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

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

**TURKEY**

**DRAFT OPINION**

**ON THE COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS  
STANDARDS OF LAW NO. 7262 ON THE PREVENTION OF  
FINANCING OF THE PROLIFERATION OF WEAPONS OF MASS  
DESTRUCTION**

**on the basis of comments by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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## I. Introduction

1. By letter of 1 February 2021, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested the Venice Commission to prepare an opinion on the compatibility with international human rights standards of Law No. 7262 on the "Prevention of Financing of the Proliferation of Weapons of Mass Destruction"<sup>1</sup> recently passed by Turkey's National Assembly (hereinafter: Parliament), amending, inter alia, the Law on Aid Collection (No. 2860)<sup>2</sup> and the Law on Associations (No. 5253).<sup>3</sup>
2. Ms H. Kjerulf Thorgeirsdottir, Mr C. Pinelli and Mr P. van Dijk, acted as rapporteurs for this opinion.
3. Due to the health situation, it was not possible to travel to Turkey. Instead, the rapporteurs, assisted by Ms Silvia Grundmann, Mr Pierre Garrone, Mr Serguei Kouznetsov and Ms Sopio Japaridze from the Secretariat, held a series of online meetings on 27, 29 April and 4, 5, 11 May 2021 with representatives of the Ministry of Justice, the Ministry of Interior, the Ministry of Treasury and Finance, the Financial Crimes Investigation Board (hereinafter: MASAC) and the Grand National Assembly of Turkey, as well as with representatives of civil society organisations, bar associations, and the international community. The Venice Commission is grateful to the Permanent Representation of Turkey at the Council of Europe and to the Secretariat of the Turkish Delegation to the Parliamentary Assembly of the Council of Europe for their assistance in the organisation of these meetings.
4. This opinion was prepared in reliance on the English translation of the law provided by the authorities of Turkey. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
5. This opinion was drafted on the basis of comments by the rapporteurs, the results of the virtual meetings and written submissions from stakeholders. Following an exchange of views with representatives of the authorities, it was adopted by the Venice Commission at its ... Plenary Session (...2021).

## II. Background

6. Freedom of association is a fundamental human right that is crucial for the functioning of a democracy. The right of associations to seek resources, as an inherent part of the right to freedom of association, is not an absolute but a qualified right. An important number of countries have increased the regulatory framework concerning the financial resources of non-governmental organisations.<sup>4</sup> Among different reasons for such measures is the fight against money laundering and financing of terrorism.
7. The Venice Commission is aware of the challenges faced by Turkey in connection with terrorism. Measures taken to fight terrorism must, however, be "necessary in a democratic society", and in compliance with human rights obligations and the Rule of Law. The Venice Commission observes with concern that in the wake of the failed coup d'état of July 2016, the frequent and broad application of anti-terrorism laws has had serious consequences for civil society in Turkey.<sup>5</sup>

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<sup>1</sup> Law No. 7262 on the "Prevention of Financing of the Proliferation of Weapons of Mass Destruction", CDL-REF(2021)035.

<sup>2</sup> Law No. 2860 on Aid Collection, CDL-REF(2021)036.

<sup>3</sup> Law No. 5253 on Associations, CDL-REF (2021)037.

<sup>4</sup> See, Venice Commission, CDL-AD(2019)002 - Report on funding of associations, para. 40.

<sup>5</sup> See, ECtHR, judgment of 10.12.2019, *Kavala v. Turkey*, application no. 28749/18; judgment of 15.12.2020, *Pişkin v. Turkey*, application no.33399/18; judgment of 19.04.2021, see also *Resolution 2376 (2021) of the Parliamentary Assembly of the Council of Europe*, adopted on 22 April 2021, para. 14 available at:

### **A. Preventing and suppressing the financing of the spread of weapons of mass destruction**

8. One of the ways to combat terrorism is to prevent and suppress the financing of the spread of weapons of mass destruction (hereinafter: WMD). This has been regulated by a special international agreement, the 1999 International Convention for the Suppression of the Financing of Terrorism, which qualifies the financing of terrorism as a crime.<sup>6</sup> Turkey is party to this Convention and is therefore internationally obliged to prevent and suppress the financing of terrorism. However, when fulfilling that obligation, Turkey is also under the obligation to assure compliance with its other obligations under international law, including human rights law. This implies, among other things, that the strict conditions under which human rights may be restricted, have to be respected, and that the aims of the suppression of the financing of terrorism have to be legitimate, proportionate and balanced against other public interests and human rights. UNSC Resolution 2462 (2019) calling upon UN Member States to combat and criminalise the financing of terrorists and their activities<sup>7</sup> sets out the obligation to “ensure that all measures taken to counter terrorism, including measures taken to counter the financing of terrorism (...), comply with their obligations under international law, international human rights law and international refugee law”.

### **B. The Financial Action Task Force (FATF) 2019 mutual evaluation report on Turkey and its recommendations**

9. Turkey has been a member of FATF since 1991. FATF has developed 40 recommendations which set out a comprehensive and consistent list of measures which countries should implement in order to combat money laundering and financing of terrorism, as well as the financing of the proliferation of weapons of mass destruction.<sup>8</sup> To assess the levels of implementation of the FATF Recommendations, the FATF conducts mutual evaluations of each member on an ongoing basis and provides an in-depth description and analysis of each country's system for preventing criminal abuse of the financial system, focusing on effectiveness and technical compliance as the key components of the mutual evaluation.

10. In December 2019, the mutual evaluation report on Turkey was published.<sup>9</sup> The report analysed the level of effectiveness of Turkey's anti-money laundering (hereinafter: AML) /combating financing of terrorism (hereinafter: CFT) system and the level of compliance with the FATF 40 Recommendations, and provided recommendations on how Turkey's AML/CTF system could be strengthened.

11. As to Recommendation 8 concerning non-profit organisations (hereinafter NPO; the – more common - term “NGO” will be further used when not quoting a document expressly referring to non-profit organisations), Turkey was found partially compliant. The relevant section of the report concluded that “Turkey's legal framework lacks specific procedures to periodically review NPO risk, to conduct outreach and guidance to NPO, or to work with

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<https://pace.coe.int/pdf/9ac20bc4b53b10363ada89a046f6f27b241d4e214bf91f522a494ef19e341c07/resolution%202376.pdf>, See also the Report (Doc. 15272) “The functioning of democratic institutions in Turkey”, adopted by the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the PACE, chapter 5.3 “Dissenting and Critical Voices under Pressure”, available at : <https://www.ecoi.net/en/file/local/2050294/doc.+15272.pdf>

<sup>6</sup> See also UNSC Res. 1373 and 2462, available at [https://undocs.org/S/RES/2462\(2019\)](https://undocs.org/S/RES/2462(2019)) .

<sup>7</sup> *Idem*.

<sup>8</sup> See, *International Standards on Combating Money Laundering and the Financing of Terrorism and proliferation (the FATF Recommendations)*, updated on October 2020, available at : [Documents - Financial Action Task Force \(FATF\) \(fatf-gafi.org\)](https://www.fatf-gafi.org/publications/fatfgafr/documents/financing-of-terrorism-and-proliferation/)

<sup>9</sup> See, *Anti-money laundering and counter-terrorist financing measures, Turkey, Mutual Evaluation Report*, available at : [Mutual-Evaluation-Report-Turkey-2019.pdf \(fatf-gafi.org\)](https://www.fatf-gafi.org/publications/mutualevaluations/mutualevaluationsdocuments/mutualevaluationreportturkey2019.pdf)

NPOs to develop best practices on preventing TF (terrorism financing) abuse. The primary vehicles for oversight in Turkish law, such as required financial statement and internal audits, are overseen by authorities who are not focused on TF and are aimed primarily at preventing fraud and mismanagement. The framework is ambiguous as to when audits will take place and the auditing that takes place routinely is not based on any assessment of TF risk.”<sup>10</sup>

12. A 2012 report by Statewatch and the Transnational Institute argued that the FATF’s program of promoting financial regulation had been abused by repressive governments to suppress civil society, limit dissent and otherwise violate human rights. After examining the effects of FATF regulation in nearly 160 countries, the report found that FATF rules are being used by governments as an instrument to limit the space of civil society to have free access to and distribute financial resources, among others for undertaking human rights work.<sup>11</sup> The World Bank in 2010 warned that “the rarity of instances of terrorism financing by NPOs, when contrasted against the enormous scope of the sector, does raise the question of whether, in and of itself, government regulation is the most appropriate response”.<sup>12</sup> In response to such concerns, the FATF in June 2016 revised its Standards and Methodology to clarify the subset of NPOs that should be subject to supervision and monitoring, bringing the Standards in line with the FATF *Typologies Report on Risk of Terrorist Abuse of NPOs* (June 2014) and the FATF *Best Practices on Combatting the Abuse of NPOs* (June 2015). In recent years, the FATF has spent considerable time and resources in promoting a result based approach and developing constructive engagement with the NPO sector.

