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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**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 88<sup>th</sup> Plenary Session  
Venice (14-15 October 2011)**

**On the basis of comments by**

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## I. Introduction

1. By letter dated 29 June 2011, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan.
2. The request drew particular attention to the provisions of the Law and the Decree relating to the registration of branches and representatives of international NGOs in Azerbaijan and expressed its concern over the impact that such a regulation could have on the state of the freedom of association in the Republic of Azerbaijan.
3. The Venice Commission appointed Ms Bilkova and Ms Thorgeirsdottir as rapporteurs. They worked on the basis of an English unofficial translation of the 2009 Law on non-governmental organisations (Public Associations and Funds, CDL-REF (2011) 049) and of the Decree n°43 of 16.03.2011, CDL-REF (2011)048 and presented their individual comments (CDL (2011)089) and (CDL(2011)090) respectively.
4. The present opinion was drawn up on the basis of the rapporteurs' comments. It was discussed at the Sub-Commission on Fundamental Rights ( Venice, 13 October 2011) and adopted at the 88<sup>th</sup> Plenary Session of the Commission (Venice, 14-15 October 2011).

## II. Preliminary Observations

5. In 2009, two separate reports of the Parliamentary Assembly expressed concern about the situation of NGOs on Azerbaijan. In its report on "The state of human rights in Europe and the progress of the Assembly's monitoring procedure"<sup>1</sup> the Parliamentary Assembly expressed concern about the fact that "legal restrictions on freedom of association have recently been introduced in Azerbaijan". The Council of Europe in its report on "The functioning of democratic institutions in Azerbaijan" had been informed by several prominent NGOs that the registration of international NGOs branches in Azerbaijan had become subject to numerous arbitrary conditions and thus more difficult<sup>2</sup>.
6. The exact terms of the present request draw particular attention to the provisions of the 2009 Law on Non-Governmental Organisations (Law No. 401) and the Decree No. 43 relating to the registration of branches and representatives of international NGOs in Azerbaijan and express concern over the impact that such a regulation could have on the state of freedom of association in the Republic of Azerbaijan.
7. The present Opinion aims to assess the compatibility of the 2009 NGOs legislation with the Republic of Azerbaijan's international human rights obligations. The Republic of Azerbaijan became a member state of the Council of Europe (hereinafter CoE) on 25 January 2001. It ratified the European Convention on Human Rights (hereinafter ECHR) on

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<sup>1</sup> See Doc. 11941, The state of human rights in Europe and the progress of the Assembly's monitoring procedure <http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc09/EDOC11941.htm>.

<sup>2</sup> See Doc. 12270, The functioning of democratic institutions in Azerbaijan, 31 May 2010 <http://www.assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc10/EDOC12270.htm>.

15 April 2002. The Republic of Azerbaijan ratified the International Covenant on Civil and Political Rights (hereinafter ICCPR) on 13 August 1992.

8. The legislation which is the subject of the present opinion has also been examined by the INGO (International Non Governmental Organisation) Conference of the Council of Europe. In April 2011, the Standing Committee of the INGO Conference of the Council of Europe asked its Expert Council to prepare an Opinion on the amendments in 2009 to the NGO Law in Azerbaijan and their application. On 3<sup>rd</sup> October 2011, the Standing Committee Conference of INGO adopted a Recommendation on the amendments in 2009 to the NGO Law in Azerbaijan and their application (see Annex).

### III. Background Information and Facts

9. In July 2009, the Republic of Azerbaijan amended its 2000 Law on Non-Governmental Organisations (Law No. 401). In March 2011, a Decree “on approval of rules for state registration and rules related to the preparation for negotiations with foreign non-governmental organisations and representations in Azerbaijan Republic” (Decree No. 43) was adopted by the Cabinet of Ministers in order to ensure the implementation of this amended law.

10. The main changes pertain to the registration of branches and representatives of international NGOs in Azerbaijan, which is newly conditioned by an agreement signed by such organisations<sup>3</sup> with the Government. The agreement should be an outcome of a negotiation process between the Ministry of Justice and the NGOs, in the course of which the NGOs have to accept a series of conditions and pledges.

11. On 10 March 2011, the Ministry of Justice of the Republic of Azerbaijan issued an order requiring the Baku offices of the Washington, DC-based National Democratic Institute (NDI) and the Human Rights House Azerbaijan, partner of the international Human Rights House Network, to cease their activities. The Human Rights House Azerbaijan was registered in 2007 as an international branch of the Human Rights House Foundation. Its office in Baku, opened in April 2009 with the financial support of the Norwegian Ministry of Foreign Affairs and the Fritt Ord Foundation, served as a platform for meetings for several Azerbaijani NGOs and as a resource and information centre on the human rights situation in Azerbaijan.

12. The Human Rights House in Azerbaijan was a popular meeting place for youth and human rights activists and journalists, According to the Human Rights House Network the centre in Baku was before its closure a focal point for promotion and protection of human rights in Azerbaijan. Despite its registration, the government demanded a bilateral agreement with Norway about the organisation’s operations.

13. The closure of the Human Rights House Azerbaijan gave rise to criticism from both international and Azerbaijani NGOs.<sup>4</sup> Local analysts have cited the closure of the NGOs as an attempt by authorities to clamp down on the country’s relatively weak civil society. The closures took place just over a month after the start of unauthorized street rallies by youth activists and opposition parties that have been met with the arrests of dozens of rally participants and suspected organizers.

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<sup>3</sup> Article 12.3 of the Law

<sup>4</sup> Human Rights House Network, *Statement on the closing of the Human Rights House Azerbaijan*, available at <http://humanrightshouse.org/Articles/16055.html> (visited 8 August 2011)

14. On 11 April 2011 member organisations of the International Partnership Group for Azerbaijan (IPGA), a coalition of twenty international NGOs working to promote and protect freedom of expression in Azerbaijan issued a statement urging the Parliamentary Assembly of the Council of Europe to take action to address the alarming freedom of expression situation in Azerbaijan. This statement was supported by major freedom of expression associations as Article 19: Global Campaign for Free Expression, Human Rights House Foundation, Index on Censorship, Institute for Reporters' Freedom and Safety, Open Society Institute – Assistance Foundation, Reporters without Borders and the World Association of Newspapers and News Publishers.<sup>5</sup> This statement was particularly concerned with the wave of arrests and beatings connected with recent protests and the increased pressure against NGOs, stating that: From February to April 2011, the Azerbaijani authorities had stepped up pressure against NGOs working on democracy and human rights issues. In March 2011, authorities ordered the closure of three NGOs in the Azerbaijani city of Ganja.<sup>6</sup> Other Baku-based NGOs have reported increased pressure by authorities, including the Institute for Reporters' Freedom and Freedom and Safety, whose employees had, according to the above statement, faced surveillance, harassment and detention in recent weeks. The statement furthermore called attention to violence against journalists and impunity for their attackers.<sup>7</sup>

15. On 29 September 2011, in an "Observation on the human rights situation in Azerbaijan", the Commissioner for Human Rights of the Council of Europe "called upon the authorities not to create obstacles for NGOs wishing to operate in Azerbaijan"<sup>8</sup>.

