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Comments on the Draft Federal law amending the Criminal Code, the Code of Criminal Procedure 1975, the Penal Code and the Court Organisation Act to combat terror in Austria

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1. Introduction

On 22 December 2020, the Austrian Ministry for Interior submitted to the national parliament a Draft Federal "Anti-Terrorism Act" amending the Criminal Code, the Code of Criminal Procedure 1975, the Penal Code and the Court Organisation Act to combat terror (TeBG). The draft law was open for public consultation until 2 February 2021. The present analysis and submission are intended to feed such consultation.

The present analysis draws attention to the most concerning aspects of the draft law, focusing in particular on the draft provisions' potential impact on civic space and the exercise of civic freedoms, which constitute the core of ECNL work. It highlights, in particular, concerns regarding the draft law's interference with freedom of religion, freedom of expression and freedom of association, as it draws on the use of the concept of "religious motivated extremism" as a basis for criminalisation.

The analysis was conducted in the light of Austria's obligations under key international and regional human rights instruments, and in particular the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) read in light of the case-law of the European Court of Human Rights (ECtHR).

The draft law was also reviewed in the light of Austria's obligations pursuant to the EU Charter of Fundamental Rights (EU CFR), to the extent of which the provision in question may be regarded as implementing EU law, in light of the case-law of the EU Court of Justice (CJEU) on the scope of application of the EU CFR (see, in particular, the landmark CJEU judgment in case C-617/10, *Fransson*). In this respect, it is arguable that the draft provisions in question, while going beyond the obligations imposed by EU law, do contribute to the objectives pursued by:

- Directive (EU) 541/2017 on combating terrorism, as regards, in particular, the criminalisation of offences relating to a terrorist group and offences related to terrorist activities, such as public provocation to commit a terrorist offence and terrorist financing;
- Directive (EU) 2018/1673 on combating money laundering by criminal law, as explicitly referred to in Article 6 of the TeBG, as regards provisions concerning offences related to money laundering and terrorist financing.

As a result of its analysis, ECNL is concerned that a number of provisions of the TeBG appear potentially problematic in terms of their compatibility with international human rights standards, including within the framework of Austria's obligations under European Union (EU) law. These obligations include the protection of freedom of religion, freedom of expression, freedom of association as well as the principle of legality and proportionality of criminal offences and penalties, presumption of innocence and the right to privacy under the EU Charter of Fundamental Rights.

2. Analysis

2.1 National provisions considered

Article 1(8) of the draft TeBG foresees the introduction in the Criminal Code of a new Section 247b, which would criminalise the creation, leadership, financing or support in any other form of a "***religiously motivated extremist association***" or promotion of "***religiously motivated extremist acts***".

The punishment would amount to up to two year of imprisonment for the founder or leader of such an association where such person, or another member of the association, has carried out or contributed to a serious illegal act motivated by religious extremism (Section 247b(1)). It would amount to up to one year of imprisonment or a fine of up to 720 daily rates for anyone promoting, financing or supporting in any other substantial manner, acts motivated by religious extremism (Section 247b(2)). This would apply notwithstanding a more severe punishment applicable to the offence under other provisions (Section 247b(4)). Furthermore, for these crimes, stricter rules would apply limiting the possibility of conditional release, as provided for in Article 3 of the TeBG.

According to Section 247b(5), anybody who voluntarily withdraws from a religiously motivated extremist association, showing he or she no longer supports the association's extremist orientation, before the authority has found out about his fault, may not be punished.

The draft provision contains a definition of "***religiously motivated extremist association***", defined as one that "***continually attempts to replace, in an unlawful manner, the essential elements of the democratic constitutional order of the Republic with a social and state order based exclusively on religion, by preventing the enforcement of laws, ordinances or other state decisions or by arrogating to itself sovereign rights based on religion or attempting to enforce such rights***" (our translation) (Section 247b(3)).

Article 1(3) of the draft TeBG foresees the introduction in Section 33(1) of the Criminal Code of a new general aggravating factor to be considered when sanctioning criminal offences under the Criminal Code. The aggravating factor would refer to the criminal conduct be held with "***religiously motivated extremist motives***", to be defined by reference to paragraph 3 of the new draft Section 247b.

