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OPINION ON AMENDMENTS IN 2009 TO THE NGO LAW IN AZERBAIJAN AND THEIR APPLICATION

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on behalf of the Expert Council
at the request of the Standing Committee of the Conference of INGOs

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Foreword

The Expert Council on NGO Law was created in January 2008 by the Conference of INGOs of the Council of Europe. In January of each of the following years - 2009, 2010, 2011 - the Expert Council submitted to the Conference Plenary a Thematic Study on specific aspects of NGO legislation and its implementation, covering the 47 member countries of the Council of Europe and Belarus.

In 2011 the Expert Council is reviewing its mode of functioning and its outreach, in order to be an ever-more relevant contributor from the civil society viewpoint to the promotion of the Council of Europe's core values, namely the rule of law, democracy and human rights.

In this context the Conference of INGOs became aware that the legislation governing NGOs in Azerbaijan had been subject to amendments that seemed to pose problems of conformity with international standards, notably the European Convention on Human Rights and the Council of Europe's Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe. Moreover, the implementation of the revised Azerbaijani legislation also seemed to be in contradiction with a number of these standards.

The Standing Committee of the INGO Conference therefore asked the Expert Council in April 2011 to review all these matters and prepare an Opinion on the amendments in 2009 to the NGO Law in Azerbaijan and their application, with the intention of informing the Conference of INGOs and affording an opportunity for the Azerbaijani authorities to respond to the conclusions of the Opinion and take any appropriate action. That is the essence of the present Opinion.

The Expert Council mandated Jeremy McBride to draft the Opinion.

Cyril Ritchie
President, Expert Council on NGO Law
of the Conference of INGOs
August 2011

OPINION ON AMENDMENTS IN 2009 TO THE NGO LAW IN AZERBAIJAN AND THEIR APPLICATION

Introduction

1. This opinion examines the compatibility with international standards, particularly the European Convention on Human Rights ('the Convention') and the Council of Europe's Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe ('Recommendation CM/Rec(2007)14'), of the Law of the Republic of Azerbaijan on Non-Governmental Organisations (Public Associations and Funds) ('the NGO Law'), as amended in 2009 ('the 2009 amendments')[1] together with the implementing measures, and of the application of this legislation, especially as regards registration, closure and financial reporting. The opinion has been prepared at the request of the Conference of International Non-governmental Organisations of the Council of Europe.

2. The process leading to the elaboration of the NGO Law before the 2009 amendments has, together with the legal provisions governing registration of a non-governmental organisation ('NGO'), previously been the subject of substantial evaluation by the Council of Europe[2]. This concluded that the reforms being made went a considerable way to meeting the requirements of the Convention but that there was a need for a clear recognition of the value of associations and of the permissibility of them engaging in political activities of a non-party kind. It was also emphasised that there was a need to bear in mind that the actual implementation of the law was of the most significance and that there was a need for a fresh start in the administrative and judicial aspects of this.

3. The 2009 amendments entered into force on 30 June 2009. Subsequently 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' ('the Presidential Decree') adopted on 27 August 2009 instructed the Cabinet of Ministers to prepare proposals on bringing the existing legislative acts and its own normative legal acts into conformity with the 2009 amendments, to determine the forms, content and procedure of submission of the financial reports

[1] Effected by the Law of the Republic of Azerbaijan 'On making changes and amendments to some legislative acts of the Republic of Azerbaijan', which entered into force on 1 September 2009.

[2]. See 'Opinion on the Draft Law on Social Associations for Azerbaijan' (Council of Europe, 1999), 1-16, 'Expert Appraisal of the Second Draft Law on Public Associations' (Non-Governmental Organizations) of Azerbaijan, (Council of Europe, 2000) (ADACS-DGI Azerb. (2000) 1), 1-21 and 'Third Reading Draft Law of the Azerbaijan Republic on the State Register of Legal Entities', (Council of Europe, 2001), 1-2.

envisaged by Article 29.4 of the NGO Law and to solve other issues stemming from the 2009 amendments[3].

4. Three measures purporting to implement the 2009 amendments which have been adopted. One is the Decree of the President of the Republic of Azerbaijan On making changes and amendments to some decrees of the President of the Republic of Azerbaijan in connection with implementation of the Law of the Republic of Azerbaijan #842-IIIQD, which was adopted on 21 December 2009 ('the 2009 Decree')[4]. The second is the Rule for form, content and submission of annual financial accounting of non-governmental organisations approved by the Cabinet of Ministers in December 2009[5] ('the financial reporting Rule'). The third is 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 Azerbaijan Republic ('the 2011 Decree')[6], which was only adopted on 16 March 2011, i.e., more than 20 months after the adoption of the 2009 amendments.

5. The opinion looks first at the legal framework governing NGOs prior to 2009 amendments before considering the case law of the European Court of Human Rights ('the Court') concerning its application. Thereafter the opinion analyses the individual amendments to the NGO Law grouped together by particular theme, then considers the issues arising from the application of the 2009 amendments and concludes with an overall evaluation of the compatibility of this law and practice with international standards.

6. This opinion was prepared by Jeremy McBride on behalf of the Expert Council on NGO Law of the Conference of INGOs.

The NGO Law[7]

Introduction

7. The NGO Law provides for two forms of NGO, public associations - membership based bodies - and foundations[8].

[3] It also identifies the meaning of the 'relevant body of executive power' in various provisions in the 2009 amendments.

[4] Published in the official newspaper, *Azerbaijan*, on 25 December 2009. The 2009 Decree is concerned particularly with identifying the bodies charged with exercising the powers provided for in the 2009 amendments. However, it also deals with some matters not addressed by the 2009 amendments, namely, by restating an existing prohibition on using grants that are not registered and by providing for the exercise of control to ensure that grants from the state budget are used for the purposes for which they are given.

[5] Decree No. 201, 25 December 2009.

[6] Decree no. 43, 16 March 2011.

[7] This section draws upon and expands the analysis in the *First Annual Report of the Expert Council on NGO Law* (OING Conf/Exp (2009) 1). See also ICNL, *Assessment of the Legal Framework for NGOs in the Republic of Azerbaijan* (2007) and The Council of State Support to NGOs under the President of the Republic of Azerbaijan, *National Report on the NGO Sector in the Republic of Azerbaijan* (2010), ch. 2.

