decree 88, as set out above.



Notwithstanding the above-mentioned problematic practices which have evolved since 2011, the current domestic framework broadly complies with applicable international human rights law (IHRL). For example, Article 22 of the [International Covenant on Civil and Political Rights](#) (ICCPR) requires that State parties, [including](#) Tunisia, not only guarantee to everyone within its jurisdiction 'the right to freedom of association', but also respect the limits by which it can restrict those rights, requiring that restrictions be 'prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.' In 2020, the Human Rights Committee (HRCCom), the body charged



with monitoring the implementation of the ICCPR, [noted](#) Decree 88 'with satisfaction' in relation to Article 22.

Guidance from International standard-setting bodies, such as the jurisprudence of the HRCCom, and other international human rights authorities can help understand the scope of the right to freedom of association. These include: the African Commission on Human and People's Rights in its [Guidelines on Freedom of Association and Assembly in Africa](#) (henceforth 'the ACHPR Guidelines'), the [UN Special Rapporteur on the Freedom of Assembly and Association, Best Practices on Promoting and Protecting the Right to Freedom of Assembly and Association](#) (henceforth 'UNSRFAA Best Practices'); and [Office of Security Cooperation in Europe Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations](#), henceforth 'OSCE Guiding Principles'.



International human rights law and standards articulate four key guarantees for the right to freedom of association that would be undermined if the proposed amendments to Decree 88 were to be adopted.



First, States must take measures to ensure the right to freedom of association through registration procedures. Associations should be able to register swiftly via a 'notification procedure rather than a prior authorization procedure' (UNSRFAA Best Practices, ¶58 + ¶60). The administrative body overseeing registration should be 'impartial and fair' (ACHPR Guidelines, ¶21) and should ideally be 'independent from the control of the executive branch' (OSCE Guiding Principles, ¶10). States should not require associations to re-register (ACHPR Guidelines, ¶17) even if a new law regulating associations is introduced (UNSRFAA Best Practices, ¶62). Underpinning these recommendations is the notion that, absent procedures for individuals to form a legal association, the right to freedom of association would be 'deprived of any meaning', as enunciated, for example, by the [European Court of Human Rights](#) (*Sidiropoulos and others v Greece*, 1998, ¶40).



The proposed amendments to Decree 88 would remove the current notification system and instead require associations to obtain prior authorization before starting their activities (new art. 11). The administration in charge of associations would be able to reject a declaration if it is incompatible with the provisions of the decree (new art. 27, line 2). The subordination of the proposed administration in charge of associations to the head of government undermines the principles of independence, impartiality and fairness required of the body overseeing registration of associations. As such, the proposed amendments run counter to Tunisia's obligations under international human rights law and the above-mentioned international standards.

Secondly, under these standards, in order to guarantee respect for the right to freedom of association effectively, States must ensure that the procedures for suspension or dissolution of associations, which, in turn, restrict this right on a temporary or permanent basis, are prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection



of the rights and freedoms of others. The HRCCom has found that dissolution is a disproportionate response to the following acts: failure to comply with registration procedure, finding that an association had permitted non-lawyers to provide legal advice (*Mikhailovskya and Volchek v Belarus*, ¶2.1 & ¶7.5), engaging in activities not listed in the association’s statute, and the administrative violations of an association’s members (*Pinchuk v Belarus*, ¶2.2 & ¶8.5) (see also UNSRFAA Best Practices, ¶75).



The proposed amendments to Decree 88 provide for suspension and dissolution procedures akin to those that have been held to be unlawful restrictions on the right to freedom of association by the HRCCom. The GDA has discretionary powers to determine what acts or omissions may amount to ‘grave infraction’ requiring the dissolution of associations, and there is concern that the GDA may weaponize such powers to target independent civil society action in violation of article 22 of the ICCPR.



Thirdly, the right to freedom of association, as the HRCCom puts it, ‘extends to the activities of that association’ (*Mikhailovskya and Volchek v Belarus*,

¶7.2) and therefore States must not restrict or interfere in the activities of associations unless such interference is in accordance with the law and necessary in a democratic society in pursuit of a legitimate aim. In the same case, the HRCCom clarified that the ‘peaceful promotion of ideas not necessarily favourably received by the government or the majority of the population is a cornerstone of democratic society’[¶7.3] and that any prohibitive measures– such as suspension, dissolution – must be ‘demonstra[bly...] necessary to avert a real and not only hypothetical threat to national security or democratic order’ and be proportionate to this threat (¶7.3). In other words, unless the activities of the organization demonstrably amount to such a threat, the government cannot both restrict them and comply with its obligations under the ICCPR.

