ICOMOS
international council on monuments and sites

Translation of Legal Opinion on the Legal Validity of the Proposed Amendment to the ICOMOS Statutes prepared by VTM Conseil on 3/06/2016

Summary of Legal Opinion

The proposed amendment to the Statutes of ICOMOS **introduces an exception to the principle of a maximum duration of nine years** for three consecutive terms, bringing the maximum duration to twelve years, if elected as an officer in a different function during or at the end of three consecutive terms.

Because of this exception, the terms of the officers may have **different durations**. This has been criticized on the grounds that "*the French law of associations provides that the term of office shall be fixed by the Statutes, it is **the same for all members of the Board***".

It has also been argued that "*the proposed amendment, in that it establishes a difference between members of the Board, does not appear to conform to the French law of associations and could even be considered **discriminatory***."

First of all, this opinion points out that the association under French law amounts legally to a **contract** governed by the **general principle of contractual freedom** prevailing under the French law of obligations.

Under this principle, the authors of the Statutes have **considerable freedom**, including with regard to the organizational arrangements for the governing bodies of the association, since the **law of 1901** is **silent** on this point.

Alternatively, the association is also a **group** that, by analogy with the law of corporations (which are also groups), is subject to a **principle of equality** whose scope is **not clearly defined**.

This principle of equality is **sometimes likened to a democratic spirit** that may apply to associations to justify and to lead to **equal treatment**.

Even if such a democratic nature of the association existed, which is **contested by a part of the doctrine**, it would only justify a general principle of equal treatment **of members** (**not of officers**), especially from the perspective of **access to information** and of the capacity to **participate** in the work of the association.

This principle of equality **cannot be put forward to justify** the regulation or limitation of how officers join the governing bodies of the association.

According to the doctrine, it is indeed **possible to envisage an unequal treatment of officers** of an association.

Only discrimination based on **reasons punishable by law** (such as gender, race, physical appearance, health status, etc.) may be illicit.

Such is not the case of the unequal treatment brought about by the proposed statutory amendment, which is based on the membership of the Bureau.

Moreover, it **does not affect** the **freedom of the administrators**, each remaining free to run for election to the Bureau.

Finally, it is **in line with social interest**, which will be, as a precautionary measure, documented in the new Statutes by the addition of a phrase justifying its utility.

LEGAL OPINION ON THE LEGAL VALIDITY OF THE PROPOSED AMENDMENT OF THE STATUTES OF THE ASSOCIATION ICOMOS

The association under French law, ICOMOS, asked us for a **legal opinion on the compliance with French law** of a proposed amendment of its statutes, consisting of modifying the current Article 9-d-9, which specifies the conditions under which an administrator can be reelected.

In the present state, Article 9-d-9 of the Statutes stipulates that *"A retiring Board member who has served three consecutive terms may not be reelected before the expiration of a minimum period of three years. The longest continuous term of service allowed as a member of the Board, elected or ex officio, is nine years."*

The proposed amendment retains the principle of the current limitation of three consecutive terms for all members of the Board, but provides an **exception**: if elected to a different position during or at the end of their three consecutive terms, the maximum continuous term of service of nine years may be increased to twelve, in order to enable the President to capitalize on the experience acquired by previously served terms.

The proposed amendment therefore consists of adding after "*three consecutive terms*" the words "*in any one position*", and adding after "*nine years*" the words "*or twelve years if served in more than one position*".

The present opinion analyses the conformity of the proposed amendment to the applicable law. Indeed, ICOMOS France expressed doubts on the legal validity of this proposed statutory amendment, considering that:

- On the one hand, that *"the French law of associations provides that the term of office shall be fixed by the Statutes, it is the same for all members of the Board",*
- On the other hand, *"the proposed amendment, **in that it establishes a difference** between the members of the Board, does not appear to conform to the French law of associations and could even be considered **discriminatory**."*

It will first be noted that the association is a civil liberty that, by law, has the nature of a contract governed by the general principal of contractual freedom prevailing in the French law of obligations (1.).

