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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**SOME PRELIMINARY REFLECTIONS  
ON STANDARDS AND LEGISLATION  
RELATING TO FREEDOM OF ASSOCIATION  
AND NON-GOVERNMENTAL ORGANISATIONS (NGOs)**

**By**

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## I. Introduction

1. Following a meeting with EU Special Representative for Human Rights Stavros Lambrinidis on 11 February 2013, the Minister of Justice of Egypt, Mr Ahmed Mekki, by a letter of 25 February 2013 requested the Venice Commission's assistance in the preparation of the law on associations and NGOs of Egypt.
2. Meetings took place in Cairo on 11 and 12 March 2013 between Mr Peter Paczolay, member of the Venice Commission and Ms Simona Granata-Menghini, Deputy Secretary of the Commission, the Minister of Justice and the Working Group within his Ministry, as well as representatives of the European Union Delegation to the Arab Republic of Egypt. The Venice Commission delegation also had a meeting with representatives of the Egyptian civil society.
3. The Minister of Justice expressed the wish to receive information on the international standards and on the legislation of European countries on freedom of association in order to prepare a law which will meet these standards as well as the expectation of all the Egyptian stakeholders.
4. These preliminary reflections have been inspired by the discussions which took place in Cairo and focus on the issues which were debated on that occasion. The annexed comparative table on the legislation of 28 countries which are members of the Venice Commission has been prepared in a very limited time; it therefore only offers some examples and should in no way be considered as exhaustive.
5. These reflections are limited to some of the issues relating to freedom of association.<sup>1</sup>

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<sup>1</sup> More may be found on the website of the OSCE/ODIHR under seventeen topics:

**International guarantees: General and Specific:** [Binding guarantees, soft law instruments and political undertakings on Freedom of Association.](#)

**Entities to which the guarantees apply:** [The particular form and legal status of such organizations.](#)

**Formation:** [Administrative requirements and restrictions to form an NGO.](#)

**Membership:** The status and rights of members to an NGO.

**Acquisition of legal personality and registration:** The administrative process for an NGO to apply for legal personality.

**Capacities to be enjoyed by Non Governmental Organizations:** Rights and entitlements of NGOs to pursue their activities.

**Objects and Activities:** Lawfulness and acceptability of types of activities and purposes of NGOs.

**Management and internal organisation:** Rights and obligation relative to the governance of NGOs.

**Liability and Sanctions:** Civil liability and/or administrative and criminal sanctions applicable to management and members of NGOs.

**Termination and Dissolution:** Conditions of voluntary and enforced suspension of activities and termination of an NGO.

**Property and Income:** Ability and conditions to generate, seek and use income.

**State Support and Financing:** Forms of and conditions to grant public support to NGOs.

**Accountability and Supervision:** Conditions of transparency and reporting obligations for NGOs receiving public funding.

**Participation in decision-making and law-making:** Ability of NGOs to be consulted and to contribute to decision- and law-making at local, national, regional or international levels.

**Security and Duty of protection:** Rights of NGOs to be protected from discrimination, harassment and other improper treatment.

**Foreign Associations and NGOs:** Conditions of operation of foreign NGOs and right to establish/join an NGO abroad.

**Human Rights Defenders:** Specific rights and protection to be enjoyed by NGOs that are human rights defenders.

See <http://www.associationline.org>

## **II. Sources of standards on freedom of association and NGOs**

6. Freedom of association is protected by several international instruments, including: the Universal Declaration of Human Rights (Article 20); the International Covenant on Civil and Political Rights (Article 22); the International Covenant on Economic, Social and Cultural Rights (Article 8 recognizes the right to form and join trade unions); the Convention on the Elimination of All forms of Discrimination against Women (Article 7); the Convention No. 87 on Freedom of Association and Protection of the Right to organise of the International Labour Organisation (Article 2); the European Convention on Human Rights (Article 11); the African Charter on Human and Peoples' Rights (Article 10); the American Convention on Human Rights (Article 16); the Arab Charter on Human Rights (Article 28).