8. NGOs can only pursue their objectives if they are registered or, in the case of public associations only, go through the process of legalization by notification. The very name of the latter process gives, of course, the impression that their pursuit of activities in common will not be lawful without at least doing this, notwithstanding that the activities concerned are inherently lawful if pursued by one individual and their collective pursuit should not in itself render them unlawful. There is thus no provision in the legislation for an informal grouping that has not been legalised to exist, even if some of those that exist are tolerated in practice rather than threatened with action being taken against them.

9. Only NGOs that are registered can open a bank account, buy property, deal with the tax requirements for employees and bring or be a respondent in legal proceedings.

10. Provision is also made for international NGOs in Article 6 as bodies whose activities cover Azerbaijan and 'at least one more foreign state'. This is a status that can be used by NGOs established abroad.

Founders

11. The constitutional right to form associations, unlike many other individual rights in the Constitution, is not restricted to citizens.

12. The NGO Law provides for NGOs, whether public associations or foundations, to be established "upon the initiative of several individuals"[9]. Although no number of founders is actually specified, this omission does not appear in practice to be an obstacle to the creation of NGOs.

13. The founders of NGOs can be legal and physical persons but the NGO Law excludes persons under eighteen from establishing them[10].

Permitted activities and objects

14. Article 5 of the NGO Law provides that NGOs "may be established for fundamental reasons, or in order to achieve certain objectives" but public associations are more specifically defined in Article 2 as voluntary, not-for-profit organisations created by persons "having common interests, for purposes defined in charter documents of such organization". Foundations, on

[8] It does not apply to political parties, trade unions, religious unions, local self-government organizations and various associations specified in other Laws.
[9] Article 2.
[10] Article 9. The restriction is reduced to sixteen in the case of youth associations.

the other hand, are defined as being "aimed at social, charitable, cultural, educational and other public activities". In practice, these different formulations do not seem to be of any significance.

15. NGOs cannot, however, be founded and act for purposes prohibited by Azerbaijan's Constitution and laws[11].

16. Furthermore they cannot participate in presidential, parliamentary and municipal elections of the Azerbaijan Republic and may not provide financial and other material assistance to political parties. NGOs may observe presidential, parliamentary and municipal elections in accordance with the legislation of the Azerbaijan Republic[12]. A non-governmental organization may, however, come up with proposals for the improvement of legal and regulatory acts, according to the rules provided by the laws of the Azerbaijan Republic and by its own statute[13]. This possibility is used by NGOs and their recommendations have been taken into account in the drafting of some legislation[14].

17. NGOs can carry out any type of activity that is not prohibited by the legislation of the Azerbaijan Republic and does not contradict the objectives in their statutes[15].

18. NGOs can also carry out entrepreneurship activity that is aimed only at reaching objectives of their creation, without distribution of generated income among founders (members)[16].

19. NGOs may be granted a status that is national (all-Azerbaijan), regional (i.e., two or more administrative-territorial units) or local (i.e., one administrative-territorial unit)[17], thereby restricting the scope of their operations to the area concerned. Although this is apparently a matter of choice by them and some may certainly wish to restrict the scope of their activities to a particular area, it is not clear from the law why it is essential that this needs to be specifically prescribed. Such a designation might be appropriate if this were to be the basis for allocating financial or other support to a public association's activities but there is no provision to this effect in the NGO Law. Moreover insistence on

[11] Article 2.4.
[12] An exclusion from this possibility in the case of NGOs that received grants or other types of financing from foreign individuals and legal entities, as well as from Azeri legal entities with more than 30% foreign share in their charter capital, was withdrawn by an amendment to the NGO Law just before the parliamentary elections in 2005.
[13] Article 2.4.
[14] See USAID, *The 2009 NGO Sustainability Index* (http://www.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/2009/azerbaijan.pdf), at p. 63.
[15] Article 22.
[16] *Ibid*: "Production and sales of profitable goods, as well as acquisition of securities and property and non-property rights, and acting as depositor with economic agents and partnerships shall be accepted as types of such activities corresponding to objectives of creation of a non-governmental organization".
[17] Article 6.

requiring an NGO to make a formal choice about the sphere of its activities at the establishment stage means that any expansion or contraction will necessarily require a change both in the NGO's statute and the terms on which it is registered. This undermines the ability of NGOs to respond quickly to fresh opportunities and changing situations.

20. Most of what is stipulated in the NGO Law as to what should be contained in the statute of an NGO is entirely appropriate. However, it is questionable whether there is a need for this document to contain an NGO's 'subsidiary branches and representative offices' as these may change from time to time; it is unduly formalistic for the amending process to have to be used on each occasion there is any change regarding such branches and offices, particularly as a notification requirement would fulfil any legitimate public interest in knowing about their existence.

Legalisation

21. As has already been noted, the NGO Law envisages two possible conditions that can be enjoyed by public associations; either they become legal entities as a result of being registered or their activities are subject to 'legalisation' as a result of 'notification'. It is questionable whether this is a process that should be required simply to legitimise the pursuit of activities which would be lawful if carried out by individuals acting alone.

22. The requirements for notification involve the submission to the 'relevant executive authority' of the constituent records signed by the association's leadership. This must be done within 30 days of the passing of the resolution on establishing the association and the document legalising it must be sent out or handed over on the day on which these records are received[18]. As such the requirements do not appear to be particularly onerous but this process leaves unclear what real advantage is served by the act of notification.

23. Certainly the legalising document could hardly be conclusive that the objectives of the association are compatible with the Constitution and other laws so that there would be no guarantee that pursuing them would not give rise to the risk of prosecution. Furthermore no tax advantages seem to accrue to the legalised association as this benefit conferred by the NGO Law is construed as applying only to registered associations. Moreover, while notification may be a useful source of information for the authorities, there seems to be no need to set a deadline for when it can occur if it is a process intended to help associations.

24. The strict 30-day deadline running from establishment only serves to strengthen the impression that a public association which is neither registered

[18] Article 1.

nor legalized through notification is inherently unlawful. It would be much more satisfactory for there to be explicit recognition in the law that the absence of registration does not mean an association is an unlawful body but is simply one that has no legal personality discrete from that of its members.