Additionally, the association is also a **group**, subject to a **principle of equality** whose scope is **not clearly defined**, that is, for this reason, sometimes likened to a **democratic spirit** that may apply to associations to justify and to lead to equal treatment. It will be demonstrated that this principle of equality, on the one hand, **applies to the association's members and not to its officers**, and on the other hand, that it is not intended to regulate or to limit how its officers join the governing bodies of the association (2.).

Finally, we will verify if it is possible, due to the proposed exception, that the terms of the officers may have different durations, and if this **unequal treatment** constitutes or not **discrimination** (3.).

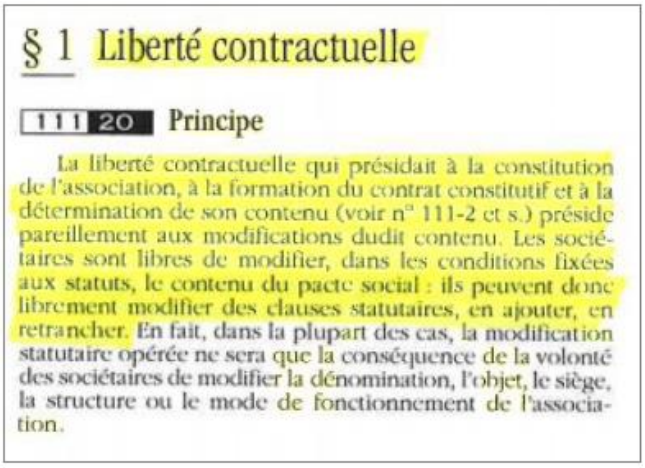
1. SUMMARY OF THE PRINCIPLE OF CONTRACTUAL FREEDOM

- **The principle: an association is a contract**

  An association is both a **civil liberty**, established by the law of 1 July 1901 that introduces and regulates the freedom of association that the French Revolution had suppressed with the Le Chapelier Law, and a **private liberty**.

  Legally, in fact, an association is a contract. The principle is thus that the founders have considerable freedom **to draft** the statutes that give tangible form to the association contract.

  It is therefore not surprising that the **law and the decree of 1901** do not impose **any specific provisions regarding the operation of associations, which, as a contract, is within the scope of the principle of autonomous will**, according to which *"Human will is in itself its own law, creates its own requirement"*.[1]



§ 1 Liberté contractuelle

111 20 Principe

La liberté contractuelle qui présidait à la constitution de l'association, à la formation du contrat constitutif et à la détermination de son contenu (voir n° 111-2 et s.) préside pareillement aux modifications dudit contenu. Les sociétaires sont libres de modifier, dans les conditions fixées aux statuts, le contenu du pacte social : ils peuvent donc librement modifier des clauses statutaires, en ajouter, en retrancher. En fait, dans la plupart des cas, la modification statutaire opérée ne sera que la conséquence de la volonté des sociétaires de modifier la dénomination, l'objet, le siège, la structure ou le mode de fonctionnement de l'association.

Out of principle, drafting the statutes of an association is therefore **entirely at the contractual freedom of the members**.

- **The exceptions: offences against public order, recognition of public interest**

  As with any contract, this contractual freedom is limited by the respect for **public policy provisions**.

