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

**OPINION**

**ON THE LAW  
ON NON-GOVERNMENTAL ORGANISATIONS  
(PUBLIC ASSOCIATIONS AND FUNDS)  
AS AMENDED**

**OF THE REPUBLIC OF AZERBAIJAN**

**Adopted by the Venice Commission  
at its 101<sup>st</sup> Plenary Session  
(Venice, 12-13 December 2014)**

**on the basis of comments by:**

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## I. Introduction

1. In a letter dated 29 September 2014, the Secretary General of the Council of Europe, Mr. Thobjorn Jagland, requested the opinion of the Venice Commission on the Law of the Republic of Azerbaijan on Non-Governmental Organisations (Public Associations and Funds) (hereinafter, "Law on NGOs"), as amended.

2. The Venice Commission invited Ms. Bílková, Ms. Thorgeirsdottir, Mr van Dijk, and Mr Clayton to act as rapporteurs for this opinion. The rapporteurs worked on the basis of an English unofficial translation of the Law on NGOs as amended in 2009<sup>1</sup>, already examined by the Venice Commission in its 2011 Opinion on NGO Law, and on the basis of unofficial translations of a set of amendments adopted by the Parliament of the Republic of Azerbaijan on 15 February 2013 (entered into force on 12 March 2013), on 17 December 2013 (entered into force on 3 February 2014) and on 17 October 2014 (signed by the President on 14 November 2014) to the Law on NGOs<sup>2</sup>. Account also has been taken of the amendments adopted on 17 October 2014 (signed by the President on 14 November 2014) to the Law on Grants<sup>3</sup> and of an unofficial translation of the 2003 Law on Registration of Legal Entities and State Registry (hereinafter "Law on Registration"). Although the correctness of the unofficial translations of the Law on NGOs and of the Law on Grants has been orally confirmed by the authorities, they may not accurately reflect the original versions on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.

3. In accordance with the Venice Commission's practice, the Rapporteurs agreed to visit Baku in the framework of the preparation of this Opinion in order to hold meetings with the representatives of the relevant authorities and civil society organisations. The Secretariat, in a letter dated 15 October 2014 to the authorities, asked their support and assistance for the organisation of this visit. However, despite initial confirmation of the proposed dates for the visit, no information about the program of the visit and no invitations have been received and the visit regrettably had to be cancelled. Consequently, this Opinion has been drafted on the basis of available information without the input that could have been obtained during the planned visit. It is to be regretted that new amendments of relevance for this Opinion were enacted by Parliament and signed by the President while this Opinion was under preparation.

4. This opinion primarily focuses on the *Law on Non-Governmental Organizations*, as amended, since the request by the Secretary General explicitly refers to it. However, due to the interlinks between this law and other legal acts amended simultaneously, the opinion also contains sections relating to such acts, when it was deemed necessary to include them to get a better understanding of the legal context within which NGOs operate in Azerbaijan.

5. The present Opinion was adopted by the Venice Commission at its 101<sup>st</sup> Plenary Session (Venice, 12-13 December 2014).

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<sup>1</sup> CDL-REF(2011)049.

<sup>2</sup> CDL-REF(2014)053.

<sup>3</sup> CDL-REF(2014)053.

## II. Background information and facts

6. After Azerbaijan gained independence in 1991, civil society developed rapidly. Today there are 2,700 registered and about 1,000 unregistered NGOs in Azerbaijan.<sup>4</sup> In 2007 the authorities established the NGO Support Council with the goal to provide financial and informational support to NGOs and initiated legislation to improve the regulatory environment for NGOs.

7. In spite of these developments, it is reported that some human rights NGOs and their representatives in recent years have been subjected to a growing wave of repression and that in the last few months, the situation has deteriorated<sup>5</sup>. Referring to “*the ongoing and increasingly severe crackdown on civil society and the right to freedom of association, including [in particular] the arrest and detention of NGO leaders on criminal charges*”, a number of NGOs recently requested from the Committee of Ministers of the Council of Europe the transfer under enhanced procedure of the supervision of the execution of a group of judgments of the European Court of Human Rights (hereafter ECtHR) against Azerbaijan, establishing violations of the right to freedom of association<sup>6</sup>.

8. The *Law on Non-Governmental Organisations* (Law No. 894-IG) was adopted in 2000, replacing an older Law on NGOs adopted in 1992. The new law was generally welcomed as more progressive and liberal than its predecessor. Yet, since its adoption, the law has been amended several times and some of the amendments have given rise to criticism.

9. At the request of the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the Venice Commission examined the compatibility with human rights standards of the Law on NGOs as amended in 2009. In its opinion adopted in October 2011, the Venice Commission included Decree no. 43 of 16 March 2011<sup>7</sup>, implementing the section of the Law on NGOs on the registration of branches and representatives of international NGOs in Azerbaijan.<sup>8</sup> The Commission concluded that “*while legislation relating to NGO’s legal status has been improved in some aspects over the years, the 2009 amendments and the 2011 Decree unfortunately overturn the previous efforts to meet with the requirements of international standards*” (par. 117). The most problematic aspects of the new legislation were found to pertain to the registration of NGOs generally; the registration of branches and representatives of international NGOs specifically; the requirements relating to the content of the charters of NGOs; and the liability and dissolution of NGOs.

10. On 15 February 2013, the Parliament of the Republic of Azerbaijan adopted new amendments to the Law on NGOs, introducing a new provision on Donations and Grants (Article 24-1), as well as to the Law on Grants and the Code of Administrative Offences. The amendments entered into force on 12 March 2013 upon their publication in the official journal.

<sup>4</sup> <http://www.balcanicaucaso.org/eng/Regions-and-countries/Azerbaijan/More-complications-for-NGOs-in-Azerbaijan-133415>

<sup>5</sup> DH-DD(2014)1163E- Communication from 7 NGOs of 5 September 2014 in the *Ramazanova and Others* group of cases and *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*.

<sup>6</sup> DH-DD(2014)1163E- Communication from 7 NGOs of 5 September 2014 in the *Ramazanova and Others* group of cases and *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*; and reply from the authorities of 17 September 2014. The NGO communication also reports that leaders of several of the most active independent NGOs have been put on pretrial detention on charges of abuse of power (Art. 308.1 of the Criminal Code), Service forgery (Art. 313), illegal entrepreneurship (Art. 192) and tax evasion (Art. 213).

<sup>7</sup> CDL-REF(2011)048.

<sup>8</sup> Opinion 636/2011, CDL-AD(2011)035-e, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan adopted by the Venice Commission at its 88th Plenary Session* (Venice, 14-15 October 2011).

11. Another set of amendments to the Law on NGOs, as well as to the Law on Grants, the Law on Registration and the Code of Administrative Offences was adopted by Parliament on 17 December 2013. The amendments entered into force on 3 February 2014, upon their publication in the official journal.

12. Finally, a new set of amendments to the Law on NGOs, as well as to the Law on Grants was adopted by Parliament on 17 October 2014. On 14 November 2014, the President signed these amendments and issued two Presidential Decrees on their application.

### **Statements by International Organizations**

13. In its Resolution 1917(2013)<sup>9</sup>, adopted on 23 January 2013, the Parliamentary Assembly of the Council of Europe called upon the Azerbaijani authorities to, among others, *“review the law on NGOs with a view to addressing the concerns formulated by the Venice Commission; improve and facilitate the registration procedures for international NGOs; and create an environment conducive for NGOs to carry out their activities, including those expressing critical opinions”* (par. 18.8.).

