

**COMMENTARY ON THE PROPOSED LAW  
REFORMING DECREE 2011-88 GOVERNING ASSOCIATIONS**

October 20, 2023

On October 10, a group of 10 deputies submitted a bill to the Assembly of People's Representatives (ARP) to replace Decree 2011-88 on associations. According to article 49 of the ARP's rules of procedure, bills relating to civil society and the media must first be examined by the Assembly's Rights and Freedoms Committee.

OMCT has studied the draft law and offers below a commentary for the attention of ARP members who will be called upon to examine the text. The main findings are as follows:

*The proposed law drastically restricts freedom of association without pursuing any legitimate aim, by setting out vague provisions granting public authorities disproportionate powers of control over the life and operation of associations. This proposal jeopardizes the survival of the associative sector, which for years has played a crucial role in the construction of Tunisian democracy. What's more, the erosion of civic space it would entail if adopted would have major negative consequences for the economy of a country currently experiencing a crisis that is plunging more and more people into economic insecurity. The associative sector has a major positive impact in terms of job creation and participation in the country's economic life. Obstacles to access to funding and the imposition of voluntary work would lead to the closure of a very large number of associations and thousands of job losses. Last but not least, associations play an important role in helping vulnerable populations gain access to their fundamental rights, particularly women victims of violence, torture and ill-treatment, and so on.*

**I/ Permissible restrictions on freedom of association under international law**

Tunisia has ratified several international texts guaranteeing freedom of association, including :

- UDHR, Universal Declaration of Human Rights (art. 20)
- ICCPR, International Covenant on Civil and Political Rights (art. 22)
- ICESCR, International Covenant on Economic, Social and Cultural Rights (art. 8)
- CEDAW, Convention on the Elimination of All Forms of Discrimination against Women (art. 7)
- Convention (No.° 87) concerning Freedom of Association and Protection of the Right to Organize (International Labour Organization) (art. 2)
- African Charter on Human and Peoples' Rights (art. 10)
- Arab Charter on Human Rights (art. 28)

Added to this corpus is the Declaration on Human Rights Defenders, unanimously adopted by the UN General Assembly in 1998, which sets out a series of principles and rights based on human rights standards enshrined in other legally binding international instruments.

Article 22.1 of the ICCPR enshrines freedom of association as follows: "Everyone has the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

The right to freedom of association is not absolute, however, and may be subject to restrictions, like other rights under the International Covenant on Civil and Political Rights and regional human rights instruments. Paragraph 2 of Article 22 expressly specifies the conditions under which such restrictions are authorized<sup>1</sup> .

**The condition of legality:** Restrictions on the right to freedom of association are often laid down in government decrees and similar legislative acts, and therefore do not meet the criterion of being "provided for by law". What's more, these laws increasingly contain rather vague and broadly-defined provisions that easily leave the door open to misinterpretation and abuse.<sup>2</sup>

**The condition of necessity/proportionality:** Restrictions must be "necessary in a democratic society", and "the existence and functioning of a plurality of associations, including associations which peacefully defend ideas which are not favorably received by the government or the majority of the population, constitute one of the foundations of a democratic society. It is therefore not sufficient that there be any reasonable and objective justification for limiting freedom of association. The State party must demonstrate that restrictions on freedom of association are genuinely necessary to pursue a legitimate aim, and that less drastic measures would be insufficient to achieve that aim. Ideas likely to "offend, shock or disturb" are protected by the right to freedom of expression. Consequently, associations which, by taking controversial positions or criticizing the government, offend, shock or disturb are fully protected by the Convention. In short, associations enjoy full freedom of expression. This condition is indispensable for a "democratic society". The principle of proportionality also implies striking a fair balance between the intensity of the measure and the reason for the interference<sup>3</sup> .

**The condition of pursuing a legitimate aim:** For a restriction on freedom of association to be provided for by law, it must pursue a "legitimate aim", i.e. be imposed in the interests of national security, public safety or public order, or to protect public health or morals, or the rights and freedoms of others.<sup>4</sup>

## II/ Excessive infringements of freedom of association in the proposed law

This proposed law raises major concerns about its justification, its impact on freedom of association and the unjustified presumption of foreign interference it spreads. Such a text, if adopted, would constitute a flagrant violation of the right to freedom of association and would destroy the civic space necessary for the vitality of Tunisian democracy. Several arguments can be put forward:

**A bill devoid of justification:** The bill fails to provide adequate justification for the proposed amendments. The motivations for the restrictions on freedom of association, notably the need to obtain prior government authorization to obtain foreign funding, are not supported by tangible evidence showing that the associations pose a threat to national security or public order. In the absence of a valid justification, it is difficult to consider that such restrictive measures pursue a legitimate aim within the meaning of international law.

**Consecration of the executive's stranglehold on the associative sector:** The bill gives the government excessive prerogatives with regard to the creation, dissolution, control and supervision of associations. The provisions providing for these prerogatives are set out in vague terms, in violation of the requirement of legality, and may give rise to an extensive interpretation that would confer on the authorities the possibility of disproportionate infringements of associative freedom. In particular, this

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<sup>1</sup> United Nations General Assembly, resolution 64/226, August 4, 2009, para. 26 (A/64/226).