16. On 5 October 2011, the Secretary General of the Council of Europe called on Azerbaijan to respect freedom of expression and of association, following the sentences handed down on 3 October to Arif Hadjili, Mahamat Majidli, Tural Abbasli and Fuad Gahramanli on charges of conspiracy to violate public order for planning and organising anti-government protests on 2 April in Baku.

#### **IV. Relevant national framework**

##### **A. The Constitution of Azerbaijan**

17. The Constitution of Azerbaijan, as adopted in 1995 and amended in 2002 and 2009, declares that the highest priority of the state is to provide rights and liberties of a person and citizen<sup>9</sup>, and that these rights shall be interpreted and applied in accordance with the international treaties ratified by Azerbaijan<sup>10</sup>. The freedom of association is enshrined in Article 58, which reads:

*(1) Everyone is free to join other people.*

*(2) Everyone has the right to establish any union, including political party, trade union and other public organisation or enter existing organisations. Unrestricted activity of all unions is ensured.*

*(3) Nobody may be forced to join any union or remain its member.*

*(4) Activity of unions intended for forcible overthrow of legal state power on the whole territory of the Azerbaijan Republic or on a part thereof is prohibited. Activity of unions which violates the Constitution and laws might be stopped by decision of law court.*

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<sup>5</sup> [http://en.rsf.org/IMG/pdf/ipga\\_joint\\_statement\\_2d9481.pdf](http://en.rsf.org/IMG/pdf/ipga_joint_statement_2d9481.pdf)

<sup>6</sup> [http://en.rsf.org/IMG/pdf/ipga\\_joint\\_statement\\_2d9481.pdf](http://en.rsf.org/IMG/pdf/ipga_joint_statement_2d9481.pdf)

<sup>7</sup> [http://en.rsf.org/IMG/pdf/ipga\\_joint\\_statement\\_2d9481.pdf](http://en.rsf.org/IMG/pdf/ipga_joint_statement_2d9481.pdf)

<sup>8</sup> <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1839497>

<sup>9</sup> Article 12.1

<sup>10</sup> Article 12.2

18. Article 58 protects both the positive right to form and join an association and the negative right not to be compelled to join one. The freedom of association is not absolute as evident from paragraph 4 of the Article which bans the activity of organisations that have for their aim to overthrow legal state power with force or that “violate the Constitution and laws”. Activities of the former are prohibited; activities of the latter may be discontinued by national courts. The power to dissolve an association is left exclusively to the courts.

19. This provision 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 which grants everyone protection of his/her rights and liberties while it is up to the State to guarantee protection of these rights to all people<sup>11</sup>. The freedom of association is guaranteed to all individuals, citizens and non-citizens equally.

20. Foreign citizens and stateless persons may have their freedom of association limited, if provided so in national laws or international agreements binding upon Azerbaijan<sup>12</sup>. Rights and liberties of foreign citizens living or temporarily staying in the Republic of Azerbaijan may only be restricted according to international legal standards and laws of the Azerbaijan Republic<sup>13</sup>.

21. It is important to mention that the Constitution provides for mechanisms to be used when human rights and fundamental freedoms are limited unlawfully. There is a right to appeal to state bodies as well as the right to criticize the work of such bodies<sup>14</sup>, though this right only applies to citizens. A more general right to appeal to court regarding decisions and activities of State bodies<sup>15</sup> is on the contrary granted to everyone.

22. Freedom of assembly is protected under a separate article 49.

23. The 2002 Constitutional law on the Regulation of the Implementation of the Human Rights and Freedoms in the Republic of Azerbaijan shall also be mentioned. The Constitutional Law aims to implement the ECHR principles for lawful restrictions of the fundamental rights. Hence restrictions can be foreseen only when prescribed by law and should meet the strict test of proportionality. The constitutional law is an integral part of the Constitution.

## **B. The Law on Non Governmental Organisations**

24. The Law on NGOs adopted in 2000 was amended in 2009. Public association is defined as “a voluntary, self-governed non-governmental organisation, 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”<sup>16</sup>. Fund is “a non-governmental organisation 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”<sup>17</sup>. The Law does not apply to “political parties, trade unions, religious unions, local self-governments as well as organisations established with an aim to fulfill the functions

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<sup>11</sup> Article 26 of the Constitution

<sup>12</sup> Article 69.1 of the Constitution

<sup>13</sup> Article 69.2 of the Constitution

<sup>14</sup> Article 57 of the Constitution

<sup>15</sup> Article 60 of the Constitution

<sup>16</sup> Article 2.1 of the Law on NGOs

<sup>17</sup> Article 2.2 of the Law on NGOs

of these establishments, and other non-governmental organisations, whose activities are regulated by other laws”<sup>18</sup>.

25. The Ministry of Justice is required to supervise activities of NGOs to ensure that they comply with “objectives of the NGO Law”<sup>19</sup>. When it determines that an NGO violates a provision of the Law, the Ministry notifies the organisation in writing, instructing it to eliminate the breach. If an NGO is notified more than twice in one year for violations, the Ministry of Justice may call for its dissolution in court<sup>20</sup>.

26. Only registered NGOs may open branch offices<sup>21</sup>. State registration of branches and foreign NGOs “shall be carried out on the basis of an agreement signed with such organisations”<sup>22</sup>.

27. Authorities may refuse to register an association in cases provided for by the Law of the Republic of Azerbaijan on State Registration and State Registry of Legal Entities<sup>23</sup>.

28. In the chapter on NGO liability, Article 31.2-1 states that non-governmental organisations shall be warned for failure to submit necessary information for the state registry of legal entities or submission of false information. If an NGO fails to submit within the deadlines an annual financial report, the relevant body of executive power can, by means of writing a written warning to the organisation, issue an instruction to submit the relevant report within 30 days. NGOs that fail to submit the report within this period can be held responsible, for violation of the law, in accordance with the legislation of the Republic of Azerbaijan (Article 31.6)

29. The provisions relating to the registration of branches and representations of foreign NGOs (Article 12.3), the requirements relating to the content of the charters of NGOs (Article 13.3) and the liability of NGOs (Article 31) were introduced by the 2009 amendments.

### **C. The Decree No. 43**

30. The Decree No. 43 issued on 16 March 2011 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 fulfill in the course of “negotiations” with public authorities before it can be registered.