2.2 Freedom of religion and freedom of expression

// Existence of an interference

The rights to freedom of religion and freedom of expression are enshrined, respectively, in Articles 18 and 19 ICCPR, Articles 9 and 10 ECHR and Articles 10 and 11 EU CFR. As by their nature, the substantive content of these rights overlaps for the purpose of the draft law in question, the following analysis is developed by taking them together.

The new criminal offence foreseen by Section 247b of the Criminal Code that would be introduced through Article 1(8) of the draft TeBG constitutes **a clear interference with the rights to freedom of religion and freedom of expression**. Indeed, the criminalisation (compounded by stricter rules on conditional release) of the founder or leader of a "*religiously motivated extremist association*", in connection to acts motivated by the association's "*orientation*"(the latter surmised by expressions manifested through its objectives and activities), constitutes a restriction on the exercise of the right manifest religious beliefs and of freedom of expression by the association and its members. Similarly, the criminalisation (compounded by stricter rules on conditional release) of anybody promoting, financing or supporting "*acts motivated by religious extremism*" constitutes a restriction on the right to freedom of religion and freedom of expression. Furthermore, the threat of such criminalisation, compounded by the exclusion of imputability for those who voluntarily withdraw from the association, has a severe chilling effect on the exercise of these rights.

The application of aggravated penalties, or the threat thereof, for the commission of a criminal offence by means of manifesting of expressions which may be regarded as amounting to "*religious extremism*", as foreseen by Article 1(3) of the draft TeBG, clearly constitutes **a restriction on the exercise of the right to freedom to manifest one's religion and to freedom of expression** (see, to that effect, ECtHR, *Kokkinakis v. Greece* and *Masaev v. Moldova*).

// Legality, necessity and proportionality of the interference

There is no doubt that the protection of national security, public safety, public order and the protection of the rights and freedom of others are regarded as legitimate aims capable, in principle, of justifying restrictions on non-absolute rights such as freedom of religion and freedom of expression. This is reflected in the formulation and application of Articles 18 and 19 ICCPR, Articles 9, and 10 ECHR and Articles 10 and 11 EU CFR, read in light of Article 52(1) thereof. It is equally clear, however, that **any such restrictions shall only be acceptable insofar as they are provided for by law and are necessary and proportionate to a legitimate aim pursued.**

As regards the **right to freedom of expression**, extensive ECtHR case-law clarifies that, in a democratic society based on the rule of law, **political ideas which offend, shock or disturb the state or any sector of the population, including ideas that challenge the existing order and whose realisation is advocated by peaceful means, must be afforded a proper opportunity of expression** (see, for example, ECtHR, *Handyside v. the United Kingdom*, § 49 and *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, § 70). **Only expressions which are apt to destroy the underlying values of a democratic society (including tolerance, social peace, non-discrimination) do not deserve such protection,** whereas proportionate restrictions or penalties may be imposed to prevent forms of expression which spread, incite, promote or justify hatred based on intolerance (see for example ECtHR, *Erbakan v. Turkey*, § 56).

The same approach is embedded in Article 20 ICCPR, which considers as unlawful any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (see also, in this respect, the UN Commission on Human Rights resolution 2005/40, which refers to "*the use of religion or belief for ends inconsistent with the Charter of the United Nations and other relevant instruments of the United Nations*").

The same principles apply to the level of protection to be afforded to the **right to freedom of religion,** and in particular the right to manifest one's religious beliefs (ECtHR, *Eweida and Others v. the United Kingdom*, § 80).

It is clear from the ECtHR case-law that **the fight against terrorism does not in itself suffice to absolve national authorities from their obligations not to unduly impair the exercise of rights such as freedom of religion and freedom of expression** (see ECtHR, *Döner and Others v. Turkey*, § 102, *Faruk Temel v. Turkey*, § 58). Indeed, the state remains under an obligation to strike a fair balance between these rights and a democratic society's legitimate right to protect itself against the activities of terrorist organisations (ECtHR, *Zana v. Turkey*, § 55; *Karataş v. Turkey*, § 51; *Yalçın Küçük v. Turkey*, § 39; *İbrahim Aksoy v. Turkey*, § 60). In this context, taking into account the problems linked to the prevention of terrorism, the ECtHR has recognised that particular attention must be paid to the need for the authorities to remain vigilant about acts capable of fuelling, exacerbating or justifying violence, with a view to the protection of public safety and the prevention of disorder or crime (see to that effect ECtHR, *Leroy v. France*, § 36 and *Roj TV A/S v. Denmark*).