<sup>2</sup> Ibid. para. 52.

<sup>3</sup> Ibid. para. 28-29.

<sup>4</sup> Ibid. para. 30.

could be used to silence human rights associations or any organization critical of public policies, in contradiction with article 40 of the constitution of 2022, which guarantees freedom of expression. Beyond freedom of association, it is freedom of expression and human rights defenders that are under attack through this proposal.

**Stifling civic space through abusive restrictions on access to foreign funding and paid employment:**

The proposed law unfairly and excessively targets foreign funding for associations. Foreign funding is often essential to support the work of civil society associations, particularly in areas such as human rights, health, education and development. The proposed law is based on the fallacious and factually unsupported assertion that foreign funding automatically entails interference in national affairs. This view is simplistic and misleading. Associations, in collaboration with international partners, can help strengthen civil society and promote positive reforms. Foreign interference and interference in national affairs are distinct issues that should be addressed in a targeted manner, rather than through blanket restrictions on foreign funding.

The authors and promoters of the proposed law provide no analysis to suggest that existing provisions are inadequate or insufficient to prevent and combat the detour of money for terrorist financing purposes. In the absence of such a diagnosis, any reform can only be presumed to fulfil another objective, in this case the stated desire to empty the civic space of all its counter-power dimension.

Equally worrying are the references to voluntary work, which seems to characterize associative work. The provisions lack clarity and precision, and can be interpreted as prohibiting any form of paid work within associations. This constitutes a major and serious violation of freedom of association.

**A/ Questions concerning the pursuit of a legitimate aim**

The proposed law aims to remedy the shortcomings of Decree-Law 2011-88, which has been in force until now. Judging by the context and objectives set out in the introduction to the proposal, the interest of national security seems to be the main motivation for this reform drastically restricting freedom of association.

However, the context and objectives are based on a summary, partial and biased assessment of the problems characterizing the associative field that the proposal is supposed to resolve. The shortcomings of decree 2011-88 are not supported by any factual data or analysis in the introduction to the new text. The authors of the proposal presume that Decree 2011-88 has led to abuses that need to be corrected, but they neither detail nor prove these abuses.

The assumption that "certain associations were nothing more than a cover for financing political parties and weapons for lobbies and foreign countries that wanted to interfere in sovereign decision-making and impose political, social and economic agendas through these associations" is rooted in a conspiracy theory that has become widespread over the last two years, and which serves as justification for numerous serious attacks on freedoms and the rule of law, without any factual basis.

It also reflects a lack of understanding of the role of associations in the public arena. Many associations, whether humanitarian or human rights organizations, are called upon to make their voices heard in the public arena and/or among political players, in order to promote their respective conceptions of fundamental freedoms and of what should be done by public authorities to ensure that these freedoms are respected in practice. Associations can also play a role in observing violations of rights and freedoms, and acting as a watchdog against abuses by the authorities, through their advocacy activities at national and international level. This fundamental role played by civil society is enshrined in several

international instruments. The former Special Representative on Human Rights Defenders believes that Article 22 of the ICCPR, which enshrines freedom of association, in conjunction with Article 5 of the Declaration on Human Rights Defenders, should be read as including protection of freedom of association for human rights organizations whose work is likely to antagonize the government, including those critical of current policies; denounce violations committed by the authorities or challenge the existing legal and constitutional order<sup>5</sup>.

Thus, the proposed law provides no serious justification for the pursuit of a legitimate aim that would explain the numerous restrictions on freedom of association it envisages. Instead, it appears to be a tool for the arbitrary regulation of the political field, through the erosion of civic space and the silencing of voices potentially critical of government action.

## **B/ Excessive interference with freedom of association in terms of setting up, sanctioning and dissolution of associations**

**Article 6** grants the General Directorate of the Presidency of the Government extensive prerogatives over the supervision and control of the work of international NGOs, without defining the purpose, basis or modalities of this control.

It also provides for the competence of the Ministry of Foreign Affairs to grant licenses to Tunisian branches of foreign NGOs. "The mechanism for licensing and announcing branches of foreign associations is governed by a special regulation issued by the ministry in charge of foreign affairs". It will thus be up to the Ministry to define the procedure within a regulation, in violation of the principle of legality, which stipulates that any restriction on freedom of association, including through the imposition of authorization procedures, must be provided for by law and not by regulation.

**Article 7** is vaguely worded, as it does not specify whether it refers only to board members or whether paid work within associations will be prohibited.

**Article 9**, which sets out the procedure for creating an association, is very imprecise. Although paragraph 2 stipulates that the administration's silence on the association's declaration of creation is interpreted as an acknowledgement of receipt, paragraph 3 introduces a threat to the life of the association. It gives the administration the possibility of requesting judicial annulment of the creation of an association. This prerogative is not limited in time, and the request for annulment can therefore be made at any time. This constitutes a permanent threat to associations.