14. On 6 August 2013, the Council of Europe Commissioner on Human Rights, Nils Muižnieks, published a report in which he expressed worries about the amendments adopted on 15 February 2013, which in his view *“further restrict the operations of NGOs in Azerbaijan”*.<sup>10</sup> He also raised concerns relating to the practical implementation of the Law on NGOs and the political discourse surrounding its application, calling upon the Azerbaijani authorities *“to ensure full respect of the right to freedom of association, in particular by alleviating the registration requirements and making the whole process, as well as the functioning of NGOs, less bureaucratic”*. On 23 April 2014, the Commissioner reiterated his concerns in his Observations on the human rights situation in Azerbaijan, extending them to the amendments adopted on 17 December 2013.<sup>11</sup>

15. In a statement issued on 12 February 2014, the spokespersons of EU High Representative Catherine Ashton and Commissioner Štefan Füle noted: *“The High Representative and the Commissioner are concerned by recent amendments to NGO legislation in Azerbaijan restricting the environment for an independent and critical civil society, especially in the field of human rights and democracy. /.../ the High Representative and the Commissioner call upon the Azerbaijani authorities to abide by their international commitments and to review the law on NGOs with a view to addressing the concerns formulated by the Venice Commission. In particular, they call upon the authorities in Azerbaijan to improve and facilitate the registration procedures for international NGOs, creating an environment conducive for all NGOs to carry out their legitimate activities.”*<sup>12</sup>

<sup>9</sup> Resolution 1917(2013), *The honouring of obligations and commitments by Azerbaijan*, 23 January 2013.

<sup>10</sup> CommDH(2013)14, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe*, 6 August 2013.

<sup>11</sup> CommDH(2004)10, *Observations on the human rights situation in Azerbaijan: An update on freedom of expression, freedom of association, freedom of assembly, and the right to property*, 23 April 2014.

<sup>12</sup> European Union, *Statement by the spokespersons of EU High Representative Catherine Ashton and Commissioner Štefan Füle on the enactment of amendments to the legislation on non-governmental organisations in Azerbaijan*, 140212/01, 12 February 2014

### III. Legal framework

#### A. National Legal Framework

##### 1. Constitution

16. The Constitution of Azerbaijan, adopted in 1995 and subsequently amended in 2002 and 2009, declares that *“to provide rights and liberties of a person and citizen (is) the highest priority objective of the state”* (Article 12(I)). It adds that *“rights and liberties of a person and citizen listed in the present Constitution are implemented in accordance with international treaties wherein the Azerbaijan Republic is one of the parties”* (Article 12(II)). Further, according to Article 148-II of the Constitution, *“International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of legislative system of the Azerbaijan Republic.”* In this respect, by virtue of Article 151 of the Constitution, international agreements binding upon Azerbaijan prevail over domestic legislation, with the exception of the Constitution itself and acts accepted by way of referendum.

17. The right to freedom of association is enshrined in Article 58 of the Constitution under which *“everyone has the right to establish any union, including political party, trade union and other public organization or enter existing organizations. Unrestricted activity of all unions is ensured”* (par. II). During the review undertaken in the framework of the Universal Periodic Review in 2013, Azerbaijan highlighted that *“freedom of association is one of the key human rights recognized by the Constitution”*.<sup>13</sup> Article 58 shall be read in the light of Article 25 of the Constitution which guarantees equality of rights and prohibits any discrimination, and of Article 26 on Protection of rights and liberties of a person and citizen.

18. The right to freedom of association is not absolute under the Constitution. First, it does not cover unions which are *“intended for forcible overthrow of legal state power”* or which *“violate the Constitution and laws”* (Article 58(IV)). Activities of the former are prohibited; activities of the latter may be discontinued by national courts. Second, foreign citizens and stateless persons may have their freedom of association limited, if provided so in national laws or international agreements binding upon Azerbaijan (Article 69(I)). Such limitations need to be based on sound rationale and be compatible with other human rights obligations of the country. It is important to mention that the Constitution provides for mechanisms to be used when human rights and fundamental freedoms are limited unlawfully. The 2002 Constitutional law on the Regulation of the Implementation of the Human Rights and Freedoms in the Republic of Azerbaijan which aims to implement the ECHR principles should also be mentioned. The restrictions can be foreseen only when prescribed by law and should meet the strict test of proportionality.

19. In 2002, the Constitution was amended to facilitate the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter “ECHR”), then ratified by Azerbaijan. The amendment, among other things, enabled individuals to lodge a constitutional complaint before the Constitutional Court (Article 130-V).

##### 2. The Law on Non-Governmental Organisations

20. The *Law on Non-Governmental Organisations*, adopted in 2000 and as amended, regulates the establishment, operation, management and termination of non-governmental organizations (NGOs) as well as the relations between these organizations and state bodies.

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<sup>13</sup> UN Doc. A/HRC/24/13, Report of the Working Group on the Universal Periodic Review, Azerbaijan, 5 July 2013, par. 51.

21. The term “NGO” encompasses public associations and funds. In the title of the present Law, the words “public associations and funds” are added between brackets after the words “non-governmental organizations”, thus suggesting that the former concepts cover, and are equal to, the latter concept. However, Article 1.2. of the Law states that the definition of “non-governmental organizations” “includes” public associations and funds. This raises the question of the exact meaning and scope of the three concepts: non-governmental organizations, public associations and funds/foundations.

22. “Public association” is defined as “*a voluntary, self-governed non-governmental organization, established by the initiative of a number of physical and/or legal persons, joined on the basis of common interests with purposes, defined in its constituent documents, without mainly aiming at gaining profits and distributing them between its members*” (Article 2.1). Public associations under the *Law on Non-Governmental Organizations* are therefore not identical to public association in the usual meaning of this word, amounting to associations established by public law or with a public aim.<sup>14</sup> They are thus fully covered by the guarantees offered by freedom of association and other human rights and fundamental freedoms.

23. “Fund” is “*a non-governmental organization without members, established by one or a number of physical and/or legal persons based on property contribution, and aiming at social, charitable, cultural, educational or other public interest work*” (Article 2.2).

24. The Law also applies to branches and representations of foreign NGOs,<sup>15</sup> which are defined as “*legal entities established out of the borders of the Republic of Azerbaijan, so defined by the Civil Code of the Republic of Azerbaijan*” (Article 2.2-1). The reference to the Civil Code is somewhat confusing, as it is not clear what exactly is defined in this act. It would in any case be preferable to have the definition as a whole contained in the Law on NGOs.

25. The Law does not apply to “*political parties, trade unions, religious unions, local self-governments as well as organizations established with an aim to fulfil the functions of these establishments, and other non-commercial organizations, whose activities are regulated by other laws*” (Article 1.4). The term “non-commercial” was inserted into this provision by amendments adopted on 17 December 2013. This term appears to be undefined in the legislation on NGOs and risks to raise issues related to foreseeability and “prescription by law” requirements, unless defined in other legislation as the Civil Code. The definition should be carefully and tightly construed.

26. There is no special law regulating human rights NGOs such as associations of human rights defenders; they therefore fall into the ambit of the Law on NGOs<sup>16</sup>.

### 3. Other Domestic Acts

27. The Law on NGOs has been implemented or complemented by other laws and executive decrees. In 2003, a *Law on State Registration and the State Registry of Legal Entities* was adopted. This law contains details on the registration of various legal entities, including NGOs, and provides a list of reasons on the basis of which registration could be denied. The Law has been amended several times since its adoption, usually in parallel with the Law on Non-Governmental Organizations.

