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OPINION ON THE COMPATIBILITY WITH THE EUROPEAN STANDARDS OF THE BILL TO ENSURE RESPECT FOR THE PRINCIPLES OF THE REPUBLIC BY ALL

Opinion prepared by the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe

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1. The bill to ensure respect for the principles of the Republic by all, currently being examined by the French Parliament, gives a central place to associations, described as a sphere where "undermining work (...) mainly of Islamic inspiration" is being carried out, an "insidious but powerful communitarian entryism, [which] is slowly corroding the foundations of [society] in certain territories"[1]. The accelerated parliamentary procedure used, which is hardly compatible with European requirements in this area[2], does not seem to have allowed the societal and democratic issues to be fully assessed. The Expert Council on NGO Law of the Conference of INGOs is deeply concerned about the restrictions that would be placed on the exercise of freedom of association in France if the text were adopted as it stands.

2. The **control of foreign funding of associations**, in order to "reduce the capacity of foreign actors to influence and control" them[3], is the first source of concern. The text imposes on religious and mixed associations (with both a religious and a cultural or social goal) the obligation to declare foreign resources in excess of 10 000 euros. The administration may object to this funding[4]. Other associations (with no religious purpose) will have to declare any foreign funding when they receive more than 153 000 euros in annual donations.

3. With regard to the principle of control itself, it should be recalled that Recommendation CM/Rec(2007)14 states that " NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties."[5] The Parliamentary Assembly also called on member states " to ensure that NGOs can seek, receive and use transparent funding and other resources, whether domestic or foreign, without discrimination or undue impediments ". [6]

4. The introduction in some Member States of controls on associations because of funding received from abroad is a major cause for concern. [7] Although these measures vary

[1] Explanatory memorandum to the bill.
[2] Recommandation Rec(2007)14 ; *Lignes directrices sur la liberté d'association*, Commission européenne pour la démocratie par le droit (Commission de Venise) - OSCE/BIDDH
[3] Explanatory memorandum to the bill.
[4]In the event of a "real, present and sufficiently serious threat affecting a fundamental interest of society". Penalties are imposed for non-compliance with the reporting obligation or opposition by the administration.
[5]Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe
[6] Resolution 2226 (2018) on New restrictions on NGO activities in Council of Europe member States
[7] See the Venice Commission's opinions on the legislation of Azebaijan (CDL-AD(2014)043), Russie (716/2013, 717/2013 et 814/2015), Hungary (CDL-AD(2017)015), Ukraine (CDL-AD(2018)006) ; Parliamentary Assembly Resolution 2162 (2017), the opinions of the Expert Council on Hungarian legislation (CONF/EXP(2017)1) et russe (CONF/EXP (2013)1, Conf/Exp (2014) 3 et Conf/EXP(2021)1)

considerably in terms of their scope and methods, they have in common that they seek to combat, not criminal behaviour, but external influences described as a factor of political and social destabilisation, of which civil society actors are said to be the instrument. The creation of such a mechanism in France, the host country of the Council of Europe, would certainly undermine the authority of the above-mentioned standards for the protection of civil society. Moreover, it would open the way for the legitimacy of civil society actors supported across borders to be questioned in the public debate. The emergence of this problematic carries the poison of suspicion and insularity.

5. Furthermore, the generalized control of religious or mixed associations with foreign resources raises questions. It is intended to prevent funding whose harmfulness is expressed by the actions of its recipient, when they reflect a real, current and sufficiently serious threat affecting a fundamental interest of society. [8] It is difficult to imagine that such actions cannot be covered by criminal law or current administrative police provisions. Moreover, it is difficult to understand the choice of a negative presumption affecting all foreign funding, rather than a mechanism targeting the suspect association because of its actions. The condition of public order could justify measures imposed on associations suspected of endangering public order, but not a general regulation imposing on all associations, whatever their purpose and activities, the declaration and publicity obligations in question.

6. With regard to the obligation to declare foreign funds applicable to non-religious associations receiving more than 153 000 euros in annual donations, its purpose appears unclear since it does not appear to trigger any particular administrative measure, but rather to allow for general surveillance of the actors concerned. The merits of the mechanism, in relation to the control mechanisms in place, are not explained. It does not therefore appear to have a sufficiently precise aim.

7. The third area of concern is **the extension of the grounds for dissolution of associations**. The grounds for administrative dissolution will first include provoking "violent acts against persons or property". Secondly, they will take into account the fact that the association "contributes by its actions" to discrimination[9] (and no longer only provokes it). The dissolution of the entities concerned is also made possible when their leaders have refrained from stopping such acts, even though they were aware of them and had the means to do so.

8. The extension of dissolution, beyond "provocation", to the fact of "contributing by its actions" to discrimination, hatred or violence marks a significant broadening of the administration's powers. This wording clearly distends the causal link required between the association's behaviour and the infringement of the protected public interest. Under Article

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[8] Criterion referring to Article 65, §1 of the Treaty on the Functioning of the European Union (TFEU)
[9] These now include those related to gender or sexual orientation.