31. The subject of the negotiations between authorities and foreign NGOs are the conditions that foreign NGOs must meet if they want to operate in Azerbaijan, among them: the NGO must “respect national-moral values” (3.2.2) and must not be involved in “the political and religious propaganda” (3.2.4). These conditions are not further defined.

32. 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. Other legislative acts relevant for the protection of the freedom of associations are the 1999 Civil Code, the 2000 Tax Code, and the 1998 Law on Grants (amended in 2003) as well as various executive decrees implementing these laws.

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<sup>18</sup> Article 1.4 of the Law on NGOs

<sup>19</sup> Article 31.2 of the Law on NGOs

<sup>20</sup> Article 31.4 of the Law on NGOs

<sup>21</sup> Article 7.1 of the Law on NGOs

<sup>22</sup> Article 12.3 of the Law on NGOs

<sup>23</sup> Article 17.1 of the Law on NGOs

## V. Relevant International Legal Framework

### A. Binding International treaties

33. The Republic of Azerbaijan is party to all the major international human rights treaties guaranteeing the freedom of association, especially the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the European Convention on Human Rights (ECHR)

34. 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. Thus, in the case of a conflict between the provisions of the ICCPR or the ECHR and the provisions of any of the laws regulating NGOs, the former shall prevail.

35. The freedom of association is enshrined in Article 20 of the Universal Declaration of Human Rights which declares:

1. *“Everyone has the right to freedom of peaceful assembly and association.*
2. *No one may be compelled to belong to an association. “*

36. The *ICCPR* grants the freedom of association in its Article 22 which states:

*“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.”*

37. The *ECHR* contains a largely similar provision, Article 11,<sup>24</sup> under which

*“1. Everyone has the right to /.../ freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”*

38. Freedom of association in the above mentioned instruments guarantees the freedom of natural persons and legal entities to collaborate on voluntary basis within the context of an association without public interference in order to realise a common goal.<sup>25</sup>

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<sup>24</sup> See also N. Valticos, *Article 11*, in L.-E. Pettiti (ed.), *La Convention européenne des droits de l'homme, Commentaire article par articles*, Economica, Paris, 1999, pp. 419-430; V. Coussirat-Coustere, *Article 11§2*, in L.-E. Pettiti (ed.), *La Convention européenne des droits de l'homme, Commentaire article par articles*, Economica, Paris, 1999, pp. 431-435; and G. Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Economica, Paris, 1989, pp. 501-515.



39. Freedom of association is an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests.

40. Freedom of association is a complex right which encompasses elements of civil, political and economic rights.<sup>26</sup> Its civil right element protects individual against unlawful intervention by the state into the individual wish to associate with others. The political right element helps individuals defend their interests against the state or other individuals in an organised and hence more efficient way. Finally, the economic right element allows individuals to promote their interests in the area of labour market, especially by means of trade unions.

41. The combination of the three elements makes the freedom of association a unique human right whose respect serves in a way as a barometer of the general standard of the protection of human rights and the level of democracy in the country.

42. The freedom of association encompasses the right to found an association, to join an existing association and to have the association perform its function without any unlawful interference by the state or by other individuals. Freedom of association entails both the positive right to enter and form an association and the negative right not to be compelled to join an association that has been established pursuant to civil law.<sup>27</sup>

43. These rights give rise to a set of obligations on the part of states. States have to respect the freedom of association by not interfering, for instance by means of prohibitions, into the operation of associations. They have to protect the freedom by ensuring that its exercise is not prevented by actions of individuals. And they have to fulfil this freedom by actively creating the legal framework, in which associations can operate.

44. As a civil right and political right, freedom of association grants protection against arbitrary interference by the State, for whatever reason and for whatever purpose, and it is an indispensable right for the existence and functioning of democracy. No restrictions can be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society. The legitimate purposes for a limitation to the right of freedom of association are national security, public safety, prevention of disorder or crime, protection of public health and morals or the protection of the rights and freedoms of others. There must furthermore be a pressing social need for restricting this fundamental right.

45. Freedom of association is an essential prerequisite for other fundamental freedoms. As the Venice Commission has recently stated : “The way in which national legislation enshrines this freedom and its practical application by the authorities reveal indeed the state of democracy in the country concerned”<sup>28</sup>. Certainly States have a right to make sure that an association’s aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions.<sup>29</sup>

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<sup>25</sup> Cf. European Commission of Human Rights, 6 July 1977, Dec. Adm. Com. Ap. 6094/73, D & R 9, p. 5(7)

<sup>26</sup> See also *Article 22* in M. Nowak (ed.), *UN Covenant on Civil and Political Rights. CCPR Commentary*, Engel, Kehl am Rhein, Strasbourg, Arlington, 1993, pp. 384-400.

<sup>27</sup> ECtHR, *Sigurður A. Sigurjónsson v. Iceland*, no. 264, Judgment of 30 June 1993, para. 35

<sup>28</sup> Opinion on the compatibility with universal human rights standards of Article 193.1 of the criminal code on non-registered associations of the Republic of Belarus , CDL-AD (2011)036

<sup>29</sup> ECtHR, *Koretsky and Others v. Ukraine*, no. 40269/02, Judgment of 3 April 2008; ECtHR, *Sidiropoulos and Others v. Greece*, Judgment of 10 July 1998; ECtHR, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, no. 59491/00, Judgment of 19 January 2006, para. 57; ECtHR, *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, para. 59; ECtHR, *Ramazanov and Others v. Azerbaijan*, no. 44363/02, Judgment of 1 February 2007, para. 54

## **B. European Court of Human rights (ECtHR) case law on Azerbaijan**

46. The ECtHR has already dealt with the freedom of association in the Azerbaijani context in more than a dozen of cases, out of which the leading cases are *Ramazanova and Others* (2007),<sup>30</sup> *Ismaylov* (2008),<sup>31</sup> and *Tebieti Mühafize Cemiyyeti and Israfilov* (2009)<sup>32</sup> (hereafter TMC case).

47. In all these three cases, the Court found violations of Article 11 of the ECHR, which consisted, in the first two cases, in the failure of the Ministry of Justice to register public associations in a timely manner and, in the third case, in an unjustified dissolution of an NGO. The TMC case highlighted major shortcomings of the NGO legislation which are still relevant.

48. The TMC case addressed the dissolution of a registered NGO. A local court had justified its dissolution on the grounds that the NGO activities did not comply with the requirements of its own statute and of Azerbaijani domestic law. The NGO had not convened a lawful general assembly of its members since its establishment and had received several notifications, in this regard from the Ministry of Justice.<sup>33</sup>

49. The ECtHR stated that the mere failure of the TMC to respect certain legal requirements could not be considered such serious misconduct as to warrant outright dissolution.<sup>34</sup> It found Azerbaijan in breach of Article 11 of the ECHR as the dissolution of the NGO could not be justified by compelling reasons and was disproportionate to the legitimate aim pursued.