<sup>14</sup> ECtHR, *Chassagnou and Others v. France*, Applications Nos 25088/94, 28331/95 and 28443/95, Judgment, 29 April 1999.

<sup>15</sup> Previously, only provisions explicitly referring to branches and representations of foreign NGOs were applicable to those branches and representations. The expansion of the scope of the Law on NGOs does not however in itself seem problematic.

<sup>16</sup> Opinion 636/2011, CDL-AD(2011)035-e, par.24-29.

28. In 2009, two executive acts implementing the Law on NGOs were enacted. One was the Decree of the President of the Republic of Azerbaijan On Implementation of the Law of the Republic of Azerbaijan "On making changes and amendments to some legislative acts of the Republic of Azerbaijan", adopted on 27 August 2009. The other was the *Rule for form, content and submission of annual financial accounting of non-governmental organisations* (Decision No. 201), adopted by the Cabinet of Ministers on 25 December 2009.

29. In 2011, the Cabinet of Ministers adopted the decree *On approval of rules for state registration and rules related to the preparation for negotiations with foreign non-governmental organisations and representations in the Azerbaijan Republic* (Decree No. 43). The Decree implements the section of the Law on NGOs relating to the registration of branches and representatives of international NGOs in Azerbaijan. It gives a set of conditions that an international NGO has to fulfil in the course of "negotiations" with public authorities before it can be registered.

30. Other legislative acts relevant for the protection of the freedom of associations are the 1999 *Civil Code of the Republic of Azerbaijan*, the 2000 *Tax Code*, the 1998 *Law on Grants* and the 2000 *Code of Administrative Offences of the Republic of Azerbaijan*, as well as various executive decrees implementing these laws.

## **B. International Legal Framework**

### **1. International Human Rights Treaties**

31. Azerbaijan is party to all the major international human rights treaties guaranteeing freedom of association, including the 1966 International Covenant on Civil and Political Rights (ratified in 1992; hereafter ICCPR) and the 1950 ECHR (ratified in 2002).

32. Freedom of association is enshrined in Article 20 of the *Universal Declaration of Human Rights*, in Article 22 of the *ICCPR* and in Article 11 of the *ECHR*.

33. All international human rights instruments conceptualize the right to freedom of association as an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests. Freedom of association encompasses the right to found an association, to join an existing association and to have the association perform its function without unlawful interference by the state or by other individuals. States have the obligation to respect, protect and facilitate the right to freedom of association. States *respect* freedom of association by not interfering, for instance by means of prohibitions, into the operation of associations. They protect this freedom by ensuring that its exercise is not prevented by actions of individuals. And they *facilitate* this freedom by creating an enabling environment in which associations can operate. The right to freedom of association is also a collective right in the sense that the association itself and/or the collectivity of its members are entitled to the rights and freedoms implied therein.

34. The right to freedom of association is not an absolute human right. It can be derogated from under Article 4 of the ICCPR and Article 15 of the ECHR under the very restrictive conditions enlisted there. It can also be limited under the conditions specified in the second paragraphs of Articles 22 of the ICCPR and 11 of the ECHR. The limitations need to be prescribed by law, pursue a legitimate goal and be necessary in a democratic society.

### **2. Other International Instruments**

35. Over the past three decades, special instruments related to the legal status of NGOs have been adopted in the Council of Europe framework. The most important of them is the *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations* (Convention No. 124), adopted in 1986 and entered into force



in 1991. The Convention has so far secured only a limited number of ratifications and the Azerbaijan's one is not among them. Yet, it is often quoted as an authoritative source with respect to the definition of an NGO and the mutual recognition of their legal status and capacity in various European countries.

36. The legal status of NGOs is also the subject of two non-binding Council of Europe instruments, namely the 2002 *Fundamental Principles on the Status of Non-governmental Organisations in Europe* and the 2007 *Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*. The two documents contain a comprehensive set of recommendations that should serve as minimum standards guiding member states of the Council of Europe in their legislation, policies and practice towards NGOs.<sup>17</sup>

### 3. International Case-Law

37. International judicial and quasi-judicial bodies, especially the UN Human Rights Committee (hereafter "the HRC") and the ECtHR, have developed a rich case-law relating to freedom of association. This case-law, though mostly related to the right to join or not to join trade unions, has further clarified the extent and limits of the freedom of association. None of the cases considered so far by the UN HRC concerned Azerbaijan, though the country became party to the Optional Protocol to the ICCPR in 2001.

38. The ECtHR, on the contrary, has dealt with freedom of association in the Azerbaijani context in more than a dozen of cases, including *Ramazanova and Others* (2007),<sup>18</sup> *Nasibova* (2007),<sup>19</sup> *Ismaylov* (2008),<sup>20</sup> *Aliyev and Others* (2008)<sup>21</sup>, *Tebieti Mühafize Cemiyeti and Israfilov* (2009),<sup>22</sup> and *Islam-Ittihad Association and Others* (2014)<sup>23</sup>. In all these cases, the Court found violations of Article 11 of the ECHR, which usually consisted in the failure by the Ministry of Justice to register public associations in a timely manner or in an unjustified dissolution of an NGO.

39. On 5 September 2014, a group of Azerbaijani NGOs sent a letter to the Department for the Execution of Judgments of the ECtHR, requesting enhanced supervision of the execution of the judgments in these cases. The Azerbaijani authorities, in their comment on the request, rejected the allegations of violations of the domestic legislation indicated by the NGOs as "*unsubstantiated and of speculator character*"<sup>24</sup>.

## IV. Analysis of the Law on Non-Governmental Organisations, as Amended

### General comments

40. Despite the Venice Commission's findings in its opinion adopted in 2011<sup>25</sup> that the 2009 and 2011 Azerbaijan's NGO legislation "*unfortunately overturn the previous efforts to meet*

<sup>17</sup> See also CoE, CM/Monitor(2005)1 Volume I-III, *Freedom of Association*, Thematic monitoring report presented by the Secretary General and decisions on follow-up action taken by the Committee of Ministers, 11 October 2005.

<sup>18</sup> ECtHR, *Ramazanova and Others v. Azerbaijan*, Application no. 44363/02, 1 February 2007.

<sup>19</sup> ECtHR, *Nasibova v. Azerbaijan*, Application no. 4307/04, 18 October 2007.

<sup>20</sup> ECtHR, *Ismaylov v. Azerbaijan*, Application no. 4439/04, Judgment, 17 January 2008.

<sup>21</sup> ECtHR, *Aliyev and Others v. Azerbaijan*, Application no. 28736/05, 18 December 2008.

<sup>22</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application no. 37083/03, 8 October 2009.

<sup>23</sup> ECtHR, *Islam-Ittihad Association and Others v. Azerbaijan*, Application no. 5548/05, 13 November 2014.

<sup>24</sup> DH-DD(2014)1163E, Communication from 7 NGOs (05/09/2014) before the Committee of Ministers of the Council of Europe in the *Ramazanova and Others* group of cases against Azerbaijan, and reply from the authorities of 17 September 2014.

<sup>25</sup> Opinion No. 636/2011, CDL-AD(2011)035-e, *supra*, note 5.

*with the requirements of international standards*”, further wide ranging legal restrictions on NGOs have been introduced after the adoption of this Opinion.