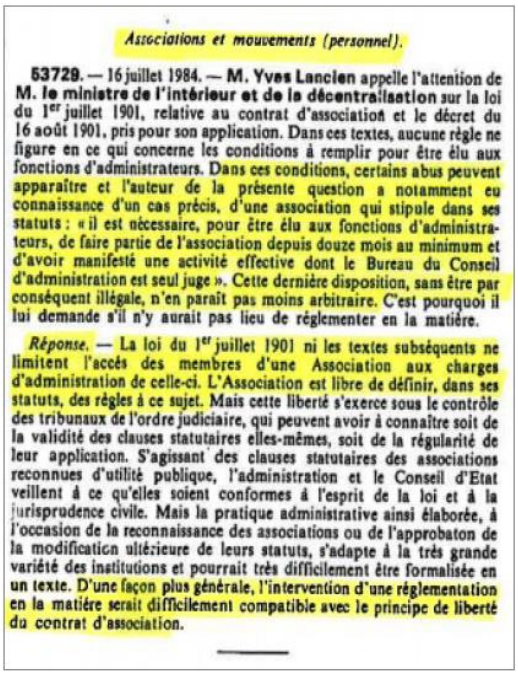
  According to Article 6 of the Civil Code, *"one cannot infringe upon, by private agreement, the laws of **public order** and **morality**."*

  The notion of **public order** will, in some cases, **and by exception, restrict contractual freedom**: a higher interest, that of the entire society, is then preferred to individual interest.

Certain categories of associations are indeed subject to special restrictions because of their public policy dimension.

In particular, this is the case of associations and approved sports federations, school and university sport associations, associations selling products or services, associations under the control or supervision of the State or public authorities, as well as **recognized associations of public interest**…

The Minister of the Interior, who supervises these recognized associations of public interest, had the opportunity to specify, in the terms recalled below, that **legislative intervention to regulate the nomination procedures for administrators and the conditions of the exercise of their duties would oppose the principle of freedom of association.**



Associations et mouvements (personnel).

53729. — 16 juillet 1984. — **M. Yves Lancien** appelle l'attention de **M. le ministre de l'intérieur et de la décentralisation** sur la loi du 1er juillet 1901, relative au contrat d'association et le décret du 16 août 1901, pris pour son application. Dans ces textes, aucune règle ne figure en ce qui concerne les conditions à remplir pour être élu aux fonctions d'administrateurs. Dans ces conditions, certains abus peuvent apparaître et l'auteur de la présente question a notamment eu connaissance d'un cas précis, d'une association qui stipule dans ses statuts : « il est nécessaire, pour être élu aux fonctions d'administrateurs, de faire partie de l'association depuis douze mois au minimum et d'avoir manifesté une activité effective dont le Bureau du Conseil d'administration est seul juge ». Cette dernière disposition, sans être par conséquent illégale, n'en paraît pas moins arbitraire. C'est pourquoi il lui demande s'il n'y aurait pas lieu de réglementer en la matière.

Réponse. — La loi du 1er juillet 1901 ni les textes subséquents ne limitent l'accès des membres d'une Association aux charges d'administration de celle-ci. L'Association est libre de définir, dans ses statuts, des règles à ce sujet. Mais cette liberté s'exerce sous le contrôle des tribunaux de l'ordre judiciaire, qui peuvent avoir à connaître soit de la validité des clauses statutaires elles-mêmes, soit de la régularité de leur application. S'agissant des clauses statutaires des associations reconnues d'utilité publique, l'administration et le Conseil d'Etat veillent à ce qu'elles soient conformes à l'esprit de la loi et à la jurisprudence civile. Mais la pratique administrative ainsi élaborée, à l'occasion de la reconnaissance des associations ou de l'approbaton de la modification ultérieure de leurs statuts, s'adapte à la très grande variété des institutions et pourrait très difficilement être formalisée en un texte. D'une façon plus générale, l'intervention d'une réglementation en la matière serait difficilement compatible avec le principe de liberté du contrat d'association.

[1] *Carbonnier, Droit civil, Les obligations, Tome 4, Thémis, PUF, 22e éd. 2000, p. 53*

None of these exceptions likely to limit contractual freedom apply to ICOMOS, since it does not correspond to any of these categories.

- **The principle of freedom also applies to the amendment of the statutes**

Contractual freedom is the rule at the time of the constitution of an association, with regards to both the establishment of the constitutive contract and the determination of its content. The same rule applies to **subsequent amendments of its statutes**.