### **C. The law-making process and the rationale behind the amendments introduced by Law No. 7262**

13. The Bill on Preventing the Financing of the Proliferation of Weapons of Mass Destruction<sup>13</sup> was submitted to the Presidency of the Turkish Grand National Assembly on December 16, 2020 and was approved by the latter on December 27, 2020. Law No. 7262 on Preventing the Financing of the Proliferation of Weapons of Mass Destruction entered into force on 31 December 2020.<sup>14</sup>

14. The Venice Commission has been informed that the legislative amendments introduced by Law No. 7262 were fast tracked, that is the two hearings by the Justice Commission of the TGNA were expedited, which limited the possibility of civil society and other interested stakeholders to provide meaningful input.<sup>15</sup>

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<sup>10</sup> See *ibid*, pages 181-182. FATF Recommendation 8 reads as follows: “Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including: (a) by terrorist organisations posing as legitimate entities; (b) by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and (c) by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations”.

<sup>11</sup> See, Transitional Institute/Statewatch, *Counter-Terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society*, available at : <https://www.statewatch.org/media/documents/analyses/no-171-fafp-report.pdf>; See also Charity and Security Network, FATF and Human Rights, available at : [https://charityandsecurity.org/issue-briefs/fatf\\_human\\_rights/](https://charityandsecurity.org/issue-briefs/fatf_human_rights/)

<sup>12</sup> See, *ibid.*, p.7.

<sup>13</sup> To be accessed at : [2-3261.pdf \(tbmm.gov.tr\)](https://www.tbmm.gov.tr/2-3261.pdf)

<sup>14</sup> To be accessed at: <https://www.resmigazete.gov.tr/eskiler/2020/12/20201231M5-19.htm>

<sup>15</sup> See *Mandates of the Special Rapporteur on the promotions and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders*, OL TUR 3/2021, III. i, 11 February 2021. See also: *Analysis of the Application of Financial Action Task Force Recommendations and its implications on civil society in Turkey*, Third Sector Foundation of Turkey, February 2021, p.18, available at : [https://www.tusev.org.tr/usfiles/images/MaliEylemGorevGucuSivilToplumEN\\_26022021.pdf](https://www.tusev.org.tr/usfiles/images/MaliEylemGorevGucuSivilToplumEN_26022021.pdf)

15. The rationale invoked by the Turkish authorities, while putting forward the Bill on Preventing the Financing of the Proliferation of Weapons of Mass Destruction, was to ensure full compliance with relevant UNSC resolutions<sup>16</sup> and the recommendations contained in the 2019 FATF report.<sup>17</sup>

16. During the virtual meetings with representatives of the civil society, the attention of the Venice Commission delegation was drawn to the fact that the scope of the changes introduced by Law No. 7262 was not limited to the prevention of proliferation of WMD and financing of terrorism, but went beyond the stated intention and negatively affected the civil society, *inter alia*, by further tightening the government's control on its activities. Similar concerns had been expressed in different reports of international organisations concerning the immediate effect of the adopted amendments.<sup>18</sup>

#### **D. The scope of the opinion**

17. Law No. 7262 is divided into two chapters. The first chapter, consisting of 6 articles, includes general provisions and definitions. It relies on UNSC resolutions and includes means and regulations to combat the financing of the proliferation of WMD. The second chapter of the Law, consisting of 36 articles, introduces amendments to six different laws, including Law No. 2860 on Aid Collection and Law No. 5253 on Associations.

18. The scope of this opinion is limited to the amendments to the Law on Aid Collection (articles 6, 9, 16 and 29) and the Law on Associations (articles 1, 3, 19, 21, 30A, 32 and 36), introduced by Law No. 7262, with a focus on articles affecting the functioning of the associations and foundations, as well as human rights defenders. The goal of the opinion is to assess the compatibility of the latest amendments with international human rights standards. Turkey is both party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the International Covenant on Civil and Political Rights (hereinafter: ICCPR). References to the Constitution of the Republic of Turkey concerning the application of international human rights standards will also be made.

### **III. Analysis**

#### **A. International standards**

##### **1. Freedom of association**

###### General remarks

19. The right to freedom of association is guaranteed by several international and regional human rights instruments, such as the 1948 Universal Declaration of Human Rights (UDHR, Article 20), the ICCPR (Article 22), and the ECHR (Article 11). It is also dealt with in an extensive volume of documents adopted by different international governmental and non-governmental organisations. Relevant international legal documents include, among others, Recommendation (2007) 14 of the Committee of Ministers of the Council of Europe on the Legal Status of Non-Governmental Organisations in Europe; the Council of Europe Fundamental Principles on the

<sup>16</sup> The following resolutions were cited: *UNSC resolution 1267(1999)* and subsequent *resolutions 1988 (2011), 1989 (2011), 2253 (2015) and 1373 (2001)*.

<sup>17</sup> See, *supra* (note 9).

<sup>18</sup> See, *supra* (note 15), See also *Resolution 2376 (2021) of the Parliamentary Assembly of the Council of Europe*, adopted on 22 April 2021, para, 23.3. See also a petition signed by 694 NGOs against the draft legislation on the grounds that it was unconstitutional and in violation of the right to assembly, available at: <https://siviltoplumsusturulamaz.org/>

Status of Non-governmental Organisations in Europe of 2002; the 2014 Joint Guidelines on Freedom of Association issued by the OSCE/ODIHR and the Venice Commission. The crucial role of freedom of association for the functioning of a democracy and for the exercise of other fundamental freedoms, has been continuously underlined, in parallel with the important role associations play in achieving goals that are in the public interest, thus contributing to the development and enforcement of democracy and human rights.<sup>19</sup>

20. Freedom of association is at the core of a modern democratic and pluralistic society. It serves “as a barometer of the general standard of the protection of human rights and the level of democracy in the country”.<sup>20</sup> Given the importance of associations, it is vital that their functioning is effectively protected by domestic law as “the way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned.”<sup>21</sup>

21. In addition to a negative obligation not to interfere with the rights and freedoms of associations and their members, the state has a positive obligation to secure these rights in domestic law and practice. This includes creating an enabling environment in which associations can operate. An enabling environment, inter alia, requires that the state provides access to resources and permits associations to seek, receive and use resources.<sup>22</sup>

#### Quality and procedural requirements of domestic regulating rules

22. Legislation concerning the freedom of association should be drafted with sufficient clarity, precision and certainty to ensure its correct application by the relevant implementing authorities.<sup>23</sup> In addition, its adoption should be accompanied by a broad, inclusive and participatory process, encompassing a wide range of stakeholders directly affected.<sup>24</sup> An open and transparent law-making process is one of the pre-requisites of participatory democracy, where associations engage in the development of law and policy at all levels.<sup>25</sup>

#### The freedom to organise the association

23. Associations should generally be self-governing. This means that internal functions of associations should be free from state interference. Any restrictions on their capacity to govern themselves will only be admissible if they have a legal basis, serve a legitimate purpose recognised by international standards and are not disproportionate in their effect.<sup>26</sup>

24. Associations should be free to determine their internal management structure, and their highest governing bodies. Public authorities should not interfere with an association's choice of its management or representatives, except where the persons concerned are disqualified from holding such positions by law, and this law is compliant with international standards.