7. The standards on freedom of association have been developed in particular by the United Nations Human Rights Committee and by the European Court of Human Rights.

8. Specific standards on the legal status of non-governmental organisations have further been set out in Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe to member States on the legal status of non-governmental organisations in Europe<sup>2</sup> and further clarified by the Council of Europe's Expert Council on NGO law of the International Conference of NGOs<sup>3</sup>. Standards applicable to associations active as human rights defenders are also set out in the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders) and clarified in its Commentary.<sup>4</sup>

## **III. Principles and comparative legislative examples on associations and NGOs**

### **A. Definition and legal personality**

9. The freedom of association is the freedom of individuals to come together for the protection of their interests by forming or being affiliated to a collective entity which represents them. NGOs are a type of association; they are voluntary self-governing bodies or organisations established to pursue the essentially non-profit making objectives of their founders or members. They do not include political parties.

10. Non-governmental Organisations (NGOs) can pursue their interests in an informal manner and thus be informal bodies; in order to fall under the scope of article 22, associations do not need to assume a legal personality: *de facto* associations are equally protected, although they should have some kind of institutional structure.<sup>5</sup>

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<sup>2</sup> Recommendation CM/Rec(2007)14 of the Committee of ministers to member States on the legal status of non-governmental organisations in Europe,

<https://wcd.coe.int/ViewDoc.jsp?id=1194609&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

<sup>3</sup> See the First, Second and Third Annual reports of the Expert Council on NGO law at [http://www.coe.int/t/ngo/Source/Expert\\_Council\\_NGO\\_Law\\_report\\_2008\\_en.pdf](http://www.coe.int/t/ngo/Source/Expert_Council_NGO_Law_report_2008_en.pdf).

<sup>4</sup> United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (A/RES/53/144); Commentary on the UN Resolution on Human Rights Defenders, July 2011

<http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>

Report submitted by the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, 4 August 2009 <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/64/226&Lang=E>

<sup>5</sup> Commentary on the UN Resolution on Human Rights Defenders , p.37,38

11. The acquisition of legal personality may enhance the effective exercise of freedom of association as on the one hand it enables the individuals to know with certainty what it is required from them in order to form an NGO; on the other hand, by acquiring legal personality, the association is able to act as an independent entity to further the interests of its members.

## **B. Relations with the State**

a) State duty not to interfere with the setting up of associations and NGOs

12. The State has the duty not to interfere with individuals who seek to exercise their freedom of association. The requirement of formal registration of an association is not as such contrary to freedom of association, provided that it is limited to obtaining legal personality: NGOs should be allowed to exist and carry out activities without having to register if they so wish. On the other hand, associations have the right to register as legal entities and to be entitled to the relevant benefits.

Article 2 of the French law of 1 July 1901 explicitly provides that associations do not need any authorisation or notification, unless they wish to obtain legal personality.

13. The rules governing the acquisition of legal personality should be objectively framed and the respective decisions should not be subject to unfettered discretion by the relevant authorities. Registration procedures should not be cumbersome, lengthy and unpredictable. Legal personality should only be refused when there has been a failure to submit all the clearly prescribed documents required, a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the state concerned or when there is an objective in the statutes which is clearly inconsistent with the requirements of a democratic society. Any evaluation of the acceptability of the objectives of an NGO seeking legal personality should be well informed and respectful of political pluralism. It should not be driven by prejudices. The body responsible for granting legal personality should act independently and impartially in its decision-making. All decisions should be taken within a reasonable time indicated in the law should be communicated to the applicant associations in writing and any refusal to register should include written reasons and be subject to appeal to an independent and impartial court.<sup>6</sup>

14. It would be useful if the legislation clarified the status of organizations in the period pending the registration. The specific criminalisation of participation in unregistered activities during this period is contrary to freedom of association.<sup>7</sup> Individuals carrying out activities on behalf of unregistered associations expose themselves to the ordinary civil, administrative and criminal liability, and no additional specific criminal sanction should be provided. Penalties should be based on the law in force. Furthermore all penalties that are imposed should respect the principle of proportionality (see paragraph 25 below).