Registration

25. The NGO Law does not contain detailed provisions on the registration process but prescribes by Article 16 that the process laid down for registration of legal entities - now governed by the Law of the Azerbaijan Republic On State Registration and State Register of Legal Entities ('the Registration Law') - is applicable.

26. A fee of 11 AZN (9.66 EUR) is payable[19].

27. The requirements in Article 13 of the NGO Law for the content of the statute of an NGO are limited and appropriate[20], as are the requirements in the Registration Law for documents to be submitted when applying for registration[21]. However, it appears to be a common practice of the registering department to ask the applicants to submit additional documentation, which is not prescribed by the law in force[22]- the most common examples being copies of passports and the employment history records of the founders – notwithstanding that this is prohibited by the Registration Law[23].

28. A notarized copy of the constituent document is required for public associations. Nonetheless there is a useful practice of requiring copies rather

[19] No fee is payable by "legal entities, representations or affiliates of foreign legal entities" seeking registration; Article 4.4..

[20] In the case of an association they are its name and address, the objectives of operation and method of management, the rights and responsibilities of members, the conditions and rules for joining and leaving the membership, the sources for its income, the rules for adoption of the statute and for making changes and additions to it and the rules for its liquidation and for the use of its property in case of liquidation. In the case of a foundation they are its name with the word "foundation" in it, its address, its objectives, its bodies, including Custody Board, as well as rules for establishment of those bodies, the rules for appointment and dismissal of its officials and the future of its property in case of liquidation.

[21] Article 5 requires the names, patronymic, places of residence, serial number and date of issue of the IDs (or registration number in the case of a legal entity) of the founders and the following documents: the statute, the record of paying the fee, a notarised copy of the registration certificate and statute of any founder that is a legal entity, a document indicating the information on the name, patronymic and place of residence of the legal representative which verifies his/her responsibilities for representation, as well as a notarised copy of his/her signature, and confirmation of the legal address of the NGO to be registered. In the case of foreign NGOs Article 6 also requires the submission of the statue approved by the foreign legal entity establishing a representation or affiliate, or its authorized representative, the decision establishing this, a document verifying the NGO's registration, the original or notarized copy of the letter of attorney provided by the NGO and the original or notarised copy of the decision on appointing the head of its representation or affiliate.

[22] Nor are they matters required to be included in the Register pursuant to Article 14.

[23] Article 11(4).

than the originals of identification cards. However, the registration process can only be completed in the capital, Baku, which can be a disincentive for those wishing to establish NGOs in the regions.

29. Some NGOs have been refused registration by a decision of the Collegium of the Ministry of Justice, while in other cases it was the Head of the Department of Registration of Legal Entities - a division of the Ministry of Justice - who took the decision. This is a matter that is possibly governed by unpublished internal instructions and so is thus not entirely clear who actually holds the authority for deciding upon registration.

30. The criteria for refusing registration are, according to Article 17 of the NGO Law and Article 11 of the Registration Law, threefold: (a) use of a name of a public association already in existence; (b) documentation that contradicts the Constitution and provisions in the NGO Law and other laws; and (c) false information in the documentation. All of these are ostensibly justified.

31. However, according to the Registration Law, information about registered entities should be published monthly in the media by the registering authority.[24] This doesn't happen and one of the consequences of this is to make it difficult for new NGOs to check whether the name they chose is not already registered, which forms one of the legal reasons for denying of the registration.

32. Moreover, in connection with the second ground for refusal, respect for freedom of association requires that there be a presumption that whatever individuals collectively propose to do will be lawful unless it is clearly evident that there is a constitutional or legal defect in the statutes. Unfortunately present practice in evaluating the statutes of public associations seems to take quite the opposite approach as there is considerable reliance on apprehension as to what might be done.

33. The existence of minor careless mistakes or inaccuracies can be used to conclude that there is false information in the application for registration.

34. It also appears that the question of expediency or the capability of the applicant NGO to pursue the aims set in its statute is taken into account while deliberating on registering or denying registration even though there is no provision for this in the law and indeed the Registration Law specifically provides that refusal of registration on account of the inexpediency of their establishment is not allowed[25].

35. Article 8 of the Registration Law provides that a decision on registration should generally be taken within 40 working days, although it is also provided

[24] Articles 8(4) and 18(2).
[25] Article 11(2).

that the checking of compliance with the requirements should be done within 30 days, with the possibility in "exceptional cases" of prolonging this period by a further 30 days for further investigation. This is much longer than the 10 days provided for in the earlier law but it is not of significance in practice, in part because of the repeated requests for corrections but also because of the failure either to give any formal decision - NGOs simply never receive any communication from the Ministry – or the deadline is not observed in practice.

36. The absence of a formal decision ought, according to the Registration Law, to lead to the NGO concerned being "considered to be registered" and give rise to an obligation to issue the certificate of registration within 10 days[26] but this does not seem to happen in practice.

37. The recognition in Article 8 of the possibility of rectifying applications which have been found to be defective ought to be welcome but it often happens that repeatedly new corrections are requested when it is specifically required that all shortcomings in the application and its supporting documents that require correction should be requested at once[27].

38. The 20-day time-limit for the correction of applications specified in the Registration Law seems inappropriate – not least because of the practical difficulties posed by the current centralised decision-making process – and it would be enough to rely on the 10 day limit for determining an application once the corrected application has been received[28].

39. The requirement that the refusal of registration be reasoned is welcome[29]. However, there seem to be instances in which letters of refusal fail to indicate the legal basis for refusal of the registration. In others there is a failure to make a correct reference to law or the provisions of law are interpreted incorrectly.

40. The provision of a clear right of appeal against any refusal[30] ought to be a useful safeguard but the courts are not able and willing to compel observance of the requirements of the Constitution and the legislation, or indeed the international agreements to which the Azerbaijan Republic is a party – including the European Convention - which the Registration Law specifies form part of the legislation on registration[31]. They thus leave officials to interpret and apply the law as they wish without fear of challenge.