41. The amendments raise barriers to the establishment of NGOs; introduce additional administrative requirements and increased checks as well as more problematic registration procedures; raise barriers to activities and operations; and restrict access to resources. More severe sanctions and penalties are also introduced for those acting in contravention of such or other legal obligations<sup>26</sup>. As such, the amendments fail to address some of the most important recommendations made by the Venice Commission in its 2011 Opinion, especially those relating to the establishment and/or registration of NGOs, to foreign NGOs and to the liability and dissolution of NGOs.

42. According to the 2007 Recommendation of the Committee of Ministers on the legal status of non-governmental organisations in Europe<sup>27</sup>, “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation”. Ensuring the effectiveness of the consultation process requires that it should be inclusive and involve stakeholders representing different and opposing views. In addition, the NGOs should be informed in advance about upcoming consultation processes concerning new draft regulations. There are doubts as to whether this requirement has been respected in the preparation of the recent amendments to the Law on NGOs and other related Acts. The Venice Commission was informed that NGOs were not in advance provided with, and consulted about, the final version of the draft amendments<sup>28</sup>.

### **Specific comments**

#### **A. Establishment/Registration of NGOs**

43. According to Article 12, par. 1, of the Law on NGOs, “an NGO may be formed as a result of its foundation as well as reorganization of an existing NGO”. In order to acquire legal personality, NGOs have to register under the procedure regulated by the 2003 *Law on State Registration and the State Registry of Legal Entities*. While public associations may operate without legal personality, on an informal basis, branches and representations of foreign NGOs may not.<sup>29</sup> Moreover, the acquisition of legal personality is a precondition for various benefits. Most importantly, only registered NGOs can, on behalf of the legal personality, open a bank account, buy property, receive grants under the 1998 Law on Grants<sup>30</sup>, and enjoy tax preferences under the 2000 Tax Code.

44. Mandatory registration for associations in order to acquire legal personality is not as such in breach of the right to freedom of association, as the Commission has observed in its 2011 Opinion. However, registration should not be an essential condition for the existence of

<sup>26</sup> See the amendments introduced to the Code of Administrative Offences (DH-DD(2014)39); NGO communication before the Committee of Ministers in the case of *Aliyev and others v. Azerbaijan*.

<sup>27</sup> Recommendation CM/Rec (2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.

<sup>28</sup> See for instance, the statement released by a group of civil society organisations’ members on 18 December 2013 ([http://ccd21.org/news/europe/azerbaijan\\_cso\\_statement.html](http://ccd21.org/news/europe/azerbaijan_cso_statement.html)): “Activists have been unable to obtain an official copy of the proposed amendments, only a few summaries in the local media, and there has been almost no public debate on the amendments”.

<sup>29</sup> According to Article 12, par. 3, of the Law on NGOs, “State registration of branches and representations of foreign NGOs in the Republic of Azerbaijan shall be carried out on the basis of the agreement signed with such organisations”. Branches and representatives of foreign NGOs operating without registration are subject to a penalty under the Code of Administrative Offences (See, DH-DD(2014)1163E, Communication from 7 NGOs (05/09/2014) before the Committee of Ministers of Council of Europe in the *Ramazanov and Others* group of cases against Azerbaijan).

<sup>30</sup> It appears that many non-registered NGOs in Azerbaijan receive grants in the name of their founder or chairperson, since according to Article 3 of the Law on Grants, individuals “may be recipient of a grant”. See, Mahammad Guluzade and Natalia Bourjaily, *Overview of the changes to NGO Legislation adopted on 17 December 2013 by the Parliament of the Republic of Azerbaijan*, Baku, 19 February 2014, p. 4.

an association, as that might enable domestic authorities to control the essence of the exercise the right to freedom of association. Moreover, the procedure of registration of NGOs in Azerbaijan has been criticised for its lengthy and cumbersome nature<sup>31</sup>.

45. In the cases of *Ramazanova and Others* (2007) and *Ismaylov* (2008), the ECtHR found Azerbaijan in violation of Article 11 ECHR (freedom of association) due to unlawful delays in State registration of an NGO. The Court considered in *Ramazanova and Others* that the significant delays in the state registration of the applicant association, which resulted in its prolonged inability to acquire the status of a legal entity, amounted to interference by the authorities with the applicants' exercise of their right to freedom of association. In this case, the Court found that the Ministry of Justice breached the statutory time-limits (as set out in Article 8 of the Law on Registration) for the association's state registration and that domestic law did not afford sufficient protection against such delays<sup>32</sup>. In the same vein, in its 2011 Opinion, the Venice Commission concluded that "*the 2009 amended version of the Law on NGOs and the 2011 Decree have further added complications to an already complicated and lengthy procedure*"<sup>33</sup>. The Commission also criticised the centralised character of the registration entailing that all NGOs, even the regional and local ones, must register in the "*Ministry of Justice Office in Baku and this, despite the fact the Ministry of Justice has branches in the different region*".<sup>34</sup>

46. The recent amendments have failed to address most of these shortcomings. The registration is still a lengthy and cumbersome process, though this is linked more to the implementation of the legislation than to its content. According to the recent expert reports,<sup>35</sup> the applicants are often required by the registering department to submit additional documentation not required under the national legislation; they often receive repeated requests for corrections of the documents, although such requests must be submitted at once (Article 8(3) of the Law on Registration); the deadline for issuing the decision on the registration is not always respected (as was found in the above-mentioned judgments in *Ramazanova and Others* and *Ismaylov* of the ECtHR); and the automatic registration, in case the Ministry of Justice does not respond to the applications within the statutory time-limit (Art. 8(5) of the Law on Registration), does not seem to be respected. Moreover, the registration is still possible only in Baku, be it that the documents may be sent by mail and plans to introduce computer-based registration and establish a single information network of registry authorities are reportedly being considered.<sup>36</sup>

47. Under the Law on NGOs, NGOs are free to determine their own purposes and fields of operation. They may "be established and operate with purposes not prohibited by the Constitution and laws of the Republic of Azerbaijan" (Article 2(3)). The amendments adopted on 17 December 2013 (entered into force on 3 February 2014) added a new provision to Art. 2 (3) which provides that "Establishment and activity of non-governmental organizations, as well as of branches or representations of non-governmental organizations of foreign states in the Republic of Azerbaijan, whose aim or activity is aimed at the change violently of the constitutional structure and secular character of the Republic of Azerbaijan, violation of its territorial integrity, propaganda of war, violence and cruelty, instigation of racial, national and religious hatred, is not allowed".

<sup>31</sup> Opinion 636/2011, CDL-AD(2011)035-e, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan adopted by the Venice Commission at its 88th Plenary Session* (Venice, 14-15 October 2011).

<sup>32</sup> According to the information available to the Venice Commission, only in 2013, more than 20 applications were introduced before the ECtHR claiming a violation of the right to freedom of association of the applicants because of repeated refusal of registration of NGOs. For a list of those pending cases before the ECtHR, see, DH-DD(2014)39 NGO communication in the case of *Aliyev and others* before the Committee of Ministers.

<sup>33</sup> Par. 119.

<sup>34</sup> Par. 65.

<sup>35</sup> OING Conf/Exp (2014) 1, *Opinion on the NGO Law of the Republic of Azerbaijan in the Light of Amendments Made in 2009 and 2013 and Their Application*, Prepared by Mr Jeremy McBride, September 2014.

<sup>36</sup> *Ibid.*

48. These provisions appear to be acceptable since associations shall be free in the determination of their objectives within the limits provided for by laws in line with international standards<sup>37</sup>. These objectives must comply with the requirements of a democratic society. In this context, it should however be reminded that in the assessment of compliance of the objectives of an association with domestic law, the authorities should always start out with a presumption of lawfulness.