The **members are free to amend the statutes in the conditions they have set out to do so**.

2. PRINCIPLE OF EQUALITY AND DEMOCRATIC NATURE

Thus, the law of 1901 allows considerable freedom to the authors of the statutes of an association.

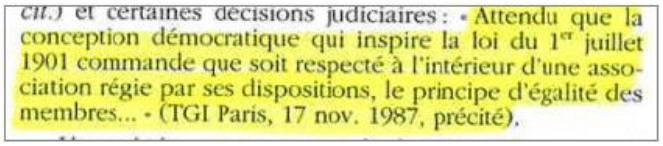
This freedom may nevertheless be mitigated by two principles:

- the **principle of equality** provided by **jurisprudence**
- the **democratic nature** of an association sometimes invoked by the **doctrine**

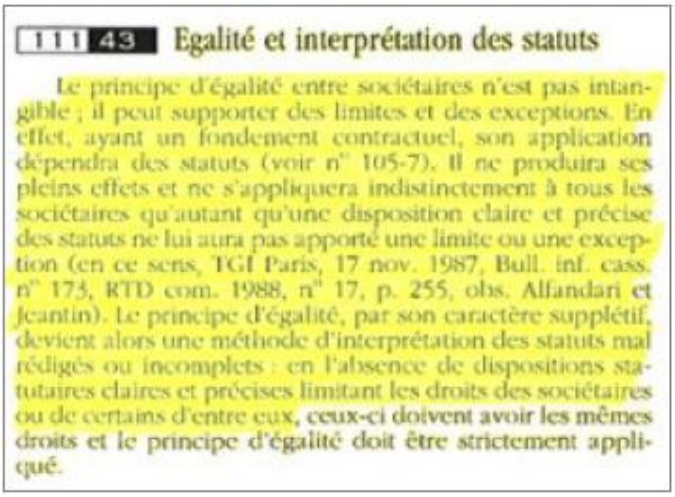
- **The principle of equality applied to associations has a residual nature**

The principle of equality does not result from the provisions of the law of 1 July 1901.

It is a principle established by **jurisprudence**,[2] as evidenced, in particular, by a judgment of the high court of Paris whose ruling is reproduced here.


cit.) et certaines décisions judiciaires : « Attendu que la conception démocratique qui inspire la loi du 1er juillet 1901 commande que soit respecté à l'intérieur d'une association régie par ses dispositions, le principe d'égalité des membres... » (TGI Paris, 17 nov. 1987, précité).

It means that the members of an association have equal rights to participate in the activities of the association and to work to achieve its goals.


111 43 Egalité et interprétation des statuts

Le principe d'égalité entre sociétaires n'est pas intangible ; il peut supporter des limites et des exceptions. En effet, ayant un fondement contractuel, son application dépendra des statuts (voir n° 105-7). Il ne produira ses pleins effets et ne s'appliquera indistinctement à tous les sociétaires qu'autant qu'une disposition claire et précise des statuts ne lui aura pas apporté une limite ou une exception (en ce sens, TGI Paris, 17 nov. 1987, Bull. inf. cass. n° 173, RTD com. 1988, n° 17, p. 255, obs. Alfandari et Jeantin). Le principe d'égalité, par son caractère supplétif, devient alors une méthode d'interprétation des statuts mal rédigés ou incomplets : en l'absence de dispositions statutaires claires et précises limitant les droits des sociétaires ou de certains d'entre eux, ceux-ci doivent avoir les mêmes droits et le principe d'égalité doit être strictement appliqué.