## **C. Other International standards**

50. The Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (General Assembly resolution 53/144 (A/RES/53/144), 8 March 1999, constitute a relevant frame of reference at the level of the United Nations.

51. 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.

52. 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

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<sup>30</sup> ECtHR, *Ramazanova and Others v. Azerbaijan*, Application no. 44363/02, 1 February 2007

<sup>31</sup> ECtHR, *Ismaylov v. Azerbaijan*, Application no. 4439/04, Judgment, 17 January 2008

<sup>32</sup> ECtHR, *Tebieti Mühafize Cemiyyeti And Israfilov v. Azerbaijan*, Application no. 37083/03, 8 October 2009

<sup>33</sup> A thorough discussion of the topic by Mahammad Guluzade and Natalia Bourjail in the International Journal of Not-for-Profit Law, vol. 12, issue 3, May 2010 [http://www.icnl.org/knowledge/ijnl/vol12iss3/art\\_2.htm#\\_ftn9](http://www.icnl.org/knowledge/ijnl/vol12iss3/art_2.htm#_ftn9)

<sup>34</sup> ECtHR, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Judgment 8 October 2009, para. 82

serve as minimum standards guiding member states of the Council of Europe in their legislation, policies and practice towards NGOs.<sup>35</sup>

## **VI. Problematic Aspects of the 2009 Amended Law on NGOs and the 2011 Decree**

53. The most problematic aspects of the 2009 Amended Law on NGOs and the 2011 Decree 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.

### **A. Registration of NGOs**

#### **a) The need for registration**

54. Under the Azerbaijani legislation, NGOs must be registered to acquire legal personality. The Venice Commission reiterates that to make it mandatory for an association to register need not in itself be a breach of the right to freedom of association.

55. The importance of the acquisition of a legal personality for NGOs has been stressed by the ECtHR, according to which “the most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning”.<sup>36</sup>

56. As the Venice Commission already holds in another context,<sup>37</sup> domestic law may require some kind of registration of associations, and failure to register may have certain consequences for the legal status and legal capacity of the association involved.

57. However, the Venice Commission recalls that such a legal requirement may not be an essential condition for the existence of an association, as that might enable the domestic authorities to control the essence of the exercise of the freedom of association.<sup>38</sup>

58. While NGOs can operate without legal personality, on an informal basis, the acquisition of the personality is the precondition for various benefits. It is important to underline that only registered NGOs can be recipients of grants under the 1998 Law on Grants, and only they can enjoy tax preferences under the 2000 Tax Code. Since grants are the main source of revenues for many NGOs, the act of registration is far from being a mere formality devoid of any practical importance.

59. The Azerbaijani registration system has been over the past years repeatedly criticised by international organisations, NGOs and scholars.<sup>39</sup>

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<sup>35</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>36</sup> ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998, par. 40. See also ECtHR, *Gorzelik and Others v. Poland*, Application No. 44158/98, 20 December 2001, par. 55.

<sup>37</sup> See Opinion on the compatibility with universal human rights standards of Article 193-1 of the Criminal Code on the rights of non registered association of the Republic of Belarus, CDL-AD (2011)036

<sup>38</sup> See Opinion on the compatibility with universal human rights standards of Article 193.1 of the Criminal Code on non-registered associations of the Republic of Belarus, CDL-AD (2011) 036, §§ 76, 77 and also Opinion on the legal status of religious communities in Turkey, CDL-AD (2010) 005

<sup>39</sup> See OSCE, *Problems of NGO Registration in Azerbaijan*, 2002, available at <http://www.osce.org/baku/42386> (visited 11 August 2011); PILI, *Enabling Civil Society: Practical Aspects of Freedom of Association*, A Source Book, 2003; UN Doc. E/CN.4/2006/95/Add.5, *Promotion And Protection Of Human Rights Human Rights Defenders*, Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, 6 March 2006, pp. 28-432 (Azerbaijan); A. Kazimov, H. Hasanov, *Report on the Registration*

## a.a) A lengthy and complicated procedure

60. The main deficiencies relate to the fact that the registration of NGOs is a lengthy and complicated procedure, whose outcomes are somewhat difficult to predict. Recorded practice shows that some of the NGOs which applied for registration have never got formal decision, and those that have got it, often needed to wait for an extensive period of time.

61. The registration is currently ensured by the Ministry of Justice under a rather complicated procedure which is regulated by the 2000 Law on NGOs and the 2003 Law on State Registration and the State Registry of Legal Entities (Articles 9, 16 and 17). State registration of NGOs is also dealt with in the Civil Code (Articles 47 and 48).

62. Registration as a rule shall be carried out by the relevant executive power within 30 days. In exceptional cases, when there is necessity for further investigation during the check, the period can be prolonged for additional 30 days (Art. 8 of the Law on State Registration). While the time-limit is rather long compared to the regulation in other countries of the Council of Europe, it could be accepted, were it meticulously respected and were the extension of the period truly reserved for "exceptional cases". Yet, several studies realised by the OSCE show that this is not always the case and that the applications of many NGOs, especially human rights NGOs, are for some reasons or even without any reasons treated as "exceptional".<sup>40</sup>

63. The Azerbaijani authorities should strive to reduce the number of cases treated in this way and they should also, ideally in an amendment to the 2003 law, define the features of an "exceptional case".<sup>41</sup>

64. The European Court of Human Rights has found delays in the registration process in cases against Azerbaijan to amount to a de facto refusal to register an association. The significant delays in the registration procedure, when attributable to the Ministry of Justice amounted to an interference with the exercise of the right of the association's founders to freedom of association<sup>42</sup>.

## a.b) A centralised procedure

65. The 2009 amended Law on NGOs failed to address some of the objections which had been raised against the registration system. One of such objections relate to the centralised nature of the procedure: all the NGOs – including the regional and local ones – need to be registered in a special office of the Ministry of Justice in Baku. This means that all NGOs, independent of where they are located within Azerbaijan, must register at the Ministry of

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*Procedures of Non-Governmental Organisations*, OSCE Office in Baku, 2006; International Centre for Not-For-Profit Law, *Assessment of the Legal Framework for Non-Governmental Organisations in the Republic of Azerbaijan*, June 2007; and G. Bayramov, *Registration and Operation of NGOs, Taxation of NGOs, Public Funding for NGOs and NGO Participation in Decision-making*, 2009, available at <http://blacksea.bcnl.org/en/nav/22-azerbaijan.html> (visited 11 August 2011).

<sup>40</sup> See OSCE, *Problems of NGO Registration in Azerbaijan*, 2002, available at <http://www.osce.org/baku/42386> (visited 11 August 2011); A. Kazimov, H. Hasanov, *Report on the Registration Procedures of Non-Governmental Organisations*, OSCE Office in Baku, 2006.