[26] Article 8(5).
[27] Article 8(3).
[28] In Article 8(4).
[29] Article 17(2) provides that the decision shall "in a written form, pointing out reasons for rejection, as well as provisions and paragraphs of legislation that have been violated in preparation of foundation documents".
[30] Article 11(5).
[31] Article 3.

41. Although the threat or commencement of proceedings before the Court has resulted in the grant of registration to some NGOs[32], there is a certain reluctance on the part of the authorities to embrace, let alone encourage, the establishment of independent NGOs seen in the manner in which legislation that might in many respects seem appropriate for regulating the establishment of NGOs is actually being applied.

Property and management

42. NGOs can acquire property from the following sources: regular or single-time membership fees by founders or members of social communities; voluntary property shares and donations; receipts from sales of goods, provision of works and services; dividends and revenues generated from shares, bonds, other securities and savings; income generated as a result of use or sales of its own property; grants; and other income not prohibited by the legislation[33].

43. NGOs that are public organisations are ultimately governed by general meetings of their members, which must be summoned at least once a year, but may work through an executive body chosen by the general meeting[34].

44. Foundations are to be managed by their president or governing body but they must also have a Custody Board which supervises their activities, the adoption and implementation of decrees by their other bodies and the use of their means, as well as adopting changes to their statutes and decrees on liquidation and re-establishment[35].

Supervision and responsibility

45. NGOs must maintain accounting in accordance with the law and must also publish information about their use of their property[36]. Furthermore information about the amount and structure of their income, as well as about their property, expenses, number of staff and salaries cannot be a state or commercial secret[37].

46. The specific responsibility for breaches of the NGO Law is governed by other legislation[38]. However, in the event of action contrary to the objectives of the NGO Law, the relevant executive authority - the Ministry of Justice - can

[32] See n. 40.
[33] Article 24.
[34] Articles 25 and 26.
[35] Article 27.
[36] Article 29.
[37] *Ibid*.
[38] Article 31.1.

warn the NGO concerned or instruct it to eliminate the violations involved. The deadline for compliance with a warning will not necessarily take account of the time required to change an NGO's statutes through convening a general assembly. Such a warning or instruction is subject to challenge in court but a court may also liquidate an NGO that has received a warning or instruction more than twice within one year[39]. As is clear from the following section, the exercise of these powers does not appear to be subjected to any requirement of proportionality.

Conclusion

47. The NGO Law before the adoption of the 2009 amendments can thus be seen as fulfilling the requirements of international standards in most respects, even if this has not always been matched by actual practice.

Findings of the European Court

48. The application of the NGO Law has been the subject of a number of applications to the Court in which violations of Article 11 of the Convention were found to have occurred primarily as a result of unjustified delay in registering NGOs and the absence of sufficient protection in domestic law against such delays[40] but also as a result of the arbitrary dissolution of an association[41].

49. The decisions impugned in the registration cases concerned the law that has since been replaced by the Registration Law[42] but it was the actual approach that was followed by the authorities in processing applications that resulted in the finding that Article 11 of the Convention was violated. This approach, which has also been evident since the legislative change, is well-exemplified by this extract from the judgment in *Ramazanova and Others v. Azerbaijan*:

> 64. The Court observes that Article 9 of the Law *On State Registration of Legal Entities* of 6 February 1996 set a ten-day time-limit for the Ministry to issue a decision on the state registration of a legal entity or refusal to register it. In the event the legal entity's foundation documents contained rectifiable deficiencies, the Ministry could return the documents to the

[39] Article 31.2.

[40] *Ramazanova and Others v. Azerbaijan*, no. 44363/02, 1 January 2007, *Nasibovo v. Azerbaijan*, no. 4307/04, 18 October 2007, *Ismayilov v. Azerbaijan*, no. 4439/04, 17 January 2008 and *Aliyev and Others v. Azerbaijan*, no. 28736/05, 18 December 2008. The following similar applications were struck out after a request was made to withdraw them following the registration of the NGOs concerned: *Asadov and Others v. Azerbaijan*, no. 138/03, 26 October 2006, *Mustafayev v. Azerbaijan*, no. 14712/05, 9 November 2006, *Suleymanova v. Azerbaijan*, no. 26241/05, 18 January 2007 and *Aliadze v Azerbaijan* (dec.), 2733/05, 20 September 2007.

[41] *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, 8 October 2009.

[42] This entered into force on 9 January 2004.

founders within the same ten-day time-limit with the instructions to rectify those deficiencies. After the registration request was re-submitted following such rectification, the law provided for a five-day time-limit for official response. However, in the present case, the Ministry delayed its response to each registration request by several months. In particular, the response to the applicants' third registration request of 2 October 2001 was delayed by more than nine months, whereas the law clearly required it to be issued within 5 days. The response to the fourth registration request was delayed by approximately six months. In such circumstances, the Court cannot but conclude that the Ministry violated the procedural time-limits.

65. It follows that there was no basis in the domestic law for such significant delays. The Government's argument that the delays were caused by the Ministry's heavy workload cannot extenuate the undisputable fact that, by delaying the examination of the registration requests for unreasonably long periods, the Ministry breached the procedural requirements of the domestic law. It is the duty of the Contracting State to organise its domestic state-registration system and take necessary remedial measures so as to allow the relevant authorities to comply with the time-limits imposed by its own law and to avoid any unreasonable delays in this respect ... In the present case, there is no evidence as to whether any measures have ever been undertaken by the State authorities to remedy the situation at the material time. The Court therefore considers that the Ministry's alleged heavy workload was not a good excuse for such unreasonable delays as in the present case.

66. Furthermore, as to the quality of the law in question, the Court considers that the law did not establish with sufficient precision the consequences of the Ministry's failure to take action within the statutory time-limits. In particular, the law did not provide for an automatic registration of a legal entity or any other legal consequences in the event the Ministry failed to take any action in a timely manner, thus effectively defeating the very object of the procedural deadlines. Moreover, the law did not specify a limit on the number of times the Ministry could return documents to the founders “with no action taken”, thus enabling it, in addition to arbitrary delays in the examination of each separate registration request, to arbitrarily prolong the whole registration procedure without issuing a final decision by continuously finding new deficiencies in the registration documents and returning them to the founders for rectification. Accordingly, the law did not afford the applicants sufficient legal protection against the arbitrary actions of the Ministry of Justice.