15. NGOs with legal personality should have the same capacities as are generally enjoyed by other legal persons and should be subject to the administrative, civil and criminal law obligations and sanctions generally applicable to those legal persons.<sup>8</sup>

16. Associations should be assisted in the pursuit of their objectives through various forms of support such as public funds, exemption from income and other taxes or duties on membership fees, funds and goods received from donors or governmental and international agencies,

<sup>6</sup> CM/Rec(2007)14, paras.28 and seq.

<sup>7</sup> See Commentary on the Declaration on Human Rights Defenders, p. 39.

<sup>8</sup> CM/Rec (2007)14, para. 7

income from investments, rent, royalties, economic activities and property transactions, as well as incentives for donations through income tax deductions or credits. Once given to NGOs, public funds become private funds (see paragraph 22 below).

17. Foreign non-governmental organisations may be required to obtain authorisation to operate in a country other than the one in which they have been established. However, they should not be required to establish a new and separate entity for this purpose. Foreign non-governmental organisations can be subjected to the same accountability requirements as non-governmental organisations with legal personality in their host country but these requirements should only be applicable to their activities in that country.<sup>9</sup>

18. Any approval for a foreign non-governmental organisation to operate can only be withdrawn by the host country in the event of its bankruptcy, prolonged inactivity or serious misconduct.<sup>10</sup>

b) State duty not to interfere with the activities of associations and NGOs

19. The State also has the duty not to interfere with the essential activities of any established association. Once the association is set up, the essential relationships are between this body and its members and between this body and non-members. State supervision and intervention should only be limited to cases in which it is necessary to protect the members or the public.

20. NGOs should therefore not be subject to direction by public authorities. The corollary to the principle of the independence of associations from the government is that they should be entitled to decide their own internal structure, to choose and manage their own staff and to have their own assets.

21. The State may not issue instructions on the management and activities of the associations. A system of prior authorization of some or all of the activities of an association is therefore incompatible with the freedom of association. In addition, such a system would almost inevitably be impracticable, inefficient and costly, as well as likely to generate a significant number of applications to courts, with a consequent unwarranted transfer of workload (and danger of clogging up) to the judiciary.

22. The funds raised by registered NGOs (which are legal persons governed by private law) belong to them and are to be considered private funds. Even when the State provides financial support, the relevant funds become private funds of the association which receives them. Any different provision, notably provision that the funds of an association are to be considered as public funds, amounts to establishing state control over the association and are therefore incompatible with freedom of association. Indeed NGOs are not state bodies. They notably differ from National human rights institutions (like ombudsmen or national human rights commissions) which are State bodies with a constitutional and/or legislative mandate to protect and promote human rights, are part of the State apparatus and are funded by the State.<sup>11</sup> State control over NGOs' funds is not the appropriate way to protect the interest of NGOs members and the public from possible wrongdoings by the NGO's management: such protection is to be afforded through adequate reporting obligations, transparency requirements and the possibility to apply to independent and impartial courts.

<sup>9</sup> CM/Rec (2007)14, paras. 45, 66

<sup>10</sup> CM/Rec (2007)14, para 74

<sup>11</sup> [www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf)

23. The only case in which an NGO's private funds may become public property is after its dissolution, after satisfaction of the creditors, in the absence of other beneficiaries specifically designed in the statute or when it is impossible to achieve the statutory goals of the dissolved NGO, or when the NGO has been dissolved by court decision for pursuing an unconstitutional goal.

None of the Venice Commission member states which have been examined provides that NGO funds are public funds.

"The former Yugoslav Republic of Macedonia" provides explicitly that "the assets that citizen associations and foundations attain in conformity with article 61 of this law are owned by them".

In Armenia it is provided that after the dissolution of the organization the property which remains after satisfying the creditor's claims shall be used for the achievement of the organisation's statutory goals and if this is not possible the property shall be transferred to the state budget.

In Moldova, the property of NGOs after its dissolution for unconstitutional activities and according to a decision of the court can become without return the property of the state after satisfying the demands of creditors.