<sup>41</sup> See ECtHR, *Sidiropoulos and Others v. Greece*, Application No. 26695/95, 10 July 1998; ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application Nos. 29221/95 and 29225/95, 2 October 2001; ECtHR, *Boris Zvozkov et al. v. Belarus*, Communication No. 1039/2001, 17 October 2006.

<sup>42</sup> ECtHR, *Ramazanov and Others v. Azerbaijan*, Application no. 44363/02, 1 February 2007, para.58

Justice Office in Baku and this, despite the fact the Ministry of Justice has branches in the different regions.<sup>43</sup>

66. As the Venice Commission has stated in another context, states have an obligation not only to respect the freedom of association and other rights in the ECHR, they must also protect and fulfil these rights<sup>44</sup>. Authorities in Azerbaijan must not discriminate against branches or NGOs that are located outside Baku.

a.c) A costly procedure

67. In addition to creating a special procedure for the registration of branches and representatives of international NGOs in Azerbaijan, the 2009 Law on NGOs also introduces the requirement of the minimal nominal capital that is necessary for the establishment of funds – one of the two forms of NGOs. This minimal nominal capital amounts to 10.000 manats, which is approximately 9000 Euro (Article 12.1-1). Fears have been expressed that “in Azerbaijan, where domestic philanthropy is limited, a minimum capital of 10,000 manats will discourage the creation of foundations”.<sup>45</sup>

68. To conclude, the Venice Commission recalls that if and when the State renders it difficult for an NGO to obtain legal personality it is standing in the way of the NGOs right to freedom of association instead of facilitating it, apparently not because of economic concerns. The Venice Commission recalls that it may be legitimate for states to take economic interests into consideration when shaping their policy but not at the expenses of the full enjoyment of the right of freedom of association.<sup>46</sup>

## **B. Registration of branches and representatives of International NGOs**

69. The 2009 Amended Law on NGOs contains a special provision in its Article 12.3 providing that state registration of branches and representations of foreign NGOs in the Republic of Azerbaijan shall be carried out on the basis of an agreement signed with such organisations.

70. The rules for the registration of foreign non-governmental organisations working in the country were approved by Decree No. 43 by the Azerbaijani Cabinet on 16 March 2011.

71. Under the new rules, foreign NGOs need to submit written applications to the Ministry of Justice to start negotiations on preparing an agreement on the state registration of their local branches.

72. The Decree No. 43 lists the subject of the negotiations. The NGO must inform the authorities about its purpose and its activities and their significance for Azerbaijani society. Subsequently the condition is set that the NGOs future activities in the Republic of Azerbaijan must: comply with the Constitution of the Republic of Azerbaijan, the laws of the country and other normative legal acts; respect national moral values. Furthermore, the NGO should have no activities in territories occupied because of the Nagorno-Karabakh conflict and no contact with the separatist regime of Nagorno-Karabakh. Finally, they may not be

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<sup>43</sup> <http://blacksea.bcnl.org/en/nav/22-azerbaijan.html>

<sup>44</sup> Opinion on the compatibility with universal human rights standards of Article 193.1 of the Criminal Code on non-registered associations of the Republic of Belarus , CDL-AD (2011) 036

<sup>45</sup> G. Bayramov, *Registration and Operation of NGOs, Taxation of NGOs, Public Funding for NGOs and NGO Participation in Decision-making*, 2009, available at <http://blacksea.bcnl.org/en/nav/22-azerbaijan.html> (visited 11 August 2011).

<sup>46</sup> See ECtHR, *Hatton and Others v United Kingdom*, GC Judgment, para. 121.

involved in political and religious propaganda and they should provide the information required to state registry within the timeframe established by the Law on NGOs.

73. Foreign NGOs can only operate in Azerbaijan on the basis of a bilateral agreement between them and the authorities.

74. The procedure is questionable under several aspects, ranking from the requirement of such a registration procedure to the registration procedure itself.

**a. With regard to the requirement of a registration procedure**

75. 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. When the Russian Federation contemplated to introduce a similar procedure in the mid-2000s, it got under severe criticism from foreign states<sup>47</sup> which argued that the practice was incompatible with the European legal standards as reflected in the 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (STE.No124).

76. Although Azerbaijan is not party to this Convention, the requirement that foreign NGOs should not have to establish a new and separate entity is also enshrined in the 2007 Recommendation<sup>48</sup>. The Russian Federation in the end dropped the draft provision on the registration of branches and representatives of international NGOs. Furthermore, such a provision seems to be absent from the laws on NGOs of other countries of the Council of Europe as well.

77. Since its inclusion into the 2009 amended Law of NGOs could give – and indeed already has given – rise to doubts as to whether international NGOs are truly welcome in Azerbaijan, the public authorities should reconsider its import and relevance.

78. Moreover, whether this requirement would be legitimate under the ECHR is also questionable.

79. As previously said freedom of association is a basic, fundamental human right, as stated in Article 11 of the ECHR and should form the basis of any pluralist democracy. All groups in society should therefore have the freedom to participate in associative life as this contributes towards the development of a strong democratic civil society.

Article 16 of the ECHR can be invoked by States. It reads :

“Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens”.

80. Article 16 makes it possible for the States to impose restrictions on the political activities by foreigners. However, the importance of this prerogative should not be overestimated. This provision has been invoked before the European Commission of Human Rights and the ECtHR only in two cases<sup>49</sup> and in neither case has the claim been upheld.

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<sup>47</sup> See J. Machleder, *Contextual and Legislative Analysis of the Russian Law on NGOs*, INDEM Foundation, 2006, p. 13.

<sup>48</sup> CM/Rec(2007)14, §45

<sup>49</sup> ECommHR, H.N v. Italy, dec. 27.101998 and EctHR, *Piermont v. France*, Judgment 27.12.1995

81. In addition, this prerogative, is not unlimited. The concept of “political activities” should be interpreted in a restrictive manner<sup>50</sup>. The doctrine has further considered that Article 16 cannot be used as a pretext to prevent from denouncing human rights violations<sup>51</sup>. In conclusion, even restrictions to political activities of foreigners under Article 16 ECHR need to comply with the need for their necessity in a democratic society and the principle of proportionality.<sup>52</sup>

82. The rights recognised by the ECHR are, generally speaking, guaranteed for nationals and foreigners alike, as Article 1 of the ECHR provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms [. . . ]” listed in the Convention. Article 14 ECHR further reinforces this approach by stating that the rights and freedoms set forth in the Convention are to be secured without discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, and association with a national minority, property, birth or other status.”

83. It must be kept in mind that Article 16 originates from a time when it was considered legitimate to restrict the political activities of foreigners. Subsequent human rights treaties, which Azerbaijan is also bound by, such as the International Covenant on Civil and Political Rights, do not contain such a clause as Article 16 of the ECHR.