50. The inapplicability of the legislative reform to registration to already pending applications was established in *Aliyev and Others v. Azerbaijan.* Thus the Court observed that:

36. One notable difference between the present case and the *Ramazanova and Others*, *Nasibova* and *Ismayilov* cases is that, in the present case, several months after the applicants had made their request for state registration, the New State Registration Act entered into force on 9 January 2004 and superseded the old rules on state registration of legal entities. Therefore, to assess whether the interference was “prescribed by law”, it is necessary to determine what domestic law regulated the registration proceedings in the present case.

37. The Court notes, first of all, that the applicants submitted their registration request on 23 June 2003, at the time when the Old State Registration Act was in force. Article 9 of that act set a ten-day time-limit for the Ministry to issue a decision on the state registration of a legal entity or refusal to register it. In the event the legal entity’s foundation documents contained rectifiable deficiencies, the Ministry could return the documents to the founders within the same ten-day time-limit with instructions to rectify those deficiencies. After the registration request was re-submitted following such rectification, the law provided for a five-day time-limit for an official response. It therefore follows that, pursuant to the Old State Registration Act, the Ministry had to issue at least an initial decision on the applicants’ request by 3 July 2003, long before the entry into force of the New State Registration Act. However, in the present case, the Ministry delayed its response by almost eight months.

38. The domestic courts decided that, since at the time of examination of the applicants’ court claim against the Ministry the Old State Registration Act was no longer in force, only the

procedural requirements of the New State Registration Act applied. They also found that the new time-limit of 40 days started to run from 9 January 2004, the date of entry into force of the New State Registration Act. Since the Ministry of Justice sent its formal response to the applicants on 18 February 2004, the courts concluded that it was sent within the time-limit currently applicable under the New State Registration Act.

39. However, such a conclusion, in its essence, constituted an implicit finding that the mere fact of entry into force of a new act superseding the previous act somehow absolved the Ministry of Justice from responsibility for breaches of procedural requirements of the superseded law committed at the time when the latter was still in force. In the Court's view, such a finding is arbitrary and incompatible with the interests of justice and legal certainty. The domestic courts failed to make any legal assessment of the Ministry's lengthy failure to act during the period from 23 June 2003, when the registration request was submitted by the applicants, until 9 January 2004, when the New State Registration Act entered into force.

40. The domestic courts have not established, and it has not been argued by the Government, that the provisions of the New State Registration Act had any retrospective effect. Having regard to the relevant provisions of the domestic law concerning the retrospective effect of legal acts (see paragraphs 18-19 above), the Court is also of the opinion that the New State Registration Act had no retrospective effect. Therefore, since in the present case the applicants submitted their registration request on 23 June 2003, the applicable state registration procedure was as provided in the Old State Registration Act, which was in force at that time.

51. Following the Court's rulings regarding registration there appeared for a short period to be a greater willingness to register NGOs but subsequently the impediments seen in the above cases once again began to manifest themselves[43]. Further applications alleging violations of Article 11 of the Convention as a result of delay in registration and negative decisions are currently pending before the Court.

52. In its assessment of the general measures taken to implement these rulings the Committee of Ministers has considered that:

"important progress has been achieved in ensuring a new legal situation in conformity with the Convention's requirements with the adoption of the law of 2004, the clarification given by the government as to its scope and the efforts made to draw the attention of the authorities concerned to the requirements of the Convention as developed in the case-law of the European Court, so as to ensure their direct effect in the Azerbaijani law. The progress achieved in taking individual measures is also an important sign of this positive evolution. However, confirmation is awaited that the problem raised by the government before the European Court regarding the heavy workload of the Ministry of Justice has been solved. In addition, the specific issue relating to the temporal scope of the new law raised in the case of Aliyev require special attention"[44].

53. The Committee of Ministers is still awaiting information "as to whether requests for registration introduced prior to the 2004 Law are still pending before the Ministry of Justice. It is also awaiting publication and

[43] See I. Aliyev (ed.), *Report On state of non-governmental sector in Azerbaijan* (2010), at pp. 4 and 7-10. See also n. 40.

[44] See http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=44363%2F02&StateCode=&SectionCode=

dissemination of the European Court's judgment in *Aliyev and Others*, together with a circular drawing judges' attention to §§ 36 to 40 of the judgment. The cases remain on the agenda of the Committee of Ministers.

54. As regards the unjustified dissolution finding in *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, the violation of Article 11 stemmed from the imprecision of the NGO Law, the insufficiency of reasoning and evidence and lack of proportionality of the sanction, as is evident from the following extracts from the Court's judgment:

> 1. Article 31.4 of the NGO Act provided for a possibility of dissolution of an association by a court order in the event the association received, within the same calendar year, more than two written warnings by the regulating authority (the Ministry of Justice). The Court, therefore, accepts that the sanction imposed on the Association had a clear basis in the domestic law and that this law was accessible.
> 2. However, as to the issue of foreseeability, the Court notes that the provisions of the NGO Act were 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. Article 31.2 of the NGO Act empowered the Ministry of Justice to warn non-governmental organisations, including public associations, if their activities were deemed to be "incompatible with the objectives" of the NGO Act. Under Article 1 of the NGO Act, its "objectives" included, *inter alia*, the general regulation of the principles and rules for the establishment, management and scope of activities of public associations. This definition, in essence, appeared to encompass an unlimited range of issues related to an association's existence and activity.
> 3. The Court agrees with the applicants that the above provisions are worded in rather general terms and may give rise to extensive interpretation. The Government have not submitted any examples of domestic judicial cases which would provide a specific interpretation of these provisions. In such circumstances, the NGO Act appears to have afforded the Ministry of Justice a rather wide discretion to intervene in any matter related to an association's existence. This situation could render it difficult for associations to foresee which specific actions on their part could be qualified by the Ministry as "incompatible with the objectives" of the NGO Act.
> 4. The situation was exacerbated by the fact that involuntary dissolution was the only sanction available under the domestic law against associations engaging in activities "incompatible with the objectives" of the NGO Act. In the Court's view, this is the most drastic sanction possible in respect of an association and, as such, should be applied only in exceptional circumstances of very serious misconduct. Therefore, the domestic law should delimit more precisely the circumstances in which this sanction could be applied.
> 5. The Court also notes that the NGO Act contained no detailed rules governing the scope and extent of the Ministry of Justice's power to intervene in the internal management and activities of associations, or minimum safeguards concerning, *inter alia*, the procedure for conducting inspections by the Ministry or the period of time granted to public associations to eliminate any shortcomings detected (see also paragraph 77 below), thus providing sufficient guarantees against the risk of abuse and arbitrariness.
> 6. The above considerations, in themselves, give a strong indication that the provisions of the NGO Act did not meet the "quality of law" requirement, which would be sufficient for a finding of a violation of Article 11 on the basis that the interference was not prescribed by law. The Court notes, however, that these questions are in this case closely related to the broader issue of whether the interference was necessary in a democratic society. The Court considers that, in the circumstances of the present case, respect for human rights requires it to examine the latter issue as well. In view of this, as well as in view of its analysis in paragraphs 70-91 below, the Court does not find it necessary to decide whether the wording of the NGO Act's relevant provisions met the "quality of law" requirement within the meaning of Article 11 § 2 of the Convention.