The proposed amendments to Decree 88 limit the current broad scope of permitted activities in a manner that is inconsistent with the above-cited international standards. Associations will, under the new amendment, be prohibited from ‘threaten[ing] the unity of the State or its republican and democratic regime’ or inciting ‘fanaticism’ (new



art. 4). Given recent [Presidential discourse](#) that has described some Civil society associations as vehicles for foreign influence, it seems likely that because the amendment is sufficiently broad, it would be used so as to silence associations suspected of opposing the President. Further, not only will this prohibition apply to the statute and activities of an association, but also through the ‘declarations and actions of its directors’ (new art. 4). This will likely also pose limitations on the freedom of expression of directors of associations, and arbitrarily extend the scope of the restrictions to ‘statutes and activities’ provided for in the Tunisian constitution (art. 35).



Fourthly, States must provide associations with access to adequate resources. The HRCOM has held that blocking access to funding, in particular, can disclose a violation of article 22 [[Korneenko et al v Belarus](#), ¶18]. The SRFAA expanded on this in [2013](#), explaining that ‘the right to freedom of association includes

the ability also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources’ [¶18]. Much focus has been directed at restrictions on foreign funding for civil society organisations; the SRFAA notes that ‘requiring CSOs to obtain Government approval prior to receiving [foreign] funding [...] violate[s] article 22’ [¶120].

The proposed amendments run counter to these standards. Under the new article 35, the amendments to Decree 88 would require associations to receive approval from the Tunisian Financial Analysis Commission before receiving foreign funding, or else be liable to dissolution under articles 33 and 45.

If Tunisia is to bring in the proposed amendments to Decree 88, the country will fall short of its constitutional and international obligations to guarantee the right to freedom of association.

4



WHAT WOULD BE THE IMPACT OF SUCH RESTRICTIONS ON FREEDOM OF ASSOCIATION ON THE RULE OF LAW AND HUMAN RIGHTS?



It is widely accepted that the right to freedom of association is a fundamental guarantee for the establishment and the consolidation the **rule of law** and **democracy**, just as it essential for the promotion of other **human rights**.



As the HRCCom puts it, ‘the existence and operation of associations [...] is a cornerstone of a democratic society’ [*Zaidov v Tajikistan*, ¶19.9]. The Human Rights Council has also recognized ‘the importance of the freedoms of peaceful assembly and association, and civil society, to good governance, including through transparency and accountability’ [*A/HRC/RES/24/5*, p. 2].



in the same vein, unwarranted and unlawful restrictions to freedom of association detrimentally affect the enjoyment and exercise of other human rights necessary to engage in the democratic process, including in particular the right to freedom of

expression [¶14] and the participation in public affairs [¶18], protected by, *inter alia*, article 19 and 25 of the ICCPR, among others. The HRCCom has succinctly mapped out the relationship between these rights in its General Comment on Article 25 (the right to participate in public affairs):

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. [...] It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.



These international standards were echoed in the [2014 constitution](#) which aimed at ‘building a republican, democratic and participatory system [...] which guarantees the freedom of association in conformity with the principles of pluralism’.



If promulgated as law, the amendments will restrict the freedom of association in a way that will undermine the rule of law and human rights in Tunisia, including in particular the right to freedom of expression and the right to participate in public

affairs. This is particularly given the President’s power grab and [anti-pluralist discourse](#). Civil society associations are the only remaining independent check on the President’s arbitrary one-man-rule following his 2022 decisions to [dissolve parliament](#) and the [High Judicial Council](#). Their crucial role in holding the President to account for affronts to the rule of law and in ensuring diversity and ability to counter the homogeneity of the political space cannot be underestimated.

5 RECOMMENDATIONS

The proposed amendments threaten civil Society in Tunisia and their adoption would have dire consequences for the rule of law, democracy and human rights in the country more generally. In light of the above-mentioned analysis, and with a view to ensuring full compliance with international human rights law obligations and relevant standards, the ICJ calls on the Tunisian authorities to:

- 1. Refrain from promulgating into law and implementing the proposed amendments to Decree 88;**
- 2. Ensure that any process to amend Decree 88 is based on public consultation and guarantees that:**
 - **Associations are able to register swiftly via a self-declaratory notification procedure rather than a prior authorization procedure;**
 - **The administrative body overseeing registration should be independent, impartial and fair;**
 - **The procedures for refusing registration, suspension**

or dissolution of associations are prescribed by law, necessary in a democratic society in pursuit of a legitimate aim as defined in IHRL, and subject to independent and effective judicial review;

- **Any discretionary powers the government might have in determining which acts or omissions might amount to ‘grave infraction’ necessitating suspension or dissolution of associations are removed, and, to that end, ensure that the law is clear, precise and in full compliance with the requirements of the principle of legality;**
 - **Associations are able also to seek, receive and use funding and other resources from domestic, foreign, and international sources, and**
- 3. Ensure that associations are able to effectively play their watchdog role and act in defence of the rule of law and human rights, without political interference, intimidation, harassment or undue restrictions.**

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**International Commission of Jurists
P.O. Box 1270
Rue des Buis 3
1211 Geneva 1
Switzerland**