84. As the Venice Commission has recently emphasized, freedom of association without freedom of expression amounts to little if anything. The exercise of freedom of association through NGOs, by workers, students, and human rights defenders in society, has always been at the heart of the struggle for democracy and human rights around the world, and it remains at the heart of society once democracy has been achieved<sup>53</sup>. The right to freedom of association is intertwined with the right to freedom of thought, conscience, religion, opinion and expression. It is impossible to defend individual rights if citizens are unable to organize around common needs and interests and speak up for them publicly.

85. Hence, the freedom of expression of an association cannot be subject to the direction of public authorities, unless in accordance with permissible restrictions ascribed by law and necessary in a democratic society for narrowly and clearly defined purposes. Only indisputable imperatives can justify interference with the enjoyment of freedom of association under the European Convention.

86. A decision not to reach an agreement with a foreign NGO must not only be prescribed by law, a condition which might be considered met with the enumerated conditions set forth in Decree No. 43, but furthermore such a decision must also pursue a legitimate aim and be necessary in a democratic society. To condition the views, activities and conduct of an NGO before allowing it to obtain the legal personality necessary for its operation, goes against the core of the values underlying the protection of civil and political rights. It clashes with the whole ideological framework underlying democracy such as pluralism, broadmindedness and tolerance.

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<sup>50</sup> Decaux, *La Convention européenne des droits de l'homme*, 1999, p. 507 ; de Guttry, in Bartole, Raimondi, Conforti, *Commentario*, 2001, p. 452 ; van Dijk - van Hoof, *Theory & practice of the European Convention on Human Right* 2006, p. 1080

<sup>51</sup> Frowein-Peukert, *EMKR-Kommentar*, 2009, p.429 ; Lecuyer, *Les droits politiques dans la jurisprudence de la CEDH*, 2009, p.169, Mascagni, *Le restrizioni alle attività politiche degli stranieri consentite dalla CEDU*, *Rivista Diritto Internazionale* 1977, 537).

<sup>52</sup> Grabenwarter, *Europäische Menschenrechtskonvention*, 2008, 279, see also the dissenting opinion in *Piermont v. France ; Velu –Ergec*,

<sup>53</sup> See Opinion on the compatibility with universal human rights standards of Article 193.1 of the criminal code on non-registered associations of the Republic of Belarus , CDL-AD(2011)036 §101.

87. The Venice Commission reiterates that it is required from the Republic of Azerbaijan as Party to the ECHR and the ICCPR to take steps to give effect to the civil and political rights it has undertaken to ensure to all individuals within its jurisdiction. This requirement is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

**b. With regard to the registration procedure itself**

88. The Decree No. 43 lists the subject of the negotiations. The NGO must inform the authorities about its purpose and its activities and their significance for Azerbaijani society. Subsequently the condition is set that the NGOs future activities in the Republic of Azerbaijan must: comply with the legal order of the Republic of Azerbaijan; respect national and moral values; respect the people of Azerbaijan; have no activities in territories occupied territories because of the Nagorno-Karabakh conflict and no contact with the separatist regime of Nagorno-Karabakh; may not be involved in the political and religious propaganda ; provide information required to state registry within the timeframe established by the Law on NGOs.

89. In the Commission's view, it is not completely clear why the term "negotiations" is used in the text. The purpose of the procedure described by the Decree is rather to have the NGO accept the conditions set by the Decree and prove its social utility rather than to negotiate.

90. Even before the formal "negotiations" are started, NGOs have to show that their activities would bring some contribution to the society in Azerbaijan (paragraph 2.2 of the Decree). Depending on how this requirement is interpreted, it can be either a mere formality, or a serious obstacle to the operation of foreign NGOs in Azerbaijan.

91. Second, with regard to the conditions set forth by the 2011 Decree, it is not fully clear whether this is compatible with the provisions of the Constitutional Law of 2002, i.e. whether limitations on human rights could be imposed by mere executive decrees.

92. Third, the content of the conditions is problematic as well. While two of them, the compliance with the national legal order and the provision of certain information, are relatively standard ones, the three others are rather unusual.

93. Moreover, the Decree does not specify, how the general terms "national and moral values" and "political and religious propaganda" are to be defined and what an NGO should do to "respect the people of Azerbaijan". In the absence of any specification, it is clear that a rejection of a registration based on one of these conditions could hardly be found compatible with Article 11 of the ECHR.

94. The final condition related to the Nagorno-Karabakh<sup>54</sup> could turn out to be problematic as well. As a minimum, it should be made clear in the decree that the condition applies to the local Azerbaijani branch or representatives and not to the international NGOs as such.

95. Another problem consists in the absence in the Decree of any specific time-frame, within which the "negotiations" should be concluded and the agreement signed. Even though the reference to "the period specified by law and order"<sup>55</sup> should be read as a confirmation that the general time-limit of the 2003 Law on State Registration and the State Registry of Legal Entities applies here, the Venice Commission holds that not concluding the whole procedure

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<sup>54</sup> Decree n°43, paragraph 3.2.2

<sup>55</sup> Decree n°43, paragraph 4.2



within the time-frame without any substantive reasons would thus violate Article 11 of the ECHR.

### **C. Requirements relating to the content of the Charters of NGOs**

96. In its new Article 13.3, the 2009 amended Law on NGOs stipulates that the charter of NGO shall not provide for appropriation for state and local self-government bodies, as well as not implying of functions of state control and revision. This provision, especially in view of its general and vague terms, could be read in a way, which would seriously hamper the capacity of NGOs to exercise their functions. This is particularly true for human rights NGOs which by their very mandate have to fulfil functions which might be seen as those of “state control”.

97. It is also not clear what the “appropriation” of powers of state and local self-governed bodies should mean in this context. Taking into account that these powers may be quite broad and may encompass such activities as ensuring public welfare or monitoring the state of human rights in the country, there is again a risk of many NGOs finding themselves in violation of Article 13.3 just by exercising their common functions.

98. It may be presumed that what the Azerbaijani legislator had in mind when drafting the provision was to avoid the situation in which NGOs would seek to actually replace state organs in the exercise of their function. Such an effort is certainly legitimate, since NGOs as non-elected entities cannot (and most of them certainly do not) aspire to get formal political powers in a state. Yet, this does not mean that they have no role to play in the *res publica*.

99. As the 2007 Recommendation explicitly states, NGOs bring an essential contribution to the development and the realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities<sup>56</sup>. The Recommendation also specifies that “NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law”<sup>57</sup>.

100. It is important that the Azerbaijani authorities have the 2007 Recommendation premises in mind when interpreting and applying Article 13.3 of the Law on NGOs.