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<sup>19</sup> See, Committee of Ministers, CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe, preamble, para. 2.

<sup>20</sup> See, Venice Commission, CDL-AD(2011)035, Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, para. 41.

<sup>21</sup> See, Venice Commission, CDL-AD(2011)003 – Opinion on the compatibility with universal human rights standards of article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, para.72.

<sup>22</sup> See, CDL-AD(2014)046, Joint Guidelines of the Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on Freedom of Association, paras. 71-75.

<sup>23</sup> See, ECtHR, *Cumhuriyet halk partisi v. Turkey*, application no.19920/13; judgment of 26.04.2016, paras. 86, 97 and 105.

<sup>24</sup> See, International Labour Organization, Digest of decisions and principles of the Freedom of Association, Committee of the Governing Body of the ILO, fifth (revised) edition, 2006, para. 1072.

<sup>25</sup> See, Committee of Ministers, CM/Rec(2007)14, paras. 76 and 77; See also UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Article 8.

<sup>26</sup> See, *Joint Guidelines*, paras. 169 and 171.

25. Cases of external intervention in the running or management of associations should only be undertaken in extremely exceptional circumstances. Intervention should only be permissible in order to bring an end to a serious breach of legal requirements, such as in cases where either the association concerned has failed to address this breach, or where there is a need to prevent an imminent breach of the said requirements because of the serious consequences that would otherwise follow.<sup>27</sup>

The freedom to seek, receive and use resources for purposes for which the association was established

26. As outlined in Principle 7 of the Joint Guidelines on Freedom of Association drafted by the Venice Commission and ODIHR, "Associations shall have the freedom to seek, receive and use financial, material and human resources, whether domestic, foreign or international, for the pursuit of their activities."<sup>28</sup> It is seen as an important condition for an association to be able to exist and to exercise its functions and fulfil its mission in an independent way.<sup>29</sup> Even though the resources received by associations may legitimately be subjected to reporting and transparency requirements, such requirements shall not be unnecessarily burdensome.<sup>30</sup>

27. The right of associations to seek resources, as an inherent part of the right to freedom of association, is not an absolute but a qualified right. It may, however, only be restricted under the three cumulative conditions foreseen in, inter alia, Article 11(2) of the ECHR and Article 22(2) of the ICCPR: 1) the restriction shall be prescribed by law (condition of legality, including the requirements of foreseeability and accessibility); 2) the restriction shall pursue at least one of the legitimate aims exhaustively indicated in Article 11(2) ECHR and Article 22(2) ICCPR<sup>31</sup> (the condition of legitimacy), and 3) the restriction shall be necessary in a democratic society to achieve that legitimate aim (the condition of necessity requiring also proportionality).<sup>32</sup>

The conditions for restrictions to the freedom of association

28. Any restriction on the right to freedom of association and on the rights of associations, including sanctions, shall be prescribed by law and must have a legitimate aim. The relevant international standards also embody a proportionality test, meaning that the least intrusive means should be applied. Moreover, restrictions must never entirely extinguish the right nor deprive it of its essence.<sup>33</sup> The principle of proportionality is of the utmost importance in the assessment of whether an association may be prohibited or dissolved as these actions shall always be measures of last resort.<sup>34</sup>

29. The expression "Prescribed by law" refers not only to the requirement for the impugned measures to have a basis in domestic law, but also to the quality of the law, which has to be

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<sup>27</sup> See, *Idem*, paras. 174 and 177.

<sup>28</sup> See, *Joint Guidelines*, principle 7, para. 32; See also, Committee of Ministers, *CM/Rec(2007)14*, para. 50.

<sup>29</sup> See, Venice Commission, CDL-AD(2019)002 - Report on funding of associations, para.18.

<sup>30</sup> See *Idem*, para.139.

<sup>31</sup> Both Instruments provide similar grounds for these restrictions "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.

<sup>32</sup> See, Venice Commission, CDL-AD(2019)002 - Report on funding of associations, para. 9.

<sup>33</sup> See, *Joint Guidelines*, Principle 10, see also, Venice Commission, DL-AD(2019)002 - Report on funding of associations, para 147.

<sup>34</sup> See, *Joint Guidelines*, paras. 113-115. See also, Venice Commission, CDL-AD(2019)002 - Report on funding of associations, para. 116. And see, ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, application no. 37083/03, judgment of 8 October 2009, paras 82 and 83.



precise, certain and foreseeable, in particular in the case of provisions that grant discretion to state authorities.<sup>35</sup>

30. The only legitimate aims for restrictions recognised by international standards are national security or public safety, public order, the protection of public health or morals and the protection of the rights and freedoms of others.<sup>36</sup> However, this does not mean that Contracting States may take any measures they deem appropriate for the protection of national security, public security or any of the legitimate aims for restriction listed in the second paragraphs of Article 11 ECHR and 22 ICCPR. Apart from the required legal basis mentioned above and the need for the limitation grounds listed in the human-rights provision concerned to be at stake, additionally, the limitation must be "necessary in a democratic society". The latter requirement amounts, according to standing case-law of the European Court of Human Rights, to that of "a pressing social need".<sup>37</sup>

31. Restrictions relating to the online activities of associations are subject to the same principles of proportionality, legality and necessity in a democratic society as any other limitations.<sup>38</sup> The blocking of websites of associations, or of certain sources of information or communication tools, can have a significantly negative impact on associations. Security measures should be temporary in nature, narrowly defined to meet a clearly set out legitimate purpose and prescribed by law. These measures should not be used to target dissent and critical speech.<sup>39</sup>

## **2. National security and public safety as grounds for limiting certain human rights**

32. The security of the State and its democratic institutions, and the safety of its population, are vital public and private interests that deserve protection, if necessary at high costs.<sup>40</sup> Under international law, States are obliged to provide protection to the State and its inhabitants.<sup>41</sup> As the European Court of Human Rights has held, the protection of the right to life "may also imply in certain well-defined circumstances a positive obligation on the part of the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual".<sup>42</sup>

33. In most situations, the right way to control those who threaten State security and public safety as well as the rights and freedoms of others, is not to give more powers to the executive authorities to restrict personal rights and freedoms, but to strengthen democracy and the Rule of Law, which are precisely meant to protect the individual against arbitrary and disproportionate restrictions of his human rights and freedoms by the authorities.<sup>43</sup> Indeed, States may be

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<sup>35</sup> See ECtHR, *Aliyev and others v. Azerbaijan*, application no.28736/05, judgement of 18 December 2008, para. 35.

<sup>36</sup> See, e.g. *European Convention on Human Rights* (Article 8.2; Article 9.2, Article 10.2 and Article 11.2), ICCPR (Article 18.3, Article 19.3 a and b, Article 21, Article 22.2).

<sup>37</sup> See Venice Commission, CDL-AD(2019)002 - Report on funding of associations, B.

<sup>38</sup> See, *Joint Guidelines*, para. 263

<sup>39</sup> See, *Joint Guidelines*, para. 270, referring to the 2013 Report by Ian Brown, *Report on Online Freedom of Expression, Assembly and Association and the Media in Europe*, MCM(2013)007, available at <https://rm.coe.int/1680484e7e>

<sup>40</sup> See, Venice Commission, CDL-AD (2006)015, *Opinion on the Protection of Human Rights in Emergency Situations*, 4 April 2006, para. 5.

<sup>41</sup> See Parliamentary Assembly of the Council of Europe, *Resolution 1840 (2011), Human Rights and Fight Against Terrorism*, para. 2.

<sup>42</sup> European Court of Human Rights (ECtHR), *Osman v. United Kingdom*, application no. 23452/94, judgment of 28 October 1998, para. 115; see also, *Branko Tomašić and Others v. Croatia*, application no. 46598/06, judgment of 15 January 2009, para. 50.