49. It should be noted that the legitimate aims for which restrictions can be imposed, are limited under Article 11 ECHR to: “the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”. Generally, the legitimate aims for restrictions indicated in Article 11(2) ECHR cover the prohibited aims pointed out in Article 2(3) as amended. The importance of the element of “violence” in Article 2(3) should however be underlined. For the Venice Commission, peaceful advocacy for a different constitutional structure, a change of the secular character of the State or for a different territorial arrangement within the country are not considered to be criminal actions, and should on the contrary be seen as legitimate expressions. Thus, it is important that the prohibited specific purposes indicated in Article 2(3) as amended on 17 December 2013, should not be applied in a “blanket manner” and what is deemed an “unlawful” objective must be assessed based on international human rights standards. Secondly, the purpose of “violation of territorial integrity” in the second sentence of this Article (as amended on 17 December 2013) should only be considered illegitimate if it is associated with an element of violence<sup>38</sup>.

50. The new Article 7(4)-1, introduced in December 2013, as well as some other new or amended provisions (Article 7(5)) specify the obligatory content of the Statute of NGOs and of some other necessary documents concerning, for instance, the appointment of NGOs’ representatives. While it is legitimate for States to regulate the minimal content of NGOs’ Statutes, the Venice Commission considers that States should refrain from excessive control over the internal matters of associations such as the regularity of their meetings, compliance of the activities of associations with these associations’ own statutes or requirement for membership. State control on these matters is only justified in exceptional circumstances in order to ensure compliance with international obligations for non-discrimination and the protection of the fundamental rights of association’s members. Requirements relating to the content of the documents in the appointment of NGOs’ representatives, e.g. the requirement that the period of service be indicated in the appointment document, are examples of such excessively interferences.

51. The 2013 amendments to the NGO Law introduced a new paragraph 3 to Article 16 (NGO’s State Registration) which stipulates that *“If discrepancy to the legislation is found in the founding documents of non-governmental organizations and of branches or representations of non-governmental organizations of foreign states, the relevant body of executive power demands from these bodies that the founding documents are brought in accordance with the legislation within the period of 30 days.”* Since this provision is included in the article on State Registration, it most probably applies to inconsistencies revealed during the registration procedure.

52. In addition, Article 17 (1) of the Law on NGOs refers to the provisions of the Law on Registration dealing with the grounds for refusal of state registration of NGOs wishing to obtain the status of legal entities. In its Article 11(3), the Law on Registration provides for

<sup>37</sup> Article 3 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders) provides that “Domestic law consistent with (...) international obligations of the State in the field of human rights and fundamental freedoms is the judicial framework within which human rights and fundamental freedoms should be implemented and enjoyed (...)”

<sup>38</sup> See ECtHR *United Communist Party of Turkey and Others v. Turkey*, no. 19392/92, 30 January 1998, par. 57.

those permitted grounds for refusal, in particular: contrariety of the documents submitted to the Constitution and to other legislative acts (Art. 11(3)1 of the Law on Registration); and conflict of goals, objective and forms of activities with legislation (Art. 11(3)2). However, this conformity with legal requirements may be too strict a test and it appears that authorities have wide discretion in refusing to register NGOs. As a general rule, the law should not deny registration based on technical omissions (a missing document, a lack of signature). This provision must, therefore, be reserved to cases of serious inconsistencies and should not be applied when minor (for instance formal) issues are at stake.<sup>39</sup>

53. Moreover, due to the introduction of changes into the Code of Administrative Offenses in January 2012, NGO registration applicants are now subject to a penalty of 4000 AZN (more than 4000 EUR) for providing false information during the registration process. The term “false information” is not defined in the law, which may, according to NGO submissions, lead to arbitrary or selective application of such fines to NGOs<sup>40</sup>.

54. Under the new Article 16(4), again included in the provision on State registration, “*non-governmental organizations and branches or representations of foreign non-governmental organizations can apply about temporary suspension of their activities to appropriate executive authority body*”. The meaning of this provision is unclear, probably due to its incorrect translation. It is not specified for what reasons, in which stage of their operation and for what period NGOs should want to suspend temporarily their activities and how this is related to their registration. It is also not specified, whether the temporary suspension can result in the termination of the registration and under what conditions and which procedure NGOs may resume their activities. The provision should be clarified accordingly.

## **B. Branches and Representations of Foreign NGOs**

55. The 2009 amendments to the Law on NGOs introduced special provisions relating to the registration and operation of branches and representatives of foreign NGOs in Azerbaijan. As the Venice Commission stated in its 2011 Opinion, “*the need for such a procedure, i.e. for international NGOs to create local branches and representatives and have them registered, is in itself questionable*”<sup>41</sup>. It is important to stress in this context that international legal instruments, as well as Article 58 of the Constitution of the Republic of Azerbaijan, grant the right to freedom of association to “everyone”, citizens and non-citizens alike.

56. Branches and representatives of foreign NGOs, unlike public associations, have the legal obligation to register under a financial penalty. The registration “*shall be carried out on the basis of the agreement signed with such organizations*” (Article 12(3)), with the details provided for in the 2003 Law on Registration and the 2011 Presidential Decree no. 43. In its 2011 Opinion, the Venice Commission criticised both the requirement of this registration and its actual content.<sup>42</sup> The recent amendments fail to address these recommendations. In fact, they impose new obligations upon branches and representations of foreign NGOs that can seriously hamper their registration and their very operation.

57. Under the new Article 7(1)1, foreign NGOs can establish only one branch or representation in the territory of Azerbaijan. This requirement might be problematic for larger

<sup>39</sup> Recommendation CM/Rec(2007)14 indicates that “*legal personality should only be refused where there has been a failure to submit all the clearly prescribed documents required, a name has been used that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person in the state concerned or there is an objective in the statutes which is clearly inconsistent with the requirements of a democratic society*” (par. 34).

<sup>40</sup> DH-DD(2014)39E 10 January 2014. 1193 meeting (4-6 March 2014) (DH) - Communication from a NGO (Legal Education Society - HMC) (28/11/2013) in the case of *Aliyev and Others v. Azerbaijan* (Application No. 28736/05).

<sup>41</sup> Par. 75.

<sup>42</sup> See Section IV.B. of the Opinion (paras. 69-95).

NGOs which engage in various types of activities and could therefore find it useful to pursue their aims through several branches or representations in Azerbaijan. The limitation to one representation or branch constitutes, therefore, an interference into the right to freedom of association of foreign associations which also operate under the jurisdiction of Azerbaijan. This limitation of the right to freedom of association requires a justification based upon a legitimate aim and requires proportionality between the limitation and that aim. However, the blanket nature of this limitation hinders any proportionality assessment in the particular circumstances of each case.

58. The amended Article 7(5) of the Law on NGOs stipulates that “*Deputies of heads of non-governmental organizations established by foreigners or stateless persons, as well as by foreign legal entities, as well as of branches and representations of non-governmental organizations of foreign states must be citizens of the Republic of Azerbaijan.*” This provision which applies to deputy heads and not to heads of foreign NGOs appears to be arbitrary as there is no justification for this distinction. Also, Article 9(1)1, as amended, requires that foreigners and stateless persons who act as legal representatives of an association, have permanent residency in Azerbaijan. Such requirements constitute a limitation of the right of associations to freely establish their own structure and appoint or elect the persons who may act on their behalf. They need a justification based upon a legitimate aim and proportionality between the limitation and that aim, in the absence of which, those requirements may amount to discrimination against non-citizens under Article 14 ECHR and constitute also a breach of Article 1 ECHR which has been incorporated into the Azerbaijani domestic law. However, as in the previous case, the blanket nature of these requirements prevents any proportionality assessment and the requirements appear to be in breach of the principle of equal treatment of all individuals regardless of their nationality.<sup>43</sup> The same observations hold good for the requirement that the term of office of the head of a branch or representation of a foreign association be indicated in the appointment document (last sentence of the amended Article 7(5)).