...
75. At the outset, the Court stresses that, indeed, the Association's failure to convene a general assembly of its members for around seven years constituted a wanton disregard of the requirements not only of the domestic law, but also of its own Charter. Moreover, by the time of its dissolution, the Association had failed to even bring its Charter into conformity with the basic legal requirements applicable under the NGO Act which, by then, had been in force for around two years. Having committed these breaches, the Association clearly put itself in a situation where it risked sanctions. Accordingly, in the light of the considerations in paragraphs 72-74 above, the Court cannot find that it was inappropriate for the domestic authorities to react to these breaches and to ensure that the basic formal requirements of the domestic law on corporate management be observed.
76. Nevertheless, in assessing whether the authorities' subsequent decision to apply the sanction of involuntary dissolution was justified and proportionate, it cannot be overlooked that the Association actually attempted to rectify the problem by convening a general assembly on 26 August 2002, even prior to the Ministry of Justice's first warning of 10 September 2002. Due account should have been taken of this intention when deciding upon the necessity of the interference with the Association's rights in the present case. The Association should have been given a genuine chance to put matters right before being dissolved.
77. While the Court has accepted that, initially, the authorities correctly reacted to the breach of the requirement to convene a general assembly once a year, it observes that, subsequently, the focus of the accusations against the Association shifted to other “breaches”. In particular, having been informed about the general assembly of 26 August 2002, the Ministry was not satisfied with its “lawfulness” and followed up its initial warning with another two warnings issued in a relatively short time span, on each occasion allowing the Association a ten-day period in which to take measures to eliminate the alleged breaches of law. The Court notes, firstly, that these ten-day periods appear to have been set arbitrarily. This problem stems from the fact that the NGO Act allowed the Ministry unlimited discretion in this respect (see paragraph 64 above). Secondly, there was no explanation in the warning letters as to what specific measures taken by the Association would be deemed as acceptable by the Ministry. Having regard to the nature of the Ministry's remarks, the Association was most likely expected to convene a new general assembly. However, under the domestic law, the process of convening a general assembly required at least two weeks (see paragraph 34 above). In such circumstances, it is difficult to see how the Association could be expected to eliminate the “breaches of law” within the ten-day period set by the Ministry. This raises a legitimate concern as to whether the Association was given a genuine chance to rectify its affairs before it had to face the sanction of dissolution.
78. As to the substance of the second and third warnings, it was noted, in generalised terms, that not all members of the Association had been properly informed of the general assembly of 26 August 2002, that the Association's local branches had not been equally represented at the assembly, and that the current membership records had not been properly maintained. The Court sees little justification for the Ministry of Justice to interfere with the internal workings of the Association to such an extent, especially in the absence of any complaints by Association members concerning these matters. For example, in so far as the question of representation of local branches is concerned, the domestic law did not appear to directly regulate this matter. The Court considers that it should be up to an association itself to determine the manner in which its branches or individual members are represented in its central governing bodies. Likewise, it should be primarily up to the association itself and its members, and not the public authorities, to ensure that formalities of this type are observed in the manner specified in the association's charter. The Court considers that, while the State may introduce certain minimum requirements as to the role and structure of associations' governing bodies (see paragraph 73 above), the authorities should not intervene in the internal organisational functioning of associations to such a far-reaching extent as to ensure observance by an association of every single formality provided by its own charter.
79. The Court further observes that, while the Ministry of Justice was vested with authority to initiate an action for the dissolution of the Association, it was for the domestic courts to

decide whether it was justified to apply this sanction. They were therefore required to provide relevant and sufficient reasons for their decision (see paragraph 68 above). In the present case, that requirement first and foremost obliged the domestic courts to verify whether the allegations made against the Association by the Ministry of Justice were well-founded. This however has not been done in the present case. It appears that the only evidence assessed by the courts were the submissions of the parties, correspondence between the Association and the Ministry of Justice, and the reports of the Ministry of Justice officials concerning the results of their inspection of the Association's activities. Having heard the parties, the courts relied on the findings of the officials of the Ministry of Justice and accepted them at their face value as constituting true facts, without an independent judicial inquiry. Specifically, there is no indication in the domestic judgments that the courts had ever attempted to evaluate the merit of the Ministry's factual findings by independently examining such evidence as the minutes of the general assembly of 26 August 2002, the Association's membership records, documents relating to the organisational structure of the Association's branches, etc.

80. Having regard to the above, the Court considers that, while it is undisputed that for around seven years the Association was in breach of the legal requirement to regularly convene a general assembly of members, the authorities did not give due weight to its attempt to rectify the problem by convening a general assembly on 26 August 2002. As to the other alleged breaches committed by the Association ("unlawfulness" of the general assembly of 26 August 2002, deficiencies in membership records, etc.), neither the domestic authorities, nor the Government in their observations before the Court, have been able to prove with any sound evidence that these breaches did indeed take place and, if so, whether they constituted a compelling reason for the interference in question.

81. It therefore follows that, in respect of this ground for the interference (breaches by the Association of the domestic legal requirements on internal management), the reasons adduced by the national authorities to justify it were not relevant and sufficient. In such circumstances, the Court considers that the respondent State failed to demonstrate that the interference met a pressing social need.