101. So far, some actions of the Azerbaijani authorities may give rise to concern in this regard. In February 2011 the Speaker of Azerbaijan’s Parliament criticised the activities of the Human Rights House Azerbaijan at the Council of Europe and called for “steps to be taken” against human rights NGOs that criticise their government in international inter-governmental institutions. The declaration followed a side-event on the human rights situation in Azerbaijan, which was held earlier this year by the Human Rights House Azerbaijan, in cooperation with Human Rights Watch and several Azerbaijani human rights organisations, in Strasbourg, during the meeting of the Council of Europe Parliamentary Assembly.

102. Such a suite of events, be it purely coincidental, might give rise to the impression that the monitoring of the human rights situation in Azerbaijan by NGOs is not truly desired by the Azerbaijani authorities. As a country considering the provision of human rights and liberties as its highest priority objective, as explicitly stated by its Constitution (Article 12.1),

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<sup>56</sup> CM/Rec(2007)14,§3

<sup>57</sup> CM/Rec(2007)14, §12

Azerbaijan should ensure effective enjoyment of human rights and liberties so that the practice shows that the above-mentioned impression is wholly incorrect.

#### **D. Liability and dissolution of NGOs**

103. As stipulated in the 2007 Recommendation, the operation of NGOs entails responsibilities and rights<sup>58</sup>. Hence, the fact that the Law on NGOs imposes some obligations on NGOs and devotes a special section to NGOs liability is *prima facie* not incompatible with human rights standards.

104. The relevant provisions are, however, drafted in a rather unclear manner and could lend themselves to various interpretations. Article 31 distinguishes between violations of the requirements of the Law<sup>59</sup> and the requirements arising out of the Law<sup>60</sup>. This distinction, which appears already in the original 2000 version of the Law on NGOs, remains unclear.

105. As already stated, the terms mentioned in paragraph 3.2 include the requirements for branches and representatives of international NGOs to “respect National and moral values<sup>61</sup>” and “not /to/ be involved in the political and religious propaganda<sup>62</sup>”. Since the terms used in these provisions are quite elusive, the liability of NGOs could be activated easily, entailing as the outmost sanction the liquidation of the NGO. According to the 2011 Decree, the branches or representatives offices registered shall also comply with the terms of paragraph 3.2.

106. Once again, it is doubtful whether such a sanction would withstand the strict test of Article 11.2 of the ECHR. Its compatibility with Article 20 of the 2007 Recommendation would also be questionable.

107. The Venice Commission recalls that the dissolution of an NGO is an extreme measure, which needs to be based on a well-founded rationale and it is well established under the international case-law that it can only be resorted to in exceptional situations.<sup>63</sup>

108. As the Venice Commission has already stated in another context, there must be convincing and compelling reasons justifying the dissolution and/or temporary forfeiture of the right to freedom of association. Such interference must meet a pressing social need and be “proportionate to the aims pursued<sup>64</sup>”.

109. The dissolution of an NGO in the specific context of Azerbaijan – under the original, pre-2009 legislation – was commented upon by the ECtHR in the *Tebieti Mühafize Cemiyeti and Israfilov (2009) case*<sup>65</sup>. The ECtHR found that the dissolution took place in violation of Article 11 of the ECHR. While accepting that the interference into the NGOs freedom of association might have pursued the legitimate aim of protection of the rights and freedoms of others<sup>66</sup>,

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<sup>58</sup> CM/Rec(2007)14, §9

<sup>59</sup> Article 31.1

<sup>60</sup> Article 31.3

<sup>61</sup> Paragraph 3.2.2

<sup>62</sup> Paragraph 3.2.4

<sup>63</sup> ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Applications No. 133/1996/752/951, Judgment of 20 January 1998

<sup>64</sup> See CDL (2011) 078; ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey* [Grand Chamber], applications nos. 41340/98, 41343/98 and 41344/98, judgement 13 February, 2003.

<sup>65</sup> ECtHR, *Tebieti Mühafize Cemiyeti And Israfilov v. Azerbaijan*, Application no. 37083/03, Judgment of 8 October 2009

<sup>66</sup> ECtHR, *Tebieti Mühafize Cemiyeti And Israfilov v. Azerbaijan*, Application no. 37083/03, Judgment of 8 October 2009, para.66

the Court found that the Law did not meet the quality of law requirement<sup>67</sup>; moreover, it held that the interference was not necessary in a democratic society<sup>68</sup>.

110. The ECtHR's analysis of Article 31 of the Law on NGOs is still relevant, since the provision has remained almost unchanged by the 2009 amendment.

111. With respect to the liability (and dissolution) of NGOs, the text of the 2009 amended Law on NGOs is therefore open to the same objections as the version scrutinized by the ECtHR in 2009 and it can be stated that it still does not meet the "quality of law" requirement under Article 11.2 of the ECHR.<sup>69</sup>

112. Moreover, the notification procedure which is provided for in Article 31.2 to 31.4 and which can lead to the liquidation of the NGO by a court decision is also questionable.

113. The Venice Commission cannot but recall that a decision that serves as the basis for a court's decision to dissolve an association must meet the requirements of being prescribed by law and pursue a legitimate aim and being necessary in a democratic society. A warning preceding dissolution based on a broad interpretation of vague legal provisions does in itself constitute a violation.<sup>70</sup> A dissolution that does not pursue a pressing social need cannot be deemed necessary in a democratic society.<sup>71 72</sup>

114. This would *a fortiori* apply to the 2011 Decree, which added one more ground for liability and (potential) dissolution of an NGO, namely the failure to comply with certain conditions stated in the Decree. Since both the liability provision<sup>73</sup> and the conditions themselves<sup>74</sup> are drafted in vague and unclear terms, the Decree certainly fails to meet the "quality of law" required by Article 11 of the ECHR as well. In fact, as a mere executive order, the Decree most probably would hardly meet the quality of "law" in any case.

115. In the light of the TMC Case and the considerations contained in the paragraphs above, it is possible to conclude that the provisions of the 2009 amended Law on NGOs and the 2011 Decree relating to the liability and dissolution of NGOs pose problems of compatibility with the European human rights standards.

116. The Azerbaijani authorities should seek to make the text of the relevant provisions less ambiguous and should ensure that the legislations are interpreted and applied in the way not colliding with the requirements of Article 11 of the ECHR.

## VII. Conclusions

117. The Venice Commission reckons that, while legislation relating to NGO's legal status has been improved in some aspects over the years, the 2009 amendments and the 2011

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<sup>67</sup> ECtHR, *Tebieti Mühafize Cemiyyeti And Israfilov v. Azerbaijan*, Application no. 37083/03, Judgment of 8 October 2009, para.65

<sup>68</sup> ECtHR, *Tebieti Mühafize Cemiyyeti And Israfilov v. Azerbaijan*, Application no. 37083/03, Judgment of 8 October 2009 para.92

<sup>69</sup> See also ECtHR, *Maestri v. Italy*, Application no. 39748/98, Judgment of 17 February 2004

<sup>70</sup> ECtHR, *Koretsky and Others v. Ukraine*, no. 40269/02, no. 107, Judgment of 3 April 2008

<sup>71</sup> ECtHR, *Koretsky and Others v. Ukraine*, no. 40269/02, no. 107, Judgment of 3 April 2008

<sup>72</sup> See Opinion on the compatibility with universal human rights standards of Article 193.1 of the criminal code on non-registered associations of the Republic of Belarus, CDL – AD (2011)036, § 87.