10 of the Convention (the right to freedom of expression), the "line that must not be crossed" is where the speech "degenerates into advocacy of violence, hatred or intolerance".[10] However, the bill aims precisely to shift this limit to cover conduct that falls short of calling for violence, hatred or intolerance. Moreover, the text does not require a breach of a legal or regulatory requirement or a particularly serious fault. The indeterminacy of the condition thus set out opens the way to a risk of arbitrariness incompatible with the requirement of "lawfulness", since this is a particularly serious interference, since it concerns dissolution.

9. As for the provision which leads to imputing to the association, in order to justify its dissolution, the acts committed by its members, the principles applicable in this matter should be recalled. The dissolution of an association is an extremely severe measure, which can only be tolerated in very serious circumstances. [11] Moreover, where the authorities rely on the unlawful actions of the association's members to order the dissolution of the association, they must support their conclusions with solid evidence, identifying the precise facts of the case and providing direct evidence of them. [12] On the other hand, where there is incitement to violence against an individual or group, national authorities have a wider margin of appreciation. [13]

10. In the present case, the diffuse nature of the criterion of "conduct contributing to discrimination, hatred or violence" has repercussions on the obligation of intervention placed on association leaders. They are not only called upon to stop incitement to discrimination or violence, but also acts whose effects on the social climate they must anticipate, which refers to a very broad spectrum of behaviour. The text does not appear to be precise enough to limit dissolutions to cases of tacit acceptance of violence, discrimination or hate speech.

11. The Senate also proposes to amend the provisions relating to the judicial dissolution of associations, which render them null and void in the event of an unlawful object or one that is contrary to laws and morality. It would include the case of "unlawful activity, contrary to the law or morality (...)"[14]. The Senate's wording does not make the reclassification of the statutory purpose conditional on the prevalence of the unlawful activity in the association's operations. This results in a lack of predictability in the grounds for dissolution. Nor does it guarantee that the judge will take account of a "compelling reason", nor does it guarantee the proportionality of dissolution, which is automatic when illegality or a conflict with the law or public morality are established.

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[10] Baldassi et autres c. France, nos 15271/16, 15280/16…, 11 juin 2020, §79
[11] Adana Tayad c. Turquie, no. 59835/10
[12] Tebieti Mühafize Cemiyyeti et Israfilov c. Azerbaïdjan, no 37083/03
[13] Schwabe et M.G. c. Allemagne, nos 8080/08 et 8577/08, § 113, CEDH 2011
[14] This would be a codification of civil case law. In reality, to assess the unlawfulness of the association's object, the judge examines its essential activity to determine whether it justifies a reclassification of the statutory object, Civ. 1re, 16 Oct. 2001, no 00-12.259.

12. Finally, although more diffuse, the consequences of the **"contract of republican commitment" imposed on any association requesting a public subsidy**[15] are worrying, as the proposed evolution redefines the place of the associative sector in the public field. As the Human Rights Defender, Ms Claire Hedon has pointed out, the text obliges subsidised associations to "commit themselves positively and explicitly, in their purpose as well as in their organisation, to principles that are those of the public authorities. This runs the risk of partially distorting the status of associations, which are essential third parties between the citizen and the public authorities". [16] Moreover, the scope of the commitment is uncertain, as the notion of public order is particularly broad, if not "indeterminate, elusive, or even changeable".[17] This obligation risks dissuading the associations concerned from expressing views or carrying out actions which, although protected by Articles 10 and 11 of the ECHR, could be perceived unfavourably by the administration. The case raised in the parliamentary debate, namely the need to withhold public money from associations carrying out illegal intrusions on agricultural land, [18] fuels this concern. A public subsidy should not restrict the exercise by its beneficiary of conventionally protected rights.

13. At a time when the French Parliament is seeking to modify the obligations and controls to which associations are subject in order to counter "separatist tendencies", it is worth recalling "the essential contribution made by non-governmental organisations (NGOs) to the development and realisation of democracy and human rights (...) and the equally important contribution of NGOs to the cultural life and social well-being of democratic societies". and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies".[19] Any initiative in this area should be conducted with great care and with the fundamental principles underlying the protection of freedom of association in Europe in mind:

> "the state of democracy (…) can be gauged by the way in which this freedom is secured under national legislation and in which the authorities apply it in practice (…) Associations formed [for, among others] protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural

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[15] According to the text that came out of the National Assembly, they must undertake to "respect the principles of liberty, equality, fraternity and respect for the dignity of the human person, as well as to respect public order, the minimum requirements of life in society and the fundamental symbols of the Republic.

[16] Audition of Ms Claire Hédon, Défenseure des droits, on 6 January 2021

[17] L'ordre public : regards croisés du Conseil d'État et de la Cour de cassation, discours d'ouverture, 24/02/2017

[18] P. Januel, *Séparatisme : l'Assemblée se penche sur le contrôle des associations*, Dalloz actualité, 7 février 2021

[19] Recommandation CM/Rec(2007)14

that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively. The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities".[20]

[20] Gorzelik et autres c. Pologne, Grande Chambre, no. 44158/98, §89, §§ 92-93, 17 février 2004.