In light of these general principles, **the interferences determined by Articles 1(8) and 1(3) of the draft TeBG would not seem to be in line with the requirements of legality, necessity and proportionality, for the following reasons:**

a) The concept of "religious motivated extremism" is not clearly defined and articulated by the law

Articles 1(8) and 1(3) of the draft TeBG would constitute a law, but may not satisfy the principles of legality and foreseeability of legislation insofar as the concept of "*religious motivated extremism*", which lays the basis of the new criminal provisions, is not properly defined and articulated.

The concept – which is relevant to understand what is a "*religious extremist motive*" for the purpose of Article 1(3) of the draft TeBG as well as to what is a "*religiously motivated extremist association*" and what is a "*religious extremist act*" for the purpose of Article 1(8) of the draft TeBG – is not, in itself, clearly defined.

A definition of "*religiously motivated extremist association*" is contained in paragraph 3 of draft Section 247b, as it would be introduced by Article 1(8) of the draft TeBG: this paragraph makes reference to the association's aspirations ("*to establish a social and state order based exclusively on religion*") and the general means of achieving such aspirations ("*by preventing the enforcement of laws, ordinances or other state decisions or by arrogating to itself sovereign rights based on religion or attempting to enforce such rights*"). As such, **this definition fails to clarify what constitutes an act motivated by religious extremism, as it does not identify the specific conducts, or types of conduct, referred to.** It seems therefore inadequate to define what is a "*religious extremist motive*" for the purpose of Article 1(3) of the draft TeBG or a"religious extremist act" for the purpose of Article 1(8) of the draft TeBG. Indeed, a dangerous conflation between the concept of acts and motives derives from the fact that Article 1(3) of the draft TeBG, which is about the "*religious extremist motives*", does not provide a definition or qualification of those and merely refers to Article 1(3) of the draft law.

In addition, the fact that paragraph 1 of that provision refers to a "*serious illegal act in which the religiously motivated extremist orientation is clearly manifested*", while paragraph 2 merely refers to a religiously motivated extremist act with no further qualification, is all the more confounding.

b) The interference with the rights of freedom of religion and freedom of expression goes beyond what is needed to achieve the objectives pursued

The concept itself of "*religiously motivated extremism*" and the concepts related to it appear too broad and thus open to arbitrary applications.

As recalled above, Article 1(8) of the draft TeBG, in its paragraph 3, refers to the establishment of "*a social and state order based exclusively on religion*", by means of

"*preventing the enforcement of laws, ordinances or other state decisions*" or "*arrogating to itself sovereign rights based on religion or attempting to enforce such rights*". Such "*definition*", however, **fails to narrow the expressions and manifestations which give rise to criminalisation to the clear use of religion or belief for ends inconsistent with the underlying values of a democratic society.**

On the one hand, **advocating for the existing order to be replaced by a different order of a religious nature is not in itself a form of expression which goes against the underlying values of a democratic society, or one that, by itself, must be regarded as capable of destroying democracy**, flouting the rights and freedom of others, or fuelling or inciting violence or terrorist activities.

On the other hand, **the means by which this would be advocated ("*preventing the enforcement of laws (…) or arrogating to itself sovereign rights (…) or attempting to enforce such rights*"), are not by themselves non-peaceful means capable of endangering public security, public safety or the rights and freedoms of others**. Indeed, a state may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy, such as, e.g., rules permitting gender-based discrimination, polygamy, etc. (see ECtHR *Refah Partisi (the Welfare Party) and Others v. Turkey*, § 128), but the formulation of this provision clearly goes beyond that narrow margin of appreciation.

c) *The added value of the new criminal provisions with respect to the objectives pursued is questionable*

The overly broad nature of the concept of "*religiously motivated extremism*" and the concepts related to it, as highlighted above, also cast doubts over the added value and therefore the necessity of these new criminal provisions with respect to the objectives pursued.

To the extent that "religious extremist acts" amount to unlawful acts, they are already subject to existing rules and sanctions, including of a criminal nature: indeed, **other provisions already exist in the Austrian Criminal Code which qualify as criminal offences a wide number of conducts attempting to undermine the existing democratic order – including terrorist and terrorism related offences**. In this context, the need of the new criminalisation provisions that would be introduced by Article 1(8) of the draft TeBG appears unclear.