<sup>43</sup> See the third paragraph of the Preamble of the Universal Declaration of Human Rights.

inclined to use their power of limiting certain rights for other purposes or to a larger extent than is justified by the prevailing situation.<sup>44</sup>

34. Effective measures taken by national legislative and executive authorities to protect State security and public safety may require and justify limitations of, and - if the life of the nation is at stake – even a temporal derogation from certain human rights and freedoms. This justification has found recognition in human rights treaties<sup>45</sup>. However, these same treaties stipulate the conditions under which limitations and derogation may be justified, while some of them have set up a specific mechanism to supervise whether, in using the room for restrictions left in the treaty concerned, the national authorities have used their power for the right purpose and have struck a fair balance between the interests involved. In this respect, Article 17 of the European Convention of Human Rights has also to be taken into account, which states that nothing in that Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. In addition, Article 18 of the same Convention stipulates that the restrictions permitted under the Convention shall not be applied for any purpose other than those for which they have been prescribed.

35. According to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association: “Combating fraud, embezzlement, corruption, money-laundering and other modes of trafficking is legitimate, and may qualify as being in the ‘interests of national security, public safety, or public order’. Nevertheless, it is not sufficient to simply pursue a legitimate interest, as limitations need also to be prescribed by law and “be necessary” in a democratic society. In this regard, limitations must be proportionate to the interest to be protected and must be the least intrusive means to achieve the desired objective.”<sup>46</sup>

## **B. The constitutional framework**

36. Article 90 of the Constitution of the Republic of Turkey stipulates that national legislation in Turkey may not be applied in contradiction with the standards of the international obligations. The aims and duties of the state are declared in Article 5 of the Constitution (the section of irrevocable provisions) *inter alia* safeguarding democracy, fundamental rights and justice in a state ruled by law. Everyone is equal before the law as stipulated in Article 10. Article 11 further underscores the supremacy and binding force of the Constitution, which no domestic laws may contravene. The Constitution affords strong protection to fundamental rights. Article 13 of Chapter I states:

*i. Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.*

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<sup>44</sup> See the observations of the UN High Commissioner on Human Rights, *UN Doc.E/CN.4/2002/18*, § 31. See also: European Commission for Democracy through Law, *Emergency powers*, Collection Science and technique of democracy No. 12 (1995), p.4; *idem*, *Human rights and the functioning of the democratic institutions in emergency situations*, Collection Science and technique of democracy No. 17 (1996), p. 143; *idem*, *Rule of law checklist*, 18 March 2016, CDL-AD (2016)007, para 51.

<sup>45</sup> See, e.g., for the European Convention on Human Rights, on the one hand, the second paragraphs of Articles 8 (“national security, public safety”, 9 (“public safety”), 10 (“national security (...) or public safety”) and 11 (“national security or public safety”) and, on the other hand, Article 15. The first four provisions mentioned also refer to “the protection of the rights and freedoms of others” as a possible ground for limitation.

<sup>46</sup> See, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, *Report to the UN Human Rights Council (Funding of associations and holding of peaceful assemblies)*, UN Doc. A/HRC/23/39, 24 April 2013, para. 35.

37. Article 14 of the Constitution prohibits the abuse of fundamental rights and freedoms in the same way as Article 17 of the ECHR.

38. Article 33 protects both the positive and negative aspects of freedom of association in a similar vein as the international human rights counterparts. Foundations are mentioned as entities requiring protection.

*i. Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission. No one shall be compelled to become or remain a member of an association. Freedom of association may be restricted only by law on the grounds of national security, public order, prevention of commission of crime, public morals, public health and protecting the freedoms of other individuals. The formalities, conditions, and procedures to be applied in the exercise of freedom of association shall be prescribed by law. Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. However, where it is required for, and a delay constitutes a prejudice to, national security, public order, prevention of commission or continuation of a crime, or an arrest, an authority may be vested with power by law to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his/her decision within forty-eight hours; otherwise, this administrative decision shall be annulled automatically.*

39. Finally, Article 148 of the Constitution allows for individual applications to the Constitutional Court “on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. [ ]”

40. The constitutional framework of Turkey integrates the international standards protecting freedom of association. The Constitutional Court of Turkey has underscored the principle of proportionality with regard to the restriction of fundamental rights:

*i."(...) in accordance with the principle of proportionality, there must be a reasonable balance between the legislation introduced and the aim to be achieved. This underlying principle of proportionality allows the necessary measures to be taken in order to achieve the aim but does not allow resorting to measures unnecessary for the aim and the disproportionate restriction of the right in question. In a democratic society, the restrictions on fundamental rights and freedoms should not be more than the aim pursued by this limitation. The principle of proportionality does not allow the use of a heavier restrictive means, while a lighter means of restriction can be preferred to achieve a legitimate aim." <sup>47</sup>*

41. The Venice Commission notes that the Action Plan of Turkey on Human Rights adopted in March 2021, *inter alia* relies<sup>48</sup> on the principle of legality/legal certainty<sup>48</sup> and aims at protecting and promoting the freedom of association. However, the Commission echoes the concern expressed by the international community that the document is not precise enough to address

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<sup>47</sup> See, *Decision of the Constitutional Court of Turkey* delivered on 08.10.2015, AYM, E. 2014/140, K. 2015/85, available at: <https://www.lexpera.com.tr/resmi-gazete/metin/RG801Y2015N29542S201585/1>

<sup>48</sup> See, *Action Plan of Turkey on Human Rights*, March 2021, available at : [insan-haklari-ep-eng02-03-202115-16.pdf \(adalet.gov.tr\)](https://adalet.gov.tr/insan-haklari-ep-eng02-03-202115-16.pdf), principle 5 “The legislation contains sufficiently clear, non-ambiguous, understandable and foreseeable rules not to allow any doubt”, aim 4 “Protection and Promotion of the Freedoms of expression, association and religion”.

particular issues of concern, as it lacks benchmarks, timelines and specific actions which would make it a practical and effective tool for the realisation of various rights enshrined therein.<sup>49</sup>

### **C. Law No 7262 in the light of international standards and the provisions of the Turkish Constitution**

Para number As mentioned above, Law No. 7262 consists of 44 articles in total, grouped into two chapters. Chapter I ('General Provisions') comprises 6 articles specifically devoted to the implementation of the UNSC Resolution concerning the financing of terrorism, while Chapter II ('Amended and Abolished Provisions') amends 6 existing laws, including those regulating activities of civil society organisations. While Chapter I is clearly aimed at implementing the UNSC Resolutions on the financing of proliferation of weapons of mass destruction (see Articles 1-3, with the further references in Articles 4-6), chapter II, (Articles 7-44) does not appear to be related to the Law's general intent of implementing the UNSC Resolutions concerning financing of proliferation of weapons of mass destruction.

#### **1. Restrictions imposed on aid collection activities**

42. Articles 7, 8 and 10 of Law No. 7262 amending Articles 6, 9, 29 of the Law on Aid Collection referring to any association are not specifically related to the cause of countering terrorism under the relevant UNSC Resolutions and carry a potential for very serious interference with, and impediment to the aid collecting activities of persons, in particular NGOs.

43. With Article 7 of Law No. 7262, a new paragraph has been added to Article 6 of Law No. 2860 on Aid Collection. It concerns online aid campaigns and stipulates that in cases where an unauthorised aid collection activity is conducted on the Internet, the relevant governorship or the Ministry of Interior shall in an email or other communication to the Internet service provider request the removal of the content on fundraising. This means that obtaining a permission before launching online aid campaigns has become mandatory. According to this new amendment, upon the detection of an unauthorised online aid campaign, the Ministry of Interior can request a penal judge of peace to block access to an unauthorised online fundraising activity within 24 hours. The judge will decide without a hearing. This amendment tightens the government's control over the civil society fundraising activities. The Venice Commission suggested in a previous opinion on a similar matter that, even before the issuance of a warning, the association should be offered the possibility to seek clarifications about the alleged violation.<sup>50</sup>

44. The Venice Commission reminds the Turkish authorities of the requirement that the right of associations to seek resources, which in a modern digital era would be impossible to materialise without carrying out online activities, can only be restricted under the three cumulative conditions elaborated in paragraph 27 above. The Venice Commission finds it difficult to see how the Turkish authorities can demonstrate that the blanket restriction imposed by the amended Article 6 of the Law on Collecting Aid on the right of NGOs to fundraising is necessary to avert a real and not only hypothetical threat of the financing of terrorism and that less intrusive measures would not be sufficiently effective to achieve the same purpose<sup>51</sup> and that consequently, the restriction is proportionate to the interest protected.