82. Moreover, the interference did not, in any event, comply with the "proportionality" requirement. In this connection the Court considers that the nature and severity of the sanction imposed are factors to be taken into account when assessing the proportionality of the interference .... In the present case, forced dissolution was the only sanction available under the domestic law in respect of public associations found to have breached the requirements of the NGO Act and, accordingly, this sanction could be applied indiscriminately without regard to the gravity of the breach in question. The Court considers that a mere failure to respect certain legal requirements on internal management of non-governmental organisations cannot be considered such serious misconduct as to warrant outright dissolution. Therefore, even if the Court were to assume that there were compelling reasons for the interference, it considers that the immediate and permanent dissolution of the Association constituted a drastic measure disproportionate to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing into the domestic law less radical alternative sanctions, such as a fine or withdrawal of tax benefits (see paragraph 43 above for examples of alternative sanctions available in other member States of the Council of Europe).

83.. In sum, the Court finds that the order to dissolve the Association on the ground of the alleged breaches of the domestic legal requirements on internal management of non-governmental organisations was not justified by compelling reasons and was disproportionate to the legitimate aim pursued.

..

84. ... the Ministry of Justice and the domestic courts found that the Association had engaged in activities in which non-commercial organisations were prohibited to engage by law. In particular, the Association was accused of having attempted to collect money from State organs and commercial organisations in the guise of membership fees, conducted unlawful inspections at various organisations, and engaged in "other illegal acts interfering with the rights of entrepreneurs" ...

7. The Court observes at the outset that, while it appears that at least some of the above allegations, if proven, would entail criminal responsibility of the Association's managers or

members implicated in the alleged unlawful actions, no criminal proceedings have ever been instituted in connection with these allegations. This fact is, in itself, indicative of lack of sound evidence supporting the authorities' findings.

8. The Court further notes that neither the third warning of the Ministry of Justice, in which the above allegations were made, nor the Ministry's submissions to the domestic courts in connection with its request to dissolve the Association contained any specific evidence proving these allegations. Moreover, the allegations themselves were extremely vague, briefly worded and offered little insight into the details of the alleged illegal activities.

9. The domestic courts accepted the above allegations as true, without any independent judicial inquiry and without examining any direct evidence of the misconduct alleged. The Yasamal District Court had regard only to the content of the Ministry's third warning letter, heard evidence from the Head of the Ministry's Department of State Registration of Legal Entities (who merely reiterated the content of the third warning letter), and examined an internal inspection report of a Ministry of Justice official, which mentioned, in very brief terms, that the Association's branch in the Tovuz Region engaged in some illegal activities ...

10. However, neither the submissions of the Ministry of Justice officials nor the Yasamal District Court's judgment itself ever mentioned who specifically (that is, which person affiliated to the Association) had attempted to unlawfully collect money in the guise of membership fees. It was never mentioned when exactly these attempts were made, and from which specific State organ or commercial organisation the money was unlawfully collected. No direct victims or other witnesses of this misconduct were examined in court, no written complaints were examined, and no other direct evidence was produced. Likewise, no evidence was produced or examined as to when exactly, by which directly responsible individuals, and in which specific organisations the alleged "unlawful inspections" had been carried out. Lastly, there was no explanation at all as to what was specifically meant by "other illegal acts interfering with the rights of entrepreneurs".

11. Put simply, the fact of the Association's alleged engagement "in activities prohibited by law" was unproven. In such circumstances, the domestic courts' decision to dissolve the Association on this ground is, in the Court's view, nothing short of arbitrary.

12. The Government have likewise failed to submit any explanation as to the specific details of the Association's allegedly unlawful activities or any evidence of such unlawful activities.

13. In sum, the Court considers that no justification has been provided by the domestic authorities or the Government for the Association's dissolution on this ground.

55. The Committee of Ministers is awaiting an action plan/action report with respect to the execution of this judgment.

56. It will be important to keep these findings in mind when considering the potential impact, and actual use, of the 2009 amendments.

The 2009 Amendments

57. The 2009 amendments modify the NGO Law with regard to provisions that deal with the following matters: the applicability of the law; names of NGOs; branches; founders; members; establishment; registration of foreign NGOs; statutes; sources of property; supervision and responsibility; and amending existing statutes. These amendments are a substantially revised and less

draconian version of the proposals initially submitted to the Parliament (Milli Mejilis) of the Republic of Azerbaijan in June 2009[45].

Applicability

58. As has already been noted, Article 1.4 of the NGO Law excludes from its application political parties, trades unions, religious associations and local self-governments. Although the first three of these have the benefit of the protection afforded by Article 11 of the Convention and the second and third are also seen as an NGO for the purpose of 'Recommendation CM/Rec(2007)14[46], international standards do not require that all forms of association and NGO be dealt with in a common piece of legislation. It is sufficient that the relevant legislation actually fulfils the international standards applicable to all the different forms of association and NGO.

59. However, the amendment to Article 1.4 extends the scope of the exclusion from the NGO Law from the four enumerated types of entity to "the entities established to carry out the functions of these institutions". Such an amendment is not only vague in its formulation but it is also one that is capable of impermissible encroachment on the rights and freedoms secured both under the Convention and Recommendation CM/Rec(2007)14.