59. The amended Article 12(3) states that “*the term of validity of the agreements (concluded between foreign NGOs and the Azerbaijani authorities) shall be indicated in the agreement*”. This amendment suggests that the agreements should be concluded for a specific period of time. This constitutes yet another hindrance in the activities of branches and representations of foreign NGOs, as they would operate under the risk of non-prolongation of the agreement.<sup>44</sup> Such a regulation would also place branches and representations of foreign NGOs into a further disadvantaged position with respect to other NGOs, which are registered for an unlimited period of time.

60. Under the amended Article 19(7), “*If a non-governmental organization of a foreign state unites, joins with another organization or divides itself, if its organizational-legal form changes, its branch or representation on the territory of the Republic of Azerbaijan is liquidated.*” This provision, sanctioning any changes in the structure of the foreign NGO with the dissolution of its branch or representation operating at the territory of Azerbaijan, is overly intrusive in its general character and can hardly be justified by any legitimate reasons. The dissolution, as an extreme measure, must be reserved to the most serious situations, such as a total disappearance of the foreign NGO<sup>45</sup>. Even then, the Azerbaijani branches or representations of such foreign NGOs shall be given a meaningful chance to continue their existence as independent (registered or unregistered) NGOs. Also, this provision which

<sup>43</sup> The Recommendation CM/Rec(2007)14 explicitly stipulates that “*NGOs should not be subject to any specific limitation on foreign nationals being on their board or staff*” (par. 49).

<sup>44</sup> The Recommendation CM/Rec(2007)14 confirms that “*approval to operate (for foreign NGOs) can only be withdrawn in the event of bankruptcy, prolonged inactivity or serious misconduct*” (par. 45).

<sup>45</sup> CDL-AD(2011)035 Opinion on the Compatibility with Human Rights Standards of the Legislation on Non-Governmental Organisations of the Republic of Azerbaijan, par. 107. CDL-AD(2011)036 Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, par. 107.

applies exclusively to foreign NGOs is by its nature discriminatory unless this difference in treatment has an objective and reasonable justification.

61. Finally, in its 2011 Opinion, the Venice Commission criticized the vague wording of Article 3(2) of Presidential Decree no. 43 of 16 March 2011, which requires for branches and representatives of international NGOs “to respect national and moral values” (Art. 3(2)2 of the Decree) and not to be involved in political and religious propaganda (Art. 3(2)3 of the Decree). However, despite the criticism of the Venice Commission, these provisions of the Presidential Decree are still in force. Moreover, the amendments introduced on 17 December 2013 added a new Article 22(4) to the Law on NGOs which provides that the NGOs cannot be involved in professional religious activity<sup>46</sup>. The general character of this ban is in violation of international standards concerning freedom of religion, which freedom also extends to legal persons and group of persons, including associations<sup>47</sup>.

### C. Receipt of Donations and Grants by NGOs

62. The recent amendments introduced a rather detailed regulation relating to the receipt of donations by NGOs. This regulation encompasses a new Article 24(1) as well as a set of other provisions. Article 24(1) defines donation as “an assistance given in the form of funds and (or) other material form provided by a citizen of the Republic of Azerbaijan or legal person, as well as branches or representations of foreign legal persons (...) registered in Azerbaijan and not being aimed at profit to a non-governmental organization, as well as branches or representations of foreign NGOs in accordance with this law without a condition to achieve any purpose” (par. 1).

63. The definition originally covered only donations provided to non-governmental organizations and not to branches and representations of foreign NGOs. Later on, with the amendments adopted on 17 December 2013, the scope was extended to encompass the latter category as well, which in itself is not objectionable. However, the third set of amendments, adopted by Parliament on 17 October 2014 and signed by the President on 14 November, limited the circle of potential donors to “a citizen of the Republic of Azerbaijan or legal person, as well as branches or representations of foreign legal persons (...) registered in Azerbaijan and not being aimed at profit to a non-governmental organization”, thus excluding donations from foreign sources. The Venice Commission reiterates that, while foreign funding might give rise to some legitimate concerns, it shall not be prohibited unless there are specific reasons to do so. Even then, foreign funding should never be object of an outright ban.<sup>48</sup>

64. Further obligations relating to the receipt of donations and grants stem from the 2014 amendments to the Law on Grants. According to Article 2(5), as amended in October 2014, branches and representations of foreign legal persons registered in Azerbaijan may act as donor after obtaining the right to give a grant. Obtaining the right to give a grant requires an opinion on financial-economic responsibility of the grant by the relevant domestic authority. The provisions do not provide for any criteria for such authorization. It is furthermore left to the discretion of the relevant authority to define the procedure for obtaining the right to give a grant. It is thus recommended that the relevant authority competent to authorize the grant as

<sup>46</sup> In the case of *Islam-Ittihad Association and Others* (application no. 5548/05, judgement of 13 November 2014), the lack of any definition in domestic law of what constitutes “religious activity” led the Court to find a violation of Article 11 ECHR. The new Article 22(4) does not seem remedy to this deficiency.

<sup>47</sup> See Joint Guidelines on the Legal Personality of Religious or Belief Communities, adopted by the Venice Commission at its 99<sup>th</sup> Plenary Session (13-14 June 2014), par. 17 and seq.

<sup>48</sup> Recommendation CM/Rec(2007)14 confirms: “NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties” (par. 50).

well as the procedure to be followed and the criteria on the basis of which the authorization is given be clearly indicated in the law.

65. NGOs are free to accept donations but they may not “*either directly or indirectly, provide, propose or promise any material or other gifts, privilege or discount to the person providing donation or any other person in return for the donation received or promised to it*” (Art. 24(1)2). It is not clear whether this provision would exclude donations provided in support of concrete project. Such donations shall obviously remain lawful.

66. Donations are received “*as a transfer to the bank account of an NGO*” (Art. 24(1)4). An exception is foreseen for donations not exceeding 200 AZN provided to NGOs/branches and representations of foreign NGOs which have charity as a primary purpose indicated in their Statutes. Since there is no special status of charitable NGOs foreseen in the Law on NGOs, this provision might be of uncertain application, factually dissuading NGOs from accepting cash donations.

67. The amendments adopted on 17 October 2014 introduced the obligation for NGOs to report all donations to relevant authorities (the amount of the received donation and the identity of the donor). The amended Article 24(1)5 does not specify whether such reports shall be made separately for each and every donation or be part of the annual financial report. The latter option is clearly preferable, as the former one would be administratively demanding for NGOs and could again dissuade them from accepting donations (especially smaller donations).

68. Moreover, the reporting obligation now applies not only to grants as such but also to sub-grants, other forms of assistance and amendments to grants, thus adding substantively to the administrative burden of NGOs, while the amendments also provide for sanctions for undertaking banking and other operations in relation to unregistered grants (2013 Amendments to the Code of Administrative Offences). These rules have made it impossible for NGOs that have been denied registration, to access funding in the form of sub-grants through registered organizations, a practice that has previously been used<sup>49</sup>.