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<sup>49</sup> See, *Resolution 2376 (2021) of the Parliamentary Assembly of the Council of Europe*, adopted on 22 April 2021, para. 21.

<sup>50</sup> See, Venice Commission, CDL-AD (2018)004 Romania – *Joint Opinion on Draft Law No. 140/2017 on amending governmental ordinance No. 26/2000 on associations and foundations*, para. 81.

<sup>51</sup> See, Venice Commission, CDL-AD (2019)002, *Report of funding of associations*, para. 9 referring to Human Rights Committee, *Mikhailovskaya and Volchek v. Belarus*, CCPR/C/111/D/1993/2010 (July 2014), para. 7.3; See also, Human Rights Committee, Communication No. 2001/2010, *Q v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

45. Article 8 of Law No. 7262 adds a paragraph to Article 9 of the Law on Aid collection where “the procedures and principles regarding the aid to be made in the country and abroad shall be arranged through a regulation.” This amendment could be considered as running counter to the principle of legality and legal certainty, enshrined in Article 13 of the Constitution of Turkey, requiring that restrictions to freedom of association shall be provided by law, as well as with the principles of legality and legal certainty (including requirements of foreseeability and accessibility) enshrined in Article 11 of the ECHR and Article 22 of the ICCPR.<sup>52</sup>

46. The amended Article 29 of the Law on Aid Collection has introduced heavy administrative fines for organisations that engage in unauthorised fundraising activities and for those which provide internet domains for such activities, as well as a possibility to seize the funds that have been collected without authorisation (per Article 10 of Law No. 7262). The major difference between the lower limits and upper limits of the prescribed administrative fines (5.000-100.000 or 10.000-200.000) paves the way for arbitrary abuse and constitutes a violation of the principle of legal certainty and predictability. The minimum amount of the fine is fixed at five thousand Turkish Liras irrespective of whether it is imposed on ‘persons or entities collecting aid in violation of the provisions of this Law’, or ‘persons or entities who provide facilities or venues for unauthorised aid collection in cases where they do not terminate such activity despite being warned’, or ‘responsible board members in cases where foreign aid is provided in violation of the authorisation granted pursuant to Article 9 of this Law’, or ‘those violating Paragraph (3) of Article 16 of this Law’, or ‘those who do not terminate collecting aid without authorisation according to other aid collection methods specified in Article 5, apart from the authorised method, despite being warned’, or any persons or entities carrying out aid collection activities outside of a permitted venue in cases where they do not terminate such activity despite being warned’. The minimum amount of the fine is established at a rather high level, without allowing for a further reduction taking into account the nature and the gravity of the violation, thus countering the proportionality principle.

47. On the other hand, the provision that ‘An administrative fine from five thousand Turkish Liras up to one hundred thousand Turkish Liras shall be imposed on persons or entities collecting aid in violation of the provisions of this Law’ (Article 10, para.1) covers all the more specific conducts that may lead to impose a fine according to the following paragraphs. The conduct of ‘persons or entities collecting aid in violation of the provisions of this Law’ is clearly broader than that of e.g. ‘persons or entities who provide facilities or venues for unauthorised aid collection in cases where they do not terminate such activity despite being warned’, and so on. Therefore, while enforcing the law, administrative authorities are given the power of choosing between one or the other provision with respect to the same conduct. Such power amounts to a violation of the principles of foreseeability, reasonableness and proportionality.<sup>53</sup> Moreover, administrative fines are imposed by administrative authorities without any judicial review, although those fines have the character of “criminal charge” in the sense of Article 6 of the European Convention of Human Rights.

48. Article 16 of the Aid Collection Law (per Article 9 of Law No. 7262) grants inspectors the authority to request information and documents from those involved in fundraising activities without a court order. The legitimacy and necessity of this power can be questioned, as it represents a potentially wide and unchecked interference with the right to privacy of the clients, members and founders of civil society organisations.<sup>54</sup>

49. The Venice Commission is of the opinion that the provisions relating to aid collection activities of associations amount to a very serious restriction of the freedom of association. Moreover, the amendments pave the way for arbitrary application and for discriminatory

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<sup>52</sup> See also, Venice Commission, CDL-AD (2016)007, Rule of Law Checklist, II.A-B.

<sup>53</sup> *Idem*, II, C.

<sup>54</sup> See, Joint Guidelines, para. 228, see also, CDL-AD (2019)002, Report on funding of associations, para. 13.

measures. The Commission recognises that, in principle, funds may be used to finance terrorist activities. However, in their indiscriminate scope the legal provisions do not seem to meet the requirements of necessity and proportionality. Moreover, it is doubtful whether all restrictions introduced are in conformity with the requirement that they have to be provided by law. The system of judicial review is restricted and, in the case of administrative fines, lacking.

## **2. Termination of assignments in administrative roles of those convicted of terrorism-related offences (amended Art. 3 of the Law on Associations)**

50. Article 12 of Law No. 7262 adds a new paragraph to Article 3 of Law No. 5253 (the Law on Associations), which now provides that those convicted of crimes within the scope of Law No.6415 on the Prevention of Financing of Terrorism, crimes of producing and trading narcotics or psychotropic substances (Turkish Criminal Code No. 5237,Article 188), or the crime of laundering assets acquired from such offences (TCC, Article 282), are banned from holding office in civil associations, other than the general assembly, after the regular period of suspension of civil privileges of persons convicted of an intentional crime under Article 53 of TCC, has ended, even if those persons are pardoned.

51. The indefinite ban to re-enter a managerial position within an NGO goes against the general rules of the Turkish Penal Code. The amended Article 53 of the Turkish Penal Code entails the principle that the deprivation of rights, which was indefinite in the past, has to be time-bound. This should apply in particular in the field under consideration in the light of the broad interpretation and wide application of anti-terror laws in Turkey. It is furthermore in line with ECtHR case-law regarding the principle of the reintegration into society of a convicted person.<sup>55</sup> The length of any deprivation of rights must respect the principle of proportionality.

## **3. Scope of audits and risk assessment of NGOs to identify terrorist abuse (amended Article 19(2) of the Law on Associations)**

52. Article 13 (1) of Law No. 7262 introduces in an amended Article 19 (2) of the Law on Associations changes regarding auditing, where the Minister of Interior is now authorised to assign a public official (any civil servant) to carry out the auditing every year, provided that it is completed within a maximum of three years in accordance with a regularly updated risk assessment – to determine whether NGOs carry out their activities in accordance with the purposes stated in their by-laws and if they keep their books and records in line with the legislation.

53. In addition, according to Article 9 of Law No. 7262, auditors within the scope of their mandate, are empowered to request information and documents from all public institutions and natural and legal persons, including banks.

### *a. Aims for auditing associations*

54. While the revised Article 19(2) of the Law on Associations makes an explicit reference to risk assessment, the nature of the risks to be assessed and the way of assessing them are not defined. There is no mention of the need for the audit to check the relation with terrorist financing, money laundering or terrorist activities in the amended provision of Article 19 (2). The FATF Recommendations Nos. 1 and 8 stress that a risk-based focus must be applied in combating the financing of terrorism. The risk-based approach requires that the measures introduced to prevent the risk must correspond to the risks identified. In this way NGOs and a diversity of civil society are protected from an all-encompassing control by the authorities independent of their vulnerability to terrorism financing.

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<sup>55</sup> See, ECtHR, *Murray v. the Netherlands* [GC], application no.10511/10, judgment of 26.04. 2016, § 101.

55. The focus of the obligatory audit under Article 19 (2) concerns whether the NGOs conduct their activities in accordance with the objectives stated in their statutes and whether their records and books are kept in pursuant of the legislation and thus does not appear to refer to risks and vulnerability towards terrorist financing and money laundering, issues not mentioned in the provision.