24. In order to ensure transparency, associations which receive public support may be required each year to submit reports on their accounts and an overview of their activities to a designated supervisory body and to have their accounts audited by an institution or person independent from the management. State supervision should be limited to cases where there has been a failure to comply with reporting requirements or where there are reasonable grounds to suspect that serious breaches of the law have occurred or are imminent; in such cases, associations may be required to submit the books, record or activities to inspection by a supervisory agency. However, in the absence of contrary evidence, the activities of the associations should be presumed to be lawful. An external intervention in the running of the associations should only take place when a serious breach of the legal requirements applicable to the associations has been established or is reasonably believed to be imminent.

25. While some interference by the State in the activities of NGOs is permissible, it must be stressed that any interference by the State with the right to freedom of association must fulfil three main conditions:<sup>12</sup>

- It must be prescribed by law: there must be some basis in domestic law; and the law must be *adequately accessible*, i.e. the individual must have an indication that is adequate in the circumstances of the legal rules applicable to a given case and *foreseeable*, i.e. it must be formulated with sufficient precision to enable the individual to foresee with a reasonable degree of certainty the consequences of his or her action or the conditions on which the authorities may take certain steps;
- It must pursue a legitimate aim: the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedom of others;
- It must be "necessary in a democratic society": the interference must correspond to a pressing social need and must be proportionate to the legitimate aim pursued. Proportionality means that the interference must not place an excessive burden on the NGO, also considering the right balance which must be found between the NGO's

<sup>12</sup> See the case-law of the European Court of Human Rights. See also Human Rights Committee, *Korneenko et al v Belarus*, 31 October 2006, Case no 1274/2004.

interest and those of the public. The reasons for the interference must be relevant and sufficient. States have a margin of appreciation in assessing whether the interference responds to a pressing social need, but this margin of appreciation is not an unlimited one.

c) Finally, the State has a positive obligation to ensure that private persons do not infringe the right of freedom of association of other private persons.

#### **IV. Funding**

26. Access to funding is essential for the right to freedom of association: if individuals were to be denied access to the resources necessary to carry out activities and to operate the organisation, the right of freedom of association would become void<sup>13</sup> and devoid of intent and essence.

27. NGOs should thus 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.

28. No prior authorisation should be required for fund-raising activities.

29. The UN Declaration on Human Rights Defenders provides specifically that “everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms through peaceful means in accordance with Article 3 of the present Declaration”. The right of access to funding is to be exercised within the juridical framework of domestic legislation – provided that such legislation is consistent with international human rights standards.

Practically all the examined provide that funds raised by the NGO as gifts, donations or voluntary contributions are part of the legitimate resources of the NGO.

30. Foreign funding of NGOs is at times viewed as problematic by States. There may be various reasons for a State to restrict foreign funding, including the prevention of money-laundering and terrorist financing. However, these legitimate aims should not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defence of human rights.

31. The prevention of money-laundering or terrorist financing does not require nor justify the prohibition or a system of prior authorisation by the government of foreign funding of NGOs.

None of the Member States of the Venice Commission which has been examined has prohibited foreign funding of NGOs. The possibility of such funding is explicitly allowed in five countries: Armenia, Bulgaria, Finland, Tunisia and Turkey. Italy explicitly allows contributions from international organisations.

Only in Algeria has funding from foreign associations and NGOs been subjected to prior authorisation from the competent authorities.

In Turkey, the need for prior authorisation was removed in 2004, and, as part of the reform undertaken by the AKP government, now it is only required to inform the competent authorities; foreign funding must be done through a bank.

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<sup>13</sup> Commentary on the UN Declaration on Human Rights Defenders, p. 95.

In Morocco, foreign funding must be declared to the government and entails the obligation to keep books and control by inspectors of the Minister of Finances.

In Tunisia, foreign funding is generally allowed, with two exceptions: if the donor State in question has no diplomatic relations with Tunisia and if the donor organisations pursue the political interests of such States.