It is equally unclear what would be the added value of the new aggravating factor introduced by Article 1(3) of the draft law, considering that **the already existing aggravating factor of acting for "racist, xenophobic or other particularly reprehensible reasons" (Section 33(1) (5) of the Criminal Code), may already apply to motives expressing an inherent hostility based on religious grounds.**

2.3 Freedom of association

// Existence of an interference

The right to freedom of association is enshrined, respectively, in Article 22 ICCPR, Article 11 ECHR and Article 12 EU CFR.

According to the international human rights standards, **a state's obligations not to unduly interfere with the right to freedom of association implies a presumption in favour of the lawfulness of the establishment of associations and of their objectives and activities** (see, to that effect, the Joint Guidelines on Freedom of Association of the Council of Europe Commission for Democracy through Law and the OSCE Office for Democratic Institutions and Human Rights (2014)). Associations must be granted the right to exercise their freedom of expression and opinion through their objectives and activities, also as a means to participate in matters of political and public debate. **Therefore, the considerations made above with regard to the interference brought by Article 1(8) of the draft TeBG to freedom of expression and of religion also apply to freedom of association:** the criminalisation (compounded by stricter rules on conditional release) of the founder or leader of a "*religiously motivated extremist association*", in connection to acts motivated by the association's "*orientation*", intended by reference to expressions manifested through its objectives and activities, constitutes a restriction on the exercise of freedom of association. Similarly, the criminalisation (compounded by stricter rules on conditional release) of anybody promoting, financing or supporting "acts motivated by religious extremism" constitutes a restriction on this right insofar as it affects the association's right to seek and receive funds. Furthermore, as already stated above, the threat of such criminalisation, coupled with the exclusion of imputability for those who voluntarily withdraw from the association, has a severe chilling effect on the exercise of freedom of association.

// Legality, necessity and proportionality of the interference

According to consistent ECtHR case-law, **the right to freedom of association is to be granted regardless of whether the position taken is in accord with government policy or advocates a change in the law or the legal and constitutional structures of the state** (see ECtHR, *Refah Partisi (the Welfare Party) and others v. Turkey*, § 88 and *Gorzelik and other v. Poland*, § 91). While states are entitled to verify whether an association carries on, for example in pursuit of religious aims, activities which are harmful to the population or to public order, **associations animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy insofar as the means used are legal and democratic and the changes proposed are themselves compatible with fundamental democratic principles** (see for example ECtHR, *Manoussakis and Others v. Greece*, §

40; *Metropolitan Church of Bessarabia and Others v. Moldova*, § 105. Such principles have also been applied by the ECtHR to political parties: see *Refah Partisi (the Welfare Party) and Others v. Turkey*, cited, and *Staatkundig Gereformeerde Partij v. the Netherlands*, § 71).

Furthermore, another aspect of Article 1(8) of the draft TeBG appears problematic in terms of the legality, necessity and proportionality of the interference brought on the right to freedom of association. This concerns the fact that there seems to be no justification for the punishment of the founder or leader of an association for a serious illegal act motivated by religious extremism of one of its members pursuant to paragraph 1 of draft Section 247b. This provision intends to punish the founder or leader of an association for an unlawful act by one of the association's members without including, however, any element justifying the liability for such act of the association's founder or leader. Acts and speeches of members of associations may give rise to (criminal) liability of the association's founder or leader only insofar as they are imputable to the organisation as a whole (see, in that connection, ECtHR, *Vona v Hungary*). According to general principles on corporate liability, this is the case where the conduct is put in place by somebody authorized to act on behalf of the association and who acts in the scope of the association's objectives and activities. In such cases, the association's leader or founder may be found personally liable for the (criminal) conduct where he or she consciously promoted it or due to a lack of his or her effective supervision or control. No consideration seems to be given to these principles in paragraph 1 of the draft provision in question.

3. Conclusion

For all the reasons illustrated above, Articles 1(8) and 1(3) and of the draft TeBG, in their current formulation, raise serious concerns with the rights to freedom of religion, expression and association as enshrined in the ICCPR, the ECHR and, to the extent applicable, the EU CFR, insofar as they do not appear to respond the requirements of legality, necessity and proportionality of criminal offences and penalties as well as the presumption of innocence.