56. It was confirmed during the virtual meeting of the Venice Commission representatives with the Ministry of Interior that the risk assessment which is introduced in the amended Article 19 is conducted prior to the audit of associations and that depending on the risk category assigned to the association (low, medium, high), the relevant type of audit is carried out, its intensity being proportional to the risk category. The representatives of the Ministry of Interior also informed the rapporteurs that the provision and the audit concern all NGOs. However, if in accordance with a prior risk assessment, an association is ranked in the high-risk category, then while checking the compatibility of its activities with their objectives, the audit will also look into the relevant risk regarding terrorist financing. This seems to confirm that the risk-assessment is a pretext for increased government control of the NGOs and that the main priority is not to detect the irregularities amounting to crime.

57. Making audits for associations a regular and mandatory affair will cause highly cumbersome audit processes considering the large number of NGOs in Turkey. Measures taken, referring to the wording of the provision in Article 19, are applied to all NGOs, without making any differentiation in terms of vulnerability to terrorist abuse. In addition, the fact that audits will be conducted by public officials who may not have the necessary experience to undertake this duty raises concerns over the efficiency of audits – leaving aside the dubious aim - while laying unduly burdens upon the associations concerned.

*b. The lack of legal basis for risk-assessment*

58. The provisions of the Law are applied indiscriminately to the entire civil society sector, rather than to the specific NGOs identified as being vulnerable to financing by terrorist entities. In other words, focused and proportionate measures in line with the risk-based approach recommended and required by the FATF are missing.<sup>56</sup>

59. As the indicators and criteria underlying the risk-assessment are not mentioned or defined in the law, this assessment as a basis for further measures appears devoid of any clear legal basis and therefore appears to be at odds with Article 13 of the Turkish Constitution.

60. During the virtual meeting with the Ministry of Interior of Turkey, the rapporteurs were informed that when NGOs are found at risk of abuse, the Ministry of Interior does not provide them with any explanation on how that conclusion was reached. Furthermore, the interlocutors confirmed that further details about the risk-assessment methodology used was only available to the ones assessing the risk while NGOs and civil society have no access to such information. However, they need such information, in order to acquaint themselves with the grounds for their ranking in risk-categories so they may appeal against such decision in case they want to. FATF Recommendation 8 stresses the importance of the co-operation between the public sector and civil society while mitigating the risks and developing strategies, increasing awareness, and fostering their ability to combat terrorist financing abuse within the NGOs in civil society. This recommendation seems not to have been followed by the Turkish authorities.<sup>57</sup> Furthermore, there appear to be no space available to NGOs to voice their concern and objections.

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<sup>56</sup> See, *supra* (note 8), *Interpretative Note to Recommendation 8*, p.58.

<sup>57</sup> The Ministry of Interior during the virtual meeting with the Venice Commission maintained that the criteria regarding the risk assessment were to be found in secondary legislation.

61. In light of these ambiguities and lack of transparency, the Venice Commission is concerned that there is a risk of misuse of these audits for the purpose of deterring civil society activism aimed at criticizing authorities under the pretext of conducting a “risk assessment”. The frequency and scope of audits, without a clear legitimate purpose, may result in an almost permanent and rather arbitrary control of the functioning of associations, that may lead to an unjustified infringement of their “freedom to seek, receive and use resources” (Principle 7 of the Joint Guidelines) and “freedom to determine objectives and activities, including the scope of operations” (Principle 4 of the Joint Guidelines) that lie at the core of Article 33 and 13 of the Constitution of Turkey as well as Article 11 of the ECHR and Article 22 of the ICCPR. Moreover, in the opinion of the Venice Commission, it is very likely that this system of audits transgresses the boundary of what is necessary and proportional. In addition, the provision in paragraph 2 of the amended Article 19 does not comply with the principles of predictability and certainty as an NGO found to be in a high-risk category (at present 170 NGOs according to the Ministry of Interior) has no way of knowing and understanding the necessary details of the procedure, not even with professional help, so that the relevant NGO can determine its conduct.<sup>58</sup>

*c. Legitimate purpose of counterterrorism*

62. The auditing requirements adopted by the government seem to cover all NGOs: the obligatory auditing of over 122 thousand NGOs raises serious doubts about the authorities’ stated objective with the current amendment. Under the pretext of conducting a “risk assessment”, the measures introduced are overly far-reaching and will have a chilling effect on any NGO, especially those taking a critical stance towards authorities, which is one of the crucial roles expected of vigorous associations upholding democratic society.

63. The Venice Commission reiterates that restrictions on the freedom of association can be considered to pursue legitimate purposes only if they aim to avert a real, and not only hypothetical danger. Any restrictions therefore can only be based on a prior risk assessment indicating “plausible evidence” of a sufficiently imminent threat to the State or to a democratic society. Abstract “public concern” and “suspicions” about the legality and honesty of financing of NGO sector, without pointing to a substantiated concrete risk analysis concerning any specific involvement of the NGO sector in the commission of crimes, such as corruption or money laundering cannot constitute a legitimate aim justifying restrictions to this right.<sup>59</sup> Moreover, the association concerned should be allowed ample opportunity to rebuke the suspicion on which the authorities base themselves.

*d. Increased sanctions for breach of auditing obligations*

64. Article 16 of Law No. 7262 amends Article 32 of the Law on Associations, which regulates penalties. Additional administrative fines are introduced for breach of obligations defined in Article 9 of Law concerning internal auditing and Article 19 (duty to submit declarations and auditing) as well as Article 21 which concerns the obligation to notify authorities about aid received from abroad and sent abroad (as amended by Article 14 of Law No. 7262).

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<sup>58</sup> See, the Constitutional Court of Turkey, *Yaman Akdeniz and others*, App. No: 2014/3986, 2/4/2014; *Youtube LLC Corporation Service Company and others [Plenary]*, App. No: 2014/4705, 29/5/2014, para 56-57). (

<sup>59</sup> See, Venice Commission, CDL-AD(2019)002 - Report on funding of associations, paras.61-62, see also *supra* (note 50), CDL-AD(2018)004, para. 81. And see, Venice Commission, CDL-AD(2018)006 Ukraine - Joint Opinion on Draft Law No. 6674 "On Introducing Changes to Some Legislative Acts to Ensure Public Transparency of Information on Finance Activity of Public Associations and of the Use of International Technical Assistance" and on Draft Law No. 6675 "On Introducing Changes to the Tax Code of Ukraine to Ensure Public Transparency of the Financing of Public Associations and of the Use of International Technical Assistance, see also CDL-AD(2017)015, Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary, para.36.



65. The sentence of imprisonment up to 3 months, foreseen in the first paragraph (k) of Article 32, has been increased to 1 year, with an additional administrative fine— applying to those who fail to comply with the obligations set forth in the third paragraphs of Articles 9 and 19, and fail to obtain a certificate from the competent court regarding the loss of books and documents within 15 days of becoming aware that these have become unreadable or are lost due to a reason beyond their control, or those who fail to present such a certificate during the audit.

66. Article 32 also stipulates an administrative fine from 5,000 to 100,000 Turkish Liras for violation of the obligation to notify about the aid sent abroad and the aid received from abroad, and the obligation to transfer the aid through a bank. The sanction in question is valid for all cases beyond the laundering of proceeds of crime and financing of terrorism given in the general reasoning of the law.

67. The Venice Commission notes with concern that a substantial increase in fines and penalties may lead to disproportionate sanctions and may have a chilling effect not only on associations, but also on their members and potential donors.

#### **4. Removal of the NGO administration and replacement of board members (Article 30/A (1) of the Law on Associations)**

68. New Article 30/A (“Suspension from office and temporary ceasing of activities”) of the Law on Associations as amended by Article 15 of Law No. 7262 allows the Minister of Interior to suspend staff members and / or executives of civil society organisations who are being prosecuted on terrorism-related charges (paragraph 1) and / or to cease the activities of the relevant associations if that measure is not sufficient (paragraph 2).