The Azerbaijan authorities argue that it is necessary to register the grants as, according to their information, some donors allocate funds to the NGOs in cash and hence the NGOs are not paying taxes from the received assets.<sup>50</sup> However, the wide discretion given to the executive authorities in assessing the reasonableness of donations is such that consistency in the implementation of the laws regarding NGOs seems improbable.

#### **D. Reporting Obligations of NGOs**

69. The recent amendments to the Law on NGOs, the Law on Registration and the Law on Grants have expanded the scope of reporting obligations that NGOs and branches and representations of foreign NGOs have towards state authorities. In addition to financial reporting obligation, as provided in Article 29(4) of the Law on NGOs, other reporting obligations are provided in the new Article 29(5), introduced in December 2013. However, the form, the content and procedure of submitting these reports will be determined by the relevant body of executive power (Art. 29(4)).

70. The amended Article 14(1)2 of the Law on Registration requires NGOs and branches and representations of foreign NGOs to inform the Ministry of Justice about any changes of their factual address and of the number of their members. Previously, NGOs were only required to report changes of their legal address and did not need to report on the number of

<sup>49</sup> <http://www.osce.org/odihr/124361?download=true>

<sup>50</sup> <http://en.trend.az/azerbaijan/politics/2334649.html>



their members<sup>51</sup>. The previous regulation is clearly more in accordance with international standards in this area. NGOs should only be required to inform states authorities about their legal address and any changes relating to this address, as it is the legal address which is used in official documents and communication.

71. Moreover, there are no reasons why state authorities should need to know the exact number of members of NGOs and be informed about any changes in this number (amended Art. 14(2)3. of the Law on Registration). Although the Law *stricto sensu* does not require the disclosure of names and addresses of members, the Venice Commission was informed that NGOs were often requested by state authorities to provide such data<sup>52</sup>. Such requests are fully unjustified and amount to unwarranted interferences into the internal autonomy of NGOs.

72. Under the new Article 14(2)5, NGOs and branches and representations of foreign NGOs are further required to inform the Ministry of Justice about the composition of their highest governing body and the term of service of its members. However, the NGOs are already under obligation to keep the registry information updated, so the purpose of the new provision remains unclear. In any case, the following Recommendation of the Committee of Ministers should be taken into account: “NGOs should ensure that their management and decision-making bodies are in accordance with their statutes but they are otherwise free to determine the arrangements for pursuing their objectives. In particular, NGOs should not need any authorisation from a public authority in order to change their internal structure or rules”<sup>53</sup>.

73. The same Article introduces the requirement for NGOs and branches and representations of foreign NGOs to inform the Ministry of Justice whether they spent their property for statutory purposes upon their dissolution. The modalities of this requirement are not specified, giving rise to doubts as to whether, for instance, evidence need to be provided proving that the property has actually been spent in the indicated way<sup>54</sup>.

74. Branches and representations of foreign NGOs have an additional obligation to inform the Ministry of Justice about the term of contract of their managers and deputy managers and provide personal data relating to these individuals. The purpose of this obligation is not clear and it appears to be excessively intrusive in the absence of any legitimate aim for its imposition.

### **E. State Supervision over NGOs**

75. The amended Law on NGOs enhances control over NGOs by state authorities and increases sanctions foreseen for those having acted in violation of their obligations under the Law. The regulation applies both to NGOs and to branches and representations of foreign NGOs (hereafter, the term NGOs will cover the two groups at the same time).

76. Article 10(5), as amended on 17 December 2013, authorises members of NGOs who believe that their rights have been violated by the executive bodies of the NGO, to submit their case to the court. If the violation is established, the court may suspend the activity of the NGO for a period of year (new Art. 31(3), introduced on 17 December 2013). In principle, it should be left to internal regulations of NGOs (e.g. the statutes of the association, internal complaint procedures and disciplinary sanctions) to determine the ways in which conflicts and disputes arising within such NGOs will be solved, as long as no criminal acts are involved. While submitting the conflict or dispute to a court should be an option, most

<sup>51</sup> See, *Overview of the Changes to NGO Legislation adopted on 17 December 2013 by the Parliament of the Republic of Azerbaijan*, prepared by Mahammad Guluzade and Natalia Bourjaily, Baku, 19 February 2014.

<sup>52</sup> *Overview of the Changes to NGO Legislation*, p. 5.

<sup>53</sup> CM/Rec(2007)14, par. 47.

<sup>54</sup> *Overview of the Changes to NGO Legislation*, p. 6.

probably reserved for extreme cases involving violations of laws and/or rights of members, it shall not be the only option; the wording of this provision suggests that this might be the case at hand.

77. The amendments adopted on 17 December 2013 introduced a new Article 30(1) to the Law on NGOs which regulates the examination of the compatibility of the activities of NGOs with their statutes and the legislation of the Republic of Azerbaijan. Examining the compatibility of the activity of NGOs with their own Statutes is clearly not the task of state authorities, unless very serious misgivings are at stake. It is up to each NGO to monitor the compliance with its Statute and determine sanctions for their violations. The internal functions of associations should be free from state interference. Autonomy is a cornerstone of the right to freedom of association. Consequently, under no circumstances should associations suffer sanctions on the sole ground that their activities breach their own internal regulations. On the other hand, state authorities may, and should, monitor the compliance with national laws, yet in this respect NGOs should not be in any different position than other entities (natural or legal persons) operating at the territory of the state. The word “with their statutes” should therefore be deleted.

78. In addition, the new Article 30(1)3 makes it an administrative offence, both for individuals and for legal entities, to create obstacles to the examinations foreseen in Article 30(1). The term “create obstacles” is unclear and open for misuse. The constitutive elements of this administrative offence should therefore be indicated in an unequivocal manner in the provision.

79. Article 31 dealing with the Liability of NGOs has also been amended in several ways (17 December 2013). Some changes have gone in the right direction, addressing some of the objections raised in the 2011 Opinion by the Venice Commission. The amended Article 31(2) now contains a specific period (up to 30 days) within which alleged violations of the legislation or of Statutes shall be rectified. Moreover, the provision confirms that NGOs have the right to appeal to administrative bodies or to a court with regard to the application of any measures of liability defined by law (amended Article 31(5)).

80. Other changes are more problematic. First, the amended provision foresees several grounds for the suspension of the activities of an NGO for the period up to one year. These grounds include: creating obstacles to the elimination of the situation which caused emergency (Article 31(3)1 as amended); the failure to eliminate the violations for which the NGOs was held liable and which were indicated in a notification or a direction of the relevant executive body (Article 31(3)2 as amended); and the establishment of a violation of rights of the members by the executive body (Article 31(3)3 as amended). These grounds, which have been broadened in the amended law, with the exception of most extreme cases, do not justify suspension of the activities of an NGO, although, according to Article 31(7) as amended, associations have the right to ask the court to review the suspension decision on the basis of reasons set forth in Article 31(3)3. Moreover, the wording – at least as provided for in the translation – is quite confusing. For instance, the meaning of “creating obstacles to the elimination of the situation which caused emergency” is unclear and may lead to misuse.

81. Secondly, according to Article 31(4) as amended, NGOs that receive, within one year, more than two written notifications or directions from the relevant executive body relating to the elimination of violations, may be liquidated by a court on the basis of an appeal by the relevant executive body. Although the liquidation can only be effected by court decision, the general character of the provision offers insufficient guarantee that the sanction of liquidation will be proportionate. In fact, it appears from the wording of this provision that the courts are obliged to decide to liquidate in case the NGO receives more than two notifications within a year. Therefore, the provision does not leave any scope for a proportionality assessment to the court concerned in the circumstances of a given case. So drastic a sanction shall be reserved to the most severe misgivings and accompanied by appropriate guarantees.