<sup>73</sup> Paragraph 5

<sup>74</sup> Paragraph 3.2

Decree unfortunately overturn the previous efforts to meet with the requirements of international standards.

118. The most problematic aspects of the 2009 Amended Law on NGOs and the 2011 Decree 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.

119. With regard to the registration, which in many countries is a rather formal procedure, the 2009 amended version of the Law on NGOs and the 2011 Decree have further added complications to an already complicated and lengthy procedure. The requirement for international NGOs to create branches and representatives and have them registered is of itself problematic.

120. As far as the liability and dissolutions of NGOs are concerned, the Law on NGOs poses problems of compatibility with Article 11 of the ECHR. There must be convincing and compelling reasons justifying the dissolution and/or temporary forfeiture of the right to freedom of association. Such interference must meet a pressing social need and be proportionate to the aims pursued. A decision not to reach an agreement with a foreign NGO must not only be prescribed by law but furthermore such a decision must also pursue a legitimate aim and be necessary in a democratic society. To condition the views, activities and conduct of an NGO before allowing it to obtain the legal personality necessary for its operation, goes against the core of the values underlying the protection of civil and political rights. It clashes with the whole ideological framework underlying democracy such as pluralism, broadmindedness and tolerance.

121. The right to freedom of association is intertwined with the right to freedom of thought, conscience, religion, opinion and expression. It is impossible to defend individual rights if citizens are unable to organize around common needs and interests and speak up for them publicly. The freedom of expression of an association cannot be subject to the direction of public authorities, unless in accordance with permissible restrictions ascribed by law and necessary in a democratic society for narrowly and clearly defined purposes. Only indisputable imperatives can justify interference with the enjoyment of freedom of association under the ECHR.

122. The Venice Commission reiterates that it is required of the Republic of Azerbaijan as Party to the ECHR and the ICCPR to take steps to give effect to the civil and political rights it has undertaken to ensure to all individuals within the territory of Azerbaijan. This requirement is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

123. The Venice Commission recalls that the way in which the national legislation enshrines freedom of association and its practical application by the authorities reveals the state of the democracy of the country concerned.

124. The Venice Commission notes that these conclusions coincide with the Recommendations adopted by the INGO Conference and invite the authorities to take due account of this text as well.

125. The Venice Commission reiterates its readiness to assist Azerbaijanis authorities as hitherto in matters concerning human rights.

**Annex**



CONFERENCE OF INGOs  
OF THE COUNCIL OF EUROPE

CONFERENCE DES OING DU  
CONSEIL DE L'EUROPE

3 October 2011

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**Recommendation on**

**The opinion of the Expert Council on NGO Law on the amendments in 2009 to the NGO Law in Azerbaijan and their application**

**CONF/PLE(2011) REC4**

**Adopted by the Standing Committee on behalf of the Conference of INGOs on 3 October 2011**

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**The Conference of INGOs of the Council of Europe,**

**Welcomes** the opinion of the Expert Council on NGO Law on the amendments in 2009 to the NGO Law in Azerbaijan and their application;

**Takes note** that the authorities of Azerbaijan were invited to transmit any factual corrections they might deem necessary and that these are expected shortly.

**Welcomes** the preparation by the Venice Commission of an opinion on "The Compatibility of the Legislation on Non-governmental Organisations in Azerbaijan with Human Rights Standards" which will be adopted at the October 2011 session of the Commission;

**Takes note** of a number of problems identified by the Expert Council on NGO Law in the amendments in 2009 to the NGO Law in Azerbaijan and their application;

**Shares** the conclusions of the opinion of the Expert Council on NGO Law on the amendments in 2009 to the NGO Law in Azerbaijan and their application, and in particular paragraphs 137-141:

"The 2009 amendments reverse in a number of significant respects previous efforts to develop a legal framework for the establishment and operation of NGOs that meets the requirements of international standards. This is especially so as regards the restrictions on 'political' and 'governmental' activities, the choice of names, the ability to be founders and office-holders, the capital requirements for foundations and the basis on which foreign NGOs will be allowed to operate.

Apart from the retrograde nature of various substantive provisions, the 2009 amendments suffer from a lack of clarity in their formulation which is inconsistent with the requirement of international standards that the regulatory framework governing the establishment and operation of NGOs should be sufficiently precise and foreseeable.

The most immediate impact of the 2009 amendments has been on existing foreign NGOs, to whom they have been applied in circumstances where their retrospective effect was not made clear and even before the key implementing measure had been adopted. Furthermore they have been applied to NGOs which have never been shown to have acted incompatibly with the law and the Constitution or the legitimate interests of the Republic of Azerbaijan. This action is incompatible with international standards regarding not only legal certainty but also those concerning NGOs and human rights defenders.

The 2009 amendments exacerbate an environment for the establishment and operation of NGOs that can already be difficult. Moreover, even where the objectives of particular provisions are not inconsistent with international standards, such as the requirement for financial reporting, the scope of the obligation appears to duplicate other similar ones and does not take account of the considerably different character of the NGOs to which it applies so that it becomes unduly burdensome.

Viewed as a whole, the 2009 amendments not only render the NGO Law less compliant with international standards but they also do so without providing any evidence of problems that need to be addressed. However, achieving compliance with international standards will require more than the reversal of those amendments. There is a need also to ensure that the approach to implementing the NGO Law fulfils the spirit as much as the letter of those standards. Furthermore, in removing the objectionable provisions that have been added to the NGO Law, the opportunity should be taken to establish a regime for NGOs that is much more supportive of the essential contribution to be made by NGOs both to the development and realisation of democracy and human rights and to the cultural life and social well-being of democratic societies.”

**Recommends**, in consequence, that the national authorities of Azerbaijan take appropriate steps to amend the relevant legislation or practice;

**Asks** the Expert Council on NGO Law to follow developments in Azerbaijan and, be ready to provide advice on the review of NGO legislation and administrative and judicial practices in the implementation of this legislation;

**Invites** the Expert Council on NGO Law to present the findings of the opinion on the amendments in 2009 to the NGO Law in Azerbaijan also to civil society in the country with a view to supporting civil society's quest for an enabling environment for civil society in Azerbaijan;

**Requests** the Expert Council on NGO Law to co-operate closely with the Venice Commission in the follow-up to their respective opinions.