69. Paragraph (1) of Article 30/A grants the authorities (the Minister of Interior) the power to suspend persons assigned to the organs in an association in the event that a prosecution is launched for crimes listed in the Law on the Prevention of the Financing of Terrorism and crimes listed in the Turkish Criminal Code, concerning offences of manufacturing and trafficking of narcotics and psychotropic substances or offences related to laundering assets derived from criminal activities. The decision to remove board members / employees is not limited in duration.

##### *a. Lack of procedural guarantees*

70. The administrative decision to suspend from office or suspend activities can be appealed to court. However, there are doubts as to the compliance of this procedure of judicial review with the requirements of Article 6 of the European Convention. In a Report published on 19 February 2020, the Council of Europe Human Rights Commissioner pointed to a number of serious problems in the Turkish judiciary while dealing with terrorism related cases, which put at risk the respect of such fundamental principles as the presumption of innocence, no punishment without a crime, non-retroactivity of the law, or *non bis in idem*.<sup>60</sup> At the same time, procedural guarantees such as adversarial proceedings, equality of arms and the right to a lawyer appear to have been significantly and permanently eroded during the state of emergency, resulting in a level of legal uncertainty and arbitrariness which threatens the very essence of the Rule of Law.<sup>61</sup>

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<sup>60</sup> See, Country Visit Report, Commissioner for Human Rights of the Council of Europe, 19 February, 2020, available at: <https://www.coe.int/en/web/commissioner/-/turkish-authorities-must-restore-judicial-independence-and-stop-targeting-and-silencing-human-rights-defenders>

<sup>61</sup> See, *Ibid*, para. 118.

71. The Venice Commission's Joint Guidelines on freedom of association underscore the principle of the right to an effective remedy for the violation of rights for associations, their founders and members, and all persons seeking to exercise their right to freedom of association, in order to challenge or seek review of decisions affecting the exercise of their rights.<sup>62</sup> The judicial review provided for in the case of suspension from office/ceasing of activities – and a *fortiori* dissolution of an association -, is therefore of the highest importance and has to be exercised in a very speedy way, also in view of the principle of presumption of innocence. The courts must have the power, by way of provisional measure, to lift the measures taken. The procedures have to be fair and transparent.

*b. Appointment of trustees*

72. Following the implementation of a decision to remove board members / employees of an NGO the Minister of Interior may, by court order, replace them with trustees on the basis of the Law on Associations and the Civil Code. Prior to this amendment, the appointment of trustees by court order was only possible for public benefit associations defined by Article 27 of the Turkish Civil Code and related Articles of the Turkish Civil Code. This possibility is now extended to all associations through reference to Article 89 of the Turkish Civil Code entitled "Dissolution by Court". If organs or employees of an association are suspended, then a trustee / trustees can be appointed to replace them.<sup>63</sup>

73. It is not provided for that these appointments require in any way the consent of the members of the association or its board. There are furthermore no restrictions on the actions of trustees once they take up their position. They have no duty to act in the interest of association and its members. Consequently, such a measure constitutes a serious infringement of the right of associations to conduct their own affairs and is neither necessary nor proportional, since there are several ways of consultation that might soften the interference if such a measure would be necessary at all. Disproportionate measures like this one could amount to altering the nature of an independent association and tightening the government control over it since there is a high risk that the authorities will appoint individuals who are loyal to the government and not to the agenda of the relevant association.

*c. Suspension of the NGOs' activities and their possible dissolution (Article 30/A (2))*

74. The amended paragraph 2 of Article 30/A of the Law on Associations gives the Minister of the Interior the power to suspend the activity of an association temporarily and refer the decision to a court if the removal of the administration and/or employee(s) is not sufficient. The court must rule on the matter within 48 hours; however, there is no time limit for initially submitting the Minister of Interior's decision to the court. The court decides on the legality of the decision of the Minister of the Interior and can confirm the temporary cease of activities. In this case the judicial proceedings continue in accordance with article 89 of Turkish Civil Law and may result in the dissolution of the association.

75. The Venice Commission reiterates that the principle of proportionality gains increased significance when assessing whether an association may be prohibited or dissolved<sup>64</sup> as such measures should always be a means of last resort, i.e. in cases where an association is engaged in conduct representing an imminent danger of violence or other serious breach of the law. Even though the second paragraph of Article 30/A of the Law on Associations refers to only

<sup>62</sup> See, *Joint Guidelines*, principle 11, p.19.

<sup>63</sup> Turkish Civil Code No. 4721; Dissolution by Court, Article 89: If the aims of the association are not compatible with the legislation and ethics, the court may order that dissolution of the association upon the request of a public prosecutor or any other concerned person. The court takes all the necessary measures during the proceeding of the case, including suspension of activity.

<sup>64</sup> See, *Joint Guidelines*, paras. 113-115.

temporary suspension of the activity of an association, this could be just an initial step leading to the dissolution of the association as discussed in the previous paragraph. Therefore, the relevant international standards concerning dissolution which, in contrast to a temporary suspension, represents a measure of last resort, have to be observed. The principles of necessity and proportionality should be complied with also in case of temporary suspension. The ECtHR has stated that involuntary dissolution is the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances for very serious misconduct.<sup>65</sup> Domestic law should thus delimit precisely the circumstances and reasons for such drastic sanctions.<sup>66</sup> The Venice Commission has also generally assessed that “the dissolution of an NGO is an extreme measure, which needs to be based on a well-founded rationale and it is well established under the international case-law that it can only be resorted to in exceptional situations.”<sup>67</sup>

76. Article 33 of the Turkish Constitution, which protects freedom of association, provides that this freedom may be restricted only by law on the grounds of national security, public order, prevention of crime etc., and may only be suspended by court decision and that the decision of an authority vested with the power to suspend the activities of an association shall be submitted for approval of the competent judge within 24 hours.

77. Article 30/A (2) does not include the constitutional requisite for the Minister of Interior to submit the decision to the court within 24 hours. As a consequence of the possible delay in the submission, the objections made against the decision may not be examined right away and the so-called temporary measure may *de facto* become (semi-)permanent. Therefore, the Venice Commission is of the opinion that the measure provided for in paragraph 2 of Article 30/A is not in line with the principle of proportionality and appears furthermore contrary to the basic law of the country. Further to the drastic measure of suspending the activities of the association, its assets may be frozen cf. Article 3 of Law No. 7262 enabling the President of the Republic to freeze the assets of an organization for alleged financing of terrorism.

78. In the Commission’s view, these measures, taken together with intensified audits of NGOs resulting from ambiguous and non-transparent risk-assessments, (Article 19 of the Law on Associations) and the chilling effect of increased prison sentences and high administrative fines for breach of auditing obligations, the prospect of the removal of NGO directors and board members and the replacement with trustees who are under no obligation to guard the interests of the relevant associations, are disproportionate and directly affect democracy and the Rule of Law.

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<sup>65</sup> See, ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov*, para. 62. The Court considered that a mere failure to respect certain legal requirements on internal management of NGOs cannot be considered such serious misconduct as to warrant outright dissolution (para. 82).

<sup>66</sup> See, CDL-AD (2019)002, para. 116.

<sup>67</sup> See, CDL-AD (2011)035, Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, para. 107. In the same vein, in its Opinion on the Hungarian draft Law on the transparency of organisations receiving support from abroad, the Venice Commission criticised the draft Law for imposing the sanction of dissolution on associations in case of breach of one of the transparency obligations, as laid down in the draft Law, regardless of the nature of the obligation breached (CDL-AD(2017)015, para. 60). Considering that it was not convinced that any failure to fulfil the reporting or disclosure obligations stemming from the draft Law could be qualified as “serious misconduct” which would justify the imposition of the sanction of dissolution, the Commission stated that the dissolution of an association can only be proportionately pronounced by courts in cases where an association is engaged in criminal activity; however, the dissolution appears as a disproportionate measure in case of simple failure to fulfil the reporting obligations stemming from the law (CDL-AD(2017)015, para. 62).