In Moldova NGOs and their juridical representatives are not allowed to use financial support from foreign (international) natural or juridical persons for supporting political parties, social-political organizations and particular candidates during the elections. These financial sources shall be confiscated and transferred to the state's budget following the court's decision.

In the Russian Federation, foreign funding is allowed and does not require prior authorisation or notification, although NGOs which receive cash funds or other property from foreign governments, their government bodies, international and foreign organizations, foreign citizens, stateless persons or other entities authorized by them, and/or from Russian legal entities receiving cash funds and other property from the indicated sources and take part in the political activity performed in the territory of the Russian Federation are considered as "non-profit organizations performing the functions of a foreign agent".

32. Failure to respect the provisions on funding may entail administrative sanctions such as fines or the withdrawal of tax benefits, as well as the loss of entitlement to apply for public funds. While the ordinary criminal provisions apply, for example in case of fraud, breaches of the rules on funding should not lead to specific criminal sanctions,

In Turkey, in case of breach of the requirements for receiving foreign funding, an administrative fine of 25 per cent of the amount of the funding is imposed.

## **V. Dissolution of NGOs**

33. The voluntary dissolution of an NGOs is generally regulated in its statute, and indeed regulation of voluntary dissolution is one of the basic requirements of the statute of an NGO with legal personality.<sup>14</sup>

34. Dissolution may also be pronounced in case of bankruptcy or cessation of operation of the NGO.

35. As concerns enforced dissolution, it must be recalled that the right to freedom of association is not absolute, and some limitations to it are permissible when they meet the three requirements of being provided for by law, being in pursuit of a legitimate aim and being "necessary in a democratic society", that is proportionate to this aim (see paragraph 23 above).

36. As for the legal basis in domestic law, it is essential that the reasons leading to dissolution be set out clearly and in sufficient detail in the law. Vague references to threats to security, danger of terrorism or infringements of the national interest do not suffice.

37. In accordance with the principle of proportionality, enforced dissolution of an NGO by the State must be seen as an extreme, last-resort measure which may only be justified when the State may prove that it was justified in order to avoid a real danger to the national security or democratic order and that less intrusive measures [for example a fine or withdrawal of tax benefits] would be insufficient to achieve this purpose. Ideas that "offend shock or disturb" are protected under the right of freedom of expression. Thus, associations that take controversial

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<sup>14</sup> See CM Rec.(2007)14, para. 19.h.



positions or criticize the Government in ways that “offend shock or disturb” are fully protected under international standards.<sup>15</sup>

38. The sanction of dissolution may thus be imposed only in “exceptional circumstances of very serious misconduct.”<sup>16</sup> The mere failure to respect certain legal requirements on internal management of an NGO cannot be considered such serious misconduct as to warrant outright dissolution.

39. An NGO as a whole may not be held responsible for the individual behaviour of its members not authorised by the association.

40. Enforced dissolution of an NGO may only be pronounced by an impartial and independent tribunal in a procedure offering all guarantees of due process, openness and a fair trial. The effects of the decision on dissolution should be suspended pending the outcome of judicial review.

Examples of grounds foreseen in national legislation for enforced dissolution include: the violent overthrow of the constitutional order, incitement to hatred, conflict with the Constitution, conflict with the public order or morals.

## **VI. CONCLUSIVE REMARK**

41. As underlined in the Warsaw Declaration, adopted at the Third Summit of Heads of State and Government of the Council of Europe member states, on 16-17 May 2005, “democracy and good governance can only be achieved through the active involvement of citizens and civil society.” NGOs are therefore as an essential element of civil society’s contribution to the transparency and accountability of democratic government. NGOs often make an invaluable contribution to the achievement of the aims and principles of the United Nations Charter.

42. Any law regulating NGOs should aim at and result in facilitating exercise on their part of freedom of association; it should not aim at or result in impairing their setting up and activities.

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<sup>15</sup> Commentary to the UN Declaration on Human Rights Defenders, p. 44.

<sup>16</sup> European Court of Human Rights, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* judgment of 8 October 2009. See also CM/Rec (2007)14.