82. The chilling effect of those amendments is evident as the scope for discretion of executive scrutiny over associations' activities seems unlimited and not precisely defined.

83. Azerbaijan has been repeatedly found in violation of Article 11 of the European Convention on Human Rights by the ECtHR for having dissolved NGOs for their alleged failure to comply with the national legislation on internal management of NGOs. In its judgment in *Tebieti Mühafize Cemiyeti and Israfilov* (2009)<sup>55</sup> the Court concluded that such an interference into the right to freedom of association might have pursued the legitimate aim of "protection of the rights and freedoms of others"<sup>56</sup>, but the provisions of the NGO Act did not meet the "quality of law" requirement<sup>57</sup> and the interference was not "necessary in a democratic society"<sup>58</sup>.

84. Although the abovementioned judgment of the ECtHR took into account the provisions of Article 31 in their versions even before the 2009 amendments, these considerations equally apply to the amended current version of Article 31. The provisions are still "*far from being precise as to what could be a basis for warnings by the Ministry of Justice that could ultimately lead to an association's dissolution*"<sup>59</sup> and the Law on NGOs, as amended, still "*appears to have afforded the Ministry of Justice a rather wide discretion to intervene in any matter related to an association's existence*"<sup>60</sup>. Moreover, dissolution as a sanction could only be applied in the very serious cases as, otherwise, such a sanction risks to be "*not justified by compelling reasons and (...) disproportionate to the legitimate aim pursued*".<sup>61</sup>

#### F. Penalties imposed upon NGOs

85. Simultaneously with the Law on NGOs, the 2000 Code of Administrative Offences of the Republic of Azerbaijan was amended. The Venice Commission does not have at its disposal a translation of the amendments introduced to the Code of Administrative Offences on 17 December 2013. Consequently, its assessment is based on information submitted and analysis made by civil society organisations. The amendments introduced new offences and increased penalties for some of the existing offences. Although the increase in the penalties in the Code was not specific for NGOs but was part of a general process of severing sanctions, any penalties imposed upon NGOs and interfering with their freedom of association (or other human rights) always need to meet the test of legality, legitimacy and necessity and need to be proportionate to the offence found.

86. The Venice Commission was also informed that, in some cases, NGOs could be sanctioned without being issued with a prior warning and without being given the chance to rectify certain deficiencies. Whereas such a procedure might be justified in case of very serious offences or in case of emergency, it should not be applied in other instances.<sup>62</sup> Moreover, NGOs must always be provided with access to an independent and impartial court competent to consider the well-foundedness of the allegation and the penalty imposed upon them.<sup>63</sup>

<sup>55</sup> ECtHR, *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan*, Application no. 37083/03, 8 October 2009.

<sup>56</sup> *Ibid.*, par. 66.

<sup>57</sup> *Ibid.*, par. 65.

<sup>58</sup> *Ibid.*, par. 92.

<sup>59</sup> *Ibid.*, par. 61.

<sup>60</sup> *Ibid.*, par. 62.

<sup>61</sup> *Ibid.*, par. 83.

<sup>62</sup> Recommendation CM/Rec(2007)14 states that "*no external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent*" (par. 70).

<sup>63</sup> Recommendation CM/Rec(2007)14 states that "*NGOs should generally be able to request suspension of any administrative measure taken in respect of them. Refusal of a request for suspension should be subject to prompt judicial challenge*" (par. 71).

87. The new Article 200-2 introduces a new penalty for failure of NGOs to submit information necessary for the state registry of legal entities. The new Article 340-2 introduces penalties for several mostly formal or procedural misgivings committed by NGOs (failure to maintain a register of members, failure to adjust constituent documents to the national legislation, etc.). The new Articles 340-3 and 340-4 sanction the above-mentioned “creating of obstacles” by NGOs for the investigation of activities of NGOs, the failure to answer to requests for additional information and the provision of false information, as well as the failure to eliminate deficiencies identified in a notification by a state body. Finally, the new Article 340-5 penalises various violations of rules on operation of branches and representations of foreign NGOs, such as the operation without registration. The need to have special offences and enhanced penalties for foreign NGOs is again disputable and could, unless properly justified, amount to discrimination.

## V. Conclusions

88. The recent amendments to the Law on NGOs of the Republic of Azerbaijan and to several other legal acts (Law on Registration, Law on Grants, Code of Administrative Offences) have brought some limited positive changes: A specific period of up to 30 days is provided for within which NGOs are to rectify their alleged violations brought to their attention by a notification from state authorities. The right of NGOs to appeal to administrative bodies or to a court with respect of any measure of liability defined by law is now explicitly recognized.

89. Despite these positive changes, the amendments have not addressed many of the recommendations contained in the 2011 Opinion of the Venice Commission. The procedure of registration of NGOs has not been simplified in any substantive way, branches and representations of foreign NGOs are still object of specific, and problematic, regulation, and NGOs can still be dissolved for misgivings which are not serious enough to justify the imposition of the most severe sanction.

90. In addition, the amendments have introduced certain new controversial provisions. Branches and representations of foreign NGOs have been put into a yet more disadvantaged position with respect to other NGOs: additional reporting obligations, special penalties, limited validity of the agreements signed with the state and the excessive discretion of the state authorities to intervene in the matters of their internal life (obligatory content of their internal documents etc.).

91. Moreover, new obligations are imposed on NGOs with respect to the receipt of grants and donations and to reporting to the state authorities. Again, some of these obligations seem to be intrusive enough to constitute a *prima facie* violation of the right to freedom of association.

92. In general, the enhanced state supervision of NGOs seems to reflect a very paternalistic approach towards NGOs and calls again for sound justification. The same holds for new and enhanced penalties that can be imposed upon NGOs even for rather minor offences.

93. Globally, the cumulative effect of those stringent requirements, in addition to the wide discretion given to the executive authorities regarding the registration, operation and funding of NGOs, is likely to have a chilling effect on the civil society, especially on those associations that are devoted to key issues such as human rights, democracy and the rule of law. Like the Council of Europe Commissioner on Human Rights has, the Venice Commission finds that the amendments, in an overall assessment, “*further restrict the operations of NGOs in Azerbaijan*”.

94. In conclusion, the following recommendations are made:

- The registration process should be simplified and decentralised in order to decrease its excessive length; specific measures should be taken to ensure full respect for the legislative requirements and to prevent *contra legem* practices as the breach of deadlines for registrations, repeated unnecessary demands for correction of registration documents etc. The relevant provisions should be amended to limit the grounds for refusal of registration to serious deficiencies.
- The requirement for international NGOs to create local branches and representations and have them registered should be reconsidered. Blanket restrictions on the registration and operation of branches and representations of foreign NGOs, such as the absolute limitation of the number of branches and representations of foreign NGOs in Azerbaijan, should be eliminated.
- The amendment preventing foreign funding of NGOs should be revised as to authorize foreign funding unless there are clear and specific reasons not to do so. The procedure for obtaining the right to give a grant, if maintained, should be associated with clear criteria and procedural indications clearly laid down in the legislation.
- Provisions allowing unwarranted interferences into the internal autonomy of NGOs, i.e. reporting obligations and state supervision on NGOs internal organisation and functioning, should be removed.

95. The Venice Commission reiterates its readiness for further assistance to the authorities of Azerbaijan in this and other areas.