## 5. Foreign associations

79. Article 17 of Law 7262 amending Article 36 of the Law on Associations makes Turkish law applicable to the activities in Turkey of associations with headquarters abroad, including legal provisions about data reporting. This means that those associations may also experience serious interferences with their right to freedom of association, through their branches and representations. This may result in violation of that right, since any person lawfully in a state party to one of the human rights treaties, foreigner or not, is entitled to the protection of his or her right of freedom of association. This broad applicability may discourage several of them from being active in Turkey, also given the high fines and the ambiguity of the definitions of prohibited activities, notably, the notions of “collaboration” and “cooperation”, and especially the criteria and procedure of “risk assessment.” Moreover, it is not clear who will incur the fines imposed and whether that imposition may be a repetitive measure.

80. Moreover, these entities need permission for any operation and cooperation activity in Turkey. There appears not justification for such an interference, as the foreign associations need to comply with the same conditions as national ones to register and function. The European Court of Human Rights has found in respect of religious associations that “no reasonable and objective justification for a difference in treatment of [...] (nationals) and foreign nationals as regards their ability to exercise the right to freedom of religion through participation in the life of organised religious communities.” The Commission is of the view that the same principle of non-discrimination of foreigners applies to ordinary associations.

81. In its indistinctive character, this curtailment of the right to freedom of association of foreign partners, when applied without convincing arguments that they are engaged in the financing of terrorist groups or actions, does not meet the requirements of necessity and proportionality. Article 16 of the European Convention of Human Rights, which leaves some room for the restriction of political activities of foreigners, should not, in the opinion of the Venice Commission, provide justification for these generally formulated restrictive rules.

### D. Procedure used for the adoption of the Law 7262.

82. Law No 7262 was adopted in a speedy way. The two hearings by the Justice Commission of the TGNA were expedited without broad consultations. Civil society and other interested stakeholders did not get a chance to provide any meaningful input in line with the Guidelines of Freedom of Association which provide that: “Associations should be consulted in the process of introducing and implementing any regulations or practices that concern their operations.”<sup>68</sup>. Recommendation 2007(14) of the Committee of Ministers of the Council of Europe on the Legal Status of Non-Governmental Organisations in Europe stipulates that “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation” (para. 77). Moreover, the Explanatory Memorandum to the Recommendation clarifies that “it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed” (par. 139).<sup>69</sup>

83. The Commission has repeatedly underlined this procedural element of the quality of the legislative process: conducting a public consultation with civil society organisations prior to the

<sup>68</sup> See, Joint Guidelines (CDL-AD(2014)046), para. 106.

<sup>69</sup> See, CDL-AD (2018)013, Hungary - Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs, para.68.

adoption of legislation as well as public trust: conducting a consultation with civil society organisations prior to the adoption of legislation directly concerning such organisations therefore constitutes part of the good practices that the European countries should strive to adhere to in their domestic legislative processes.<sup>70</sup> The speedy adoption of Law No. 7262 does not seem to meet the above-mentioned requirements.

#### **IV. Conclusions**

84. The Venice Commission is fully aware of the difficult security situation faced by Turkey and the aspiration of the authorities to introduce effective measures to combat terrorism, including measures against its financing. However, the Commission would like to remind the Turkish authorities that even in such circumstances Member States have to comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law while taking any steps to counter terrorism. Respect for human rights and the Rule of Law are an essential part of any successful counter-terrorism effort.

85. The Venice Commission has been informed that the intention of the legislator was to comply with the recommendations provided by the 2019 FATF report on Turkey, as well as with the relevant UNSC Resolutions cited in the law. However, the Venice Commission notes with concern that the solution chosen by the legislator in Articles 7-17 of Law No. 7262. goes beyond that scope, since the new provisions apply to all associations, irrespective of their goals and records of activities, and lead to far reaching consequences for basic human rights, in particular the right to freedom of association and expression and the right to a fair trial.

86. The Venice Commission regrets that the law in question was adopted in a rushed manner without any consultation with civil society and other stakeholders, which is problematic from a democratic perspective – diminishing its legitimacy and acceptability as its “coercive power” depends on whether it is in conformity with justice and fairness in the eyes of the community whose fate it may determine.

87. The Venice Commission is of the opinion that the provisions relating to aid collection activities of associations could result in a serious restriction of their freedom of association. The Commission recognises that there is a risk of funds being used to finance terrorist activities. However, in their indiscriminate scope the new legal provisions on aid collection do not seem to meet the requirements of necessity and proportionality. On the other hand, the ambiguity in the wording of the amendments of the Law on Aid Collection, government control over online fundraising attempts in the absence of clear and objective criteria of permit applications, along with the authorities’ wide scope to apply sanctions, may have a negative impact on legitimate fund-raising activities of NGOs and thus violate their right to freedom of association.

88. The lack of a legal basis for risk-assessment and transparent criteria applied indiscriminately to the entire civil society sector, rather than to specific NGOs identified as being vulnerable to financing by terrorist entities, may result in misuse of the proposed audits for the purpose of deterring civil society activism under the pretext of conducting a “risk assessment”. The proposed system of audits transgresses the boundary of what is necessary and proportional; measures introduced seem to be overly far-reaching and will have a chilling effect on NGOs, due also to the increased sanctions for breach of auditing obligations.

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<sup>70</sup> CDL-AD(2017)015, Hungary - Opinion on the Draft Law on the Transparency of Organisations receiving Support from Abroad, para. 27. See also, CDL-AD(2016)007 Rule of Law Checklist, p. 13.

89. The amendments to the Law on Associations enable the authorities to remove the board of directors without judicial review and to replace them with trustees who do not need the approval of the members of the association concerned and are under no obligation to guard the interests of the that association. Consequently, the introduction into the bodies of the association of one or more persons without approval and without any guarantee that they act in the interest of the association and its members, constitutes a serious infringement of the right of associations to conduct their own affairs.

90. While the suspension leading to the dissolution of an association cannot be decided by the Minister of Interior but need a court decision, such decision should be taken only as a measure of last resort, in conformity with the principle of proportionality and with adequate guarantees of fair trial.

91. Foreign associations, to which Turkish law is applicable for their activities in Turkey, including provisions on data reporting, are equally affected by the flaws of the amendments in questions. In addition, imposing upon them the obligation to seek permission for any cooperation activity in Turkey does not meet the requirements of necessity and proportionality.

92. The Venice Commission therefore makes the following key recommendations:

- To provide for limitations on the right of associations to seek resources only in the rare cases when the restriction is necessary in a democratic society to achieve a legitimate aim provided in Article 11(2) ECHR and Article 22(2) ICCPR;
- To abolish the authority of inspectors to request information and documents from those involved in fundraising activities without a court order;
- In conformity with the principle of proportionality, to limit the duration of the ban of those convicted of terrorism-related offences to re-enter a managerial position within an NGO (instead of a lifetime ban);
- To provide for a legal basis and transparent criteria for risk-assessment, in order to prevent misuse of audits, and to reconsider the increased sanctions for breach of auditing obligations;
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- To renounce the possibility for the authorities to remove the board of directors without judicial review and to replace them with trustees who do not need the approval of the members of the association and are under no obligation to guard the interests of the relevant association;
- To authorise the suspension of activities, and, *a fortiori*, the prohibition or dissolution of associations only in exceptional cases and as *ultimum remedium*, in conformity with the principle of proportionality; To introduce the requirement that the Minister of the Interior should submit the decision to suspend an NGO to court for confirmation within 24 hours;
- To properly ensure the freedom of association not only of national associations, but of foreign ones active on Turkish territory as well.

93. The Venice Commission expresses hope that the legislator will carry out a full and thorough re-examination of the aforementioned amendments to the Law on Associations and the Law on Aid Collection, introduced by Law No. 7262 and will ensure broad and inclusive consultations with all stakeholders, with the aim to finding an effective but also lawful solution to the problem of abuse of NGOs for the financing of terrorism or money laundering, while guaranteeing the full protection of fundamental civil and political rights of the civil society associations .

94. The Venice Commission remains at the disposal of the authorities of Turkey for further assistance in this matter.

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