However, the doctrine (see the excerpt from Lamy Associations reproduced below) considers it possible to make **exceptions** to this principle, provided that the **drafting of the statutes** is sufficiently precise to allow for **clearly defined boundaries**.[3]

It also considers that the principle of equality applies **between members of the same category**.[4]

Jurisprudence allows for the possibility to **deprive** certain members of some of their rights, **particularly of their right to vote**.[5]

---

[2] *CA Aix-en-Provence, 11 mars 1985 ; TGI Paris, 17 novembre 1987*
[3] *En ce sens, TGI Paris, 17 novembre 1987, Bull. inf. cass. N°173, RTD com. 1988, n°17, p. 255, obs. Alfandari et Jeantin*
[4] *Revue des sociétés 1990P377 Ph. Reigné » Les clauses statutaires éliminant ou restreignant le jeu de la démocratie dans les associations »*
[5] *Civ. 1er, 25 avril 1990, n°88-19.320, RTD Com.1991, p.249*

According to jurisprudence, if the statutes are complete and accurate, **nothing prevents them from unequally treating members belonging to different categories** (for example administrative members and Bureau members).

This is what the doctrine calls the "**residuary nature**" of the principle of equality.

- Limits of reasoning by analogy with company law

The contractual nature of the association, as already pointed out, results in the application of the general principles of the **law of obligations**, as explicitly stated in Article 1 of the law of 1901.

> **Article 1**
>
> L'association est la convention par laquelle deux ou plusieurs personnes mettent en commun, d'une façon permanente, leurs connaissances ou leur activité dans un but autre que de partager des bénéfices. Elle est régie, quant à sa validité, par les principes généraux du droit applicables aux contrats et obligations.

However, when the general theory of obligations proves to be insufficient to govern associations, the doctrine and jurisprudence sometimes call upon the general principles of the law **of grouping**. It is in this spirit that the provisions of **corporate law** can be invoked in the context of associations.

With regards to the **principle of equality**, the analogy should not however be taken too far. Indeed, the principle of equality in corporate law applies to **shareholders and not to officers**.

Yet, by construction, **the association has no shareholders, only members and officers**.

It is therefore **not possible** to reason by **analogy** with corporate law to apply to the association a principle of equality that applies in corporate law for a category of people or actors (i.e. shareholders**) who do not exist in the context of an association**.

- Democratic spirit of associations

The **democratic spirit** of associations[6] is sometimes mentioned by the doctrine as a legal principle to guide or limit the leeway of members.[7]

But this democratic spirit is **challenged** on two grounds:

(i) that it is **nowhere stated** in the law of 1901, and

(ii) that democracy is a **way of public government** that does not apply to the **grouping of private law** that is an association.

It must also be emphasized in this regard that the law of 1901 does not contain any **mandatory provision on the rules of access to governing bodies.**

> De même, le **prétendu caractère démocratique** de l'association parfois invoqué (dans ce sens Brichet, Associations et syndicats, Litec, 6e éd. 1992 ; TGI Paris, 17 nov. 1987, Bull. inf. cass. 1988, n° 174), ne saurait imposer à l'association ni un minimum de règles de fonctionnement, ni un mode de fonctionnement faisant obligatoirement participer tous les sociétaires, ni un principe intangible d'égalité entre sociétaires. En effet, l'association est un contrat de droit privé qui n'a aucun rapport avec la démocratie, **mode de gouvernement** relevant du droit public. La liberté contractuelle comporte certes le droit pour les parties au contrat d'association de doter leur groupement d'un mode démocratique de fonctionnement interne, mais aussi celui de le doter d'un mode dictatorial et discriminatoire de fonctionnement. L'association n'est en elle-même ni démocratique ni dictatoriale : elle est ce que souhaitent en faire les sociétaires. Dès lors aucune règle, aucune conséquence tirée du principe démocratique ne saurait être transposée a priori et imposée aux associations et ne pourrait avoir pour effet de les contraindre à une rédaction statutaire minimale.

[6] *Les clauses statutaires éliminant ou restreignant le jeu de la démocratie dans les associations, Ph. Reigne, Revue des Sociétés 1990, p. 977*

[7] *Dans ce sens, Brichet, Associations et syndicats, Litec, 6ème éd. 1992 ; TGI Paris, 17 novembre 1987, Bull. inf. cass. 1988, n°174*

The law **thus outlines no system of government** that would allow for an association to resemble a democratic group.