**Article 20** grants the authorities arbitrary power in granting and withdrawing licenses for international NGOs. Licenses are in essence temporary, which means that the very existence of international NGOs depends on the renewal of approval by the authorities. In the absence of any mention of the reasons for the withdrawal of licenses, it can be assumed that it may be motivated by the NGO's positions and activities which are not to the liking of the executive power. This can undermine the freedom of expression of the association and its members, and lead to self-censorship. This will be particularly detrimental to human rights NGOs, but not only. Humanitarian associations, which are often involved in advocacy work, could suffer from such uncertainty about their future. It should be remembered that the International Covenant on Civil and Political Rights requires any dissolution of an association to follow a clearly established procedure.

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<sup>5</sup> United Nations General Assembly, resolution, 59/401, 1<sup>er</sup> October 2004, para. 49 (A/59/401).

In the case of license withdrawal, which can be made by a simple administrative decision "at any time", the article does not mention the means of appeal to contest this decision.

This article therefore violates the principles of legality, proportionality and the right to appeal. Its consequences are all the more damaging for freedom of association in that Article 21 punishes foreign associations that have not been authorized with nullity and liquidation of assets, and Article 22 provides for criminal penalties for those responsible for such associations.

**Article 24 paragraph 3** stipulates that the administration will have the prerogative to "suspend the activity of the association for a 'specific' period based on a decision by the public prosecutor if the warning concerning an 'infraction' is not applied within three weeks by the association". The "specific period" is not time-limited, and is likely to last for the duration of the legal proceedings, i.e. years. Suspension appears to be a sanction that comes into play even before the judiciary establishes the infringement at the end of a trial.

### **C/ Excessive interference with freedom of association through control over the activities of associations**

**Article 1** prohibits the creation of associations on religious or ethnic grounds. This provision is vague, unjustified and open to wide interpretation. Does it apply to religious and cultural associations, to associations for the preservation of religious heritage, or to associations defending the rights of sub-Saharan migrants?

**Articles 6 and 23** grant the administration vaguely defined supervisory and control prerogatives. No provision is made to guarantee the confidentiality of certain data managed by associations. Furthermore, no judicial authorization/decision is required to establish "suspicion", the basis on which the administration decides whether the activities of a certain association require in-depth verification.

### **D/ The imposition of voluntary work: a major blow to freedom of association**

The introduction and articles 2, 14, 22 and 24 refer to voluntary work as the principle form of associative work. Although remunerated work is not explicitly prohibited, the insistence on voluntary work and the absence of any reference to any other form of remunerated participation in associative work could be interpreted as prohibiting remuneration for associative workers.

This is one of the most serious attacks on freedom of association contained in the proposed law. International standards include the possibility for associations to choose their working methods, including the remuneration of their staff. The imposition of voluntary work would lead to thousands of job losses and the closure of many associations due to a lack of staff dedicated to the implementation of activities. Ultimately, it is the association's workers and beneficiaries who would be the first to be penalized by the new legislation.

### **E/ Excessive restrictions on the right to obtain foreign financing**

In its **introduction**, the proposal states that it prohibits the receipt of foreign funding, with the exception of humanitarian associations, subject to approval by the competent authorities. However, in **articles 18 and 21**, civil society is authorized to receive foreign funds subject to the approval of the Prime Minister. There is therefore a major contradiction within the proposal, which clearly contravenes the criterion of legality of the provisions.

Furthermore, **article 18** establishes the principle of a ban on foreign funding unless authorized by the Prime Minister, which in itself constitutes a disproportionate infringement of freedom of association, of which the right to receive funding - including foreign funding - is a major component. Freedom should be the rule, and prohibition the exception. It should also be remembered that there is no legitimate purpose for infringing the right to receive funding in this way. Freedom of funding, which has so far been the rule, is already subject to an obligation of transparency and effective control mechanisms to ensure that such funding is not diverted for purposes unrelated to the association's mandate. The Tunisian government has already put in place legal provisions to control foreign funding of associations. Law n°2018-52 of October 29, 2019 relating to the national register of companies, in particular articles 7 and 8, subjects associations to a control similar to that of companies with regard to the declaration of their sources of funding and economic activities.

Control tools are also provided by Articles 99 and 100 of Organic Law No. 2019-9 of January 23, 2019, amending and supplementing Organic Law No. 2015-26 of August 7, 2015, on the fight against terrorism and the suppression of money laundering. The legislation that came after Decree 2011-88 comes to reinforce financial transparency and prevent activities linked to terrorism and money laundering by associations. The authors and promoters of the bill provide no analysis to suggest that the existing provisions are inadequate or insufficient to prevent and combat the detour of money for terrorist financing purposes.

Finally, the prior authorization procedure is not clearly defined. The criteria on which decisions are based are not specified, leaving room for arbitrariness. The article does not require the Prime Minister to give reasons for any refusal, making it difficult to appeal.