It should be noted however that the **principle of democratic governance** was stated in the **2014** law on Social and Solidarity Economy. But this is only a general principle, **based more on transparency and participation than on equality**, as revealed by the reading of the legislation reproduced below:

> 2° Une gouvernance démocratique, définie et organisée par les statuts, prévoyant l'information et la participation, dont l'expression n'est pas seulement liée à leur apport en capital ou au montant de leur contribution financière, des associés, des salariés et des parties prenantes aux réalisations de l'entreprise ;

Even if such a democratic nature of the association existed, which is contested by a part of the doctrine, it would not suffice to justify or to provide a legal basis for either a general principle of equal treatment of officers, or the procedure to join the governing bodies, but only for a **general principle of equal treatment of members** (not of officers), especially from the perspective of **access to information** and of the **capacity to participate in the work** of the association.

3. ANALYSIS OF THE LEGAL VALIDITY OF THE PROPOSED AMENDMENTS

As explained in the introduction, the proposed amendment introduces an exception to the principle of a maximum duration of nine years for three consecutive terms, bringing the maximum duration to twelve years, if elected to a different position during or at the end of three consecutive terms.

Because of this exception, the terms of the officers may have different durations.

Thus, we analyze as follows:

- If it is possible that the officers are subject to **different maximum durations of consecutive terms**,
- if this **unequal treatment** constitutes **discrimination** or not.

- **Can officers be subject to different maximum durations of consecutive terms?**

Following the principle of contractual freedom, the **statutes freely determine the term of office of the officers**, which may be defined or undefined. The only restriction concerns appointments “for life”, which seem contrary to the general principle of French law that prohibits perpetual commitments.

All variants are possible: the statutes may set the length of the term of office or allow the assembly to do so during the election of the officers.

According to the doctrine,[8] *“the duration of the terms of office of all officers, regardless of their function, may or may not be equal and begin and end at the same time or within the same governing body (for example, the Board),* ***the starting and ending date of such terms of office may be different in order to ensure a rotation within the Board and thus ensure a certain continuity****.”*

The statutes may also set a variable duration depending on the nature of the position: thus, the administrators may be elected for a longer or shorter term than that of the members of the Bureau or of the President.

At no point does the French law applicable to associations set an obligation to foresee an identical duration of term of office for all officers.

- **Does this unequal treatment constitute discrimination?**

The proposed amendment indeed creates an inequality between the administrative members of the Bureau who have held two different positions within the Bureau and others.

In doing so, it creates, *de facto*, two categories of administrators.

[8] *Lamy Associations, n°204-23*

In analyzing the doctrine, we note the need to distinguish **three foundations that could serve as pretext to challenge the legality of a statutory provision regarding the administrators**:

(i) unequal treatment,

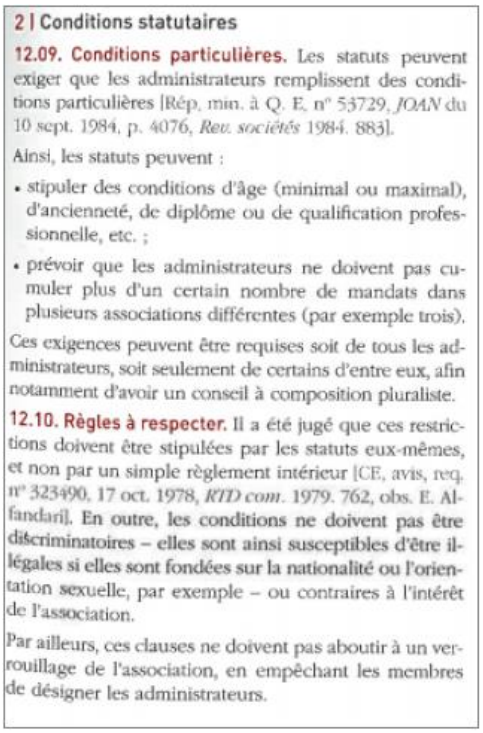
(ii) discrimination,

(iii) conflict with public interest.

Unequal treatment is considered **licit** by the doctrine, which allows the statutes to impose certain limitations on the administrators, such as, for example, **age** or the **accumulation of terms of office**.

The issue of **discrimination** is explicitly addressed, and is considered **unlawful**, but only in terms of nationality or sexual orientation, as shown in the excerpt reproduced opposite.[9]

It is difficult to hold an objective notion of discrimination, but since the general principles of law, including criminal law, apply to associations, we choose to **refer to the definition of the penal code**, reproduced below:



2 | Conditions statutaires

12.09. Conditions particulières. Les statuts peuvent exiger que les administrateurs remplissent des conditions particulières [Rép. min. à Q. E. n° 53729, *JOAN* du 10 sept. 1984, p. 4076, *Rev. sociétés* 1984. 883].

Ainsi, les statuts peuvent :

- stipuler des conditions d'âge (minimal ou maximal), d'ancienneté, de diplôme ou de qualification professionnelle, etc. ;
- prévoir que les administrateurs ne doivent pas cumuler plus d'un certain nombre de mandats dans plusieurs associations différentes (par exemple trois).

Ces exigences peuvent être requises soit de tous les administrateurs, soit seulement de certains d'entre eux, afin notamment d'avoir un conseil à composition pluraliste.

12.10. Règles à respecter. Il a été jugé que ces restrictions doivent être stipulées par les statuts eux-mêmes, et non par un simple règlement intérieur [CE, avis, req. n° 323490, 17 oct. 1978, *RTD com.* 1979. 762, obs. E. Alfandari]. En outre, les conditions ne doivent pas être discriminatoires – elles sont ainsi susceptibles d'être illégales si elles sont fondées sur la nationalité ou l'orientation sexuelle, par exemple – ou contraires à l'intérêt de l'association.

Par ailleurs, ces clauses ne doivent pas aboutir à un verrouillage de l'association, en empêchant les membres de désigner les administrateurs.

Article 225-1

Modifié par LOI n°2014-173 du 21 février 2014 - art. 15

Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur sexe, de leur situation de famille, de leur grossesse, de leur apparence physique, de leur patronyme, de leur lieu de résidence, de leur état de santé, de leur handicap, de leurs caractéristiques génétiques, de leurs moeurs, de leur orientation ou identité sexuelle, de leur âge, de leurs opinions politiques, de leurs activités syndicales, de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée.

Given these factors, **is it clear that a differential treatment of administrators based on membership of the Bureau cannot reasonably be regarded as discriminatory because it does not correspond to any form of discrimination punishable by law**.

Moreover, it **does not affect the freedom of the administrators**, each remaining free to run for election to the Bureau.

This differential treatment is **also quite consistent with the interests of the association**, since it aims to ensure continuity of the terms of the President, Treasurer and Secretary General, to enable the President to acquire **adequate experience and a network of relationships** to enable him to **fulfill his mandate effectively**.

This provision is made **necessary** by the **complexity of the ecosystem in which ICOMOS evolves**, where knowledge requires a learning curve whose loss of benefits by the association because of overly restrictive statutory provisions could be damaging.

As a precaution, the reasons why this amendment was proposed should be documented, by a phrase added to Article 9 that could be worded as follows: *"or twelve years if he has held more than one position, this exception being stipulated in the interest of the association, in order to avoid a too frequent rotation of the position of President, which would be detrimental to the operation and the international visibility of the association."*

Done in Paris, 3 June 2016

Valérie Tandeau de Marsac
Attorney at law (Paris bar)

[9] *Droit des associations et fondations, sous la direction de Philippe-Henri Dutheil, 12.02, p. 271*