60. The extension made to the excluded entities is vague - and thus lacking the precision required for a restriction on freedom of association under Article 11 of the Convention - in that it can be seen as embodying what is an effectively double-subjective test for determining the entities concerned. Thus it purports to be concerned with the purpose of those establishing the entities that might be excluded (were they intending that they should perform certain functions?) and at the same time does not prescribe any criteria for determining those motives, leaving the assessment of the decision-maker to draw his or her own conclusions from provisions in the statutes of the entities concerned which do not actually identify them as being political parties, etc. The danger of authorities being too ready to draw unjustified conclusions from such provisions has been evident in a number of cases before the Court where it

[45] For a review of the original proposals, see ICNL, *Analysis of Proposed Amendments to the Law of the Republic of Azerbaijan On Non-governmental Organizations (Public Associations and Foundations)* at http://4804293991010464782-a-1802744773732722657-s-sites.googlegroups.com/site/civilsocietyproject/Home/resources/ICNLanalysisNGOLawAzerbaijanJune16eng.pdf?attachauth=ANoY7coaoBD4yPI2zlRpA7rvqKWzQ3FzKp06Liwjf0U9i9Y2_jCRSAXEQWtXr-obKj3oZTFhhy9vfGB2MVYmaD8TTLsvjwcZHcfCkrgyT8K_AB7R3IE8tcJOwalv8NLRqBgVtDws_DJqG78fSwFJXh0f-Jtv0pbcVNYzU1AsL9SpZwNuM5IENns_WfyTXcoZ6JrpKnD6IKZ4YV_dTSIZGC67Mqh2IurPyLBzN3nH5r6WC6qbO5_xMVzE2mdgtQgSvz__u5EW2zlRgoWD3jjJ1mvE6nDPvrEHeQ%3D%3D&attredirects=0.

[46] The fourth - local self-government - seems to be a form of public entity and thus comes under neither instrument.

found that there had been too precipitous a conclusion that the objectives of certain associations were unconstitutional[47]. It is thus evident from these cases that any evaluation of objectives, particularly where this has a bearing on conferment or retention of some legal status, must be well-informed. Moreover it is clear that freedom of association will be better respected if the imposition of restrictions is guided by the deeds of the body concerned[48] rather than any conclusion formed about the terms used in its formal statement of objectives[49]. The focus should thus be much more on the regulation of the former instead of on exercising control at the time of formation.

61. On this basis, therefore, the amendment to Article 1.4 is inappropriate as it lacks sufficient safeguards against improper assessments being made about the objectives of entities seeking to be established pursuant to the NGO Law.

62. However, the amendment is also objectionable in that it is likely to lead to entities which have objectives that are political or religious in character being required to become political parties or religious associations, notwithstanding that their fundamental goal is neither to be elected to public office or to conduct religious worship or observance.

63. Such an effect would be entirely inconsistent with both the right to freedom of association under Article 11 of the Convention and the terms of Recommendation CM/Rec(2007)14. Under these it should be possible to pursue any objectives provided that the objectives and the means employed for this purpose are consistent with the requirements of a democratic society[50]. Indeed the Recommendation, which does not include political parties within its scope, states explicitly 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" and "to support a particular candidate or party in an election or a

[47] See, e.g., *United Communist Party of Turkey and Others v Turkey* [GC], no. 19392/92, 30 January 1998 and , *Freedom and Democracy Party (ÖZDEP) v Turkey* [GC], no. 23885/94, 8 December 1999, .

[48] As well as by those of its leaders; in *Refah Partisi (The Welfare Party) and Others v Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 it was remarks and policy statements made by the latter which persuaded the European Court that the party was aiming at 'a model of State and society organised according to religious rules' (paras 111-115). However, see n 257 for the conclusion reached by the dissenting judges in the Chamber judgment of 31 July 2001. See also *Dicle for the Democratic Party (DEP) of Turkey v Turkey*, no. 25141/94, 10 December 2002, in which dissolution based on remarks of party's former president was held to be a disproportionate response.

[49] The objection that the refusal to register an association that described itself as an 'organisation of a national minority' because of a perceived risk that it would seek to exploit certain advantages enjoyed by national minorities under the electoral law amounted to being based on 'unfounded suspicions' about its future actions was not accepted in *Gorzelik and Others v Poland*, 17 February 2004 [GC] because this action was directed to controlling the 'lawfulness' of the claim made in its memorandum of association – the term being used suggesting that the body had the rights conferred by the electoral law – and the case was thus distinguishable from the situation in the cases previously cited.

[50] See *Refah Partisi (The Welfare Party) and Others v Turkey*[GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 and para. 11 of Recommendation CM/Rec(2007)14.

referendum provided that they are transparent in declaring their motivation"[51]. While the former is at least partly authorised by the NGO Law, the latter is prohibited by it[52] so that Article 1.4 is clearly restricting even further[53] any activity by NGOs that might be seen as "political".

64. Yet the Court has held that the fact an NGO's objectives might be seen as "political" should not necessitate it seeking the status of a political party where this is separately provided for under a country's law. Thus it found a violation of Article 11 of the Convention where the NGO in *Zhechev v Bulgaria*[54] was refused registration because some of its aims – the restoration of the Constitution of 1879 and of the monarchy – were "political goals" within the meaning of Article 12(2) of the Constitution of 1991 and could hence be pursued solely by a political party. In considering whether it was necessary in a democratic society to prohibit NGOs, unless registered as political parties, from pursuing "political goals", the Court stated that it had to examine whether this ban corresponded to a "pressing social need" and whether it was proportionate to the aims sought to be achieved. It held that:

> "55. The first thing which needs to be noted in this connection is the uncertainty surrounding the term "political", as used in Article 12 § 2 of the Constitution of 1991 and as interpreted by the domestic courts. ... Against this background [of different interpretations by national courts] and bearing in mind that this term is inherently vague and could be subject to largely diverse interpretations, it is quite conceivable that the Bulgarian courts could label any goals which are in some way related to the normal functioning of a democratic society as "political" and accordingly direct the founders of legal entities wishing to pursue such goals to register them as political parties instead of "ordinary" associations. A classification based on this criterion is therefore liable to produce incoherent results and engender considerable uncertainty among those wishing to apply for registration of such entities.
>
> 56. If associations in Bulgaria could, when registered as such, participate in elections and accede to power, as was the case in *Gorzelik and Others* ..., it might be necessary to require some of them to register as political parties, so as to make them subject to, for instance, stricter rules concerning party financing, public control and transparency ... However, under Bulgarian law, as it stood at the material time and as it stands at present, associations may not participate in national, local or European elections ... There is therefore no "pressing social need" to require every association deemed by the courts to pursue "political" goals to register as a political party, especially in view of the fact that, as noted above, the exact meaning of that term under Bulgarian law appears to be quite vague. That would mean forcing the association to take a legal shape which its founders did not seek. It would also mean subjecting it to a number of additional requirements and restrictions, such as for instance the rule that a political party cannot be formed by less than fifty enfranchised citizens ..., which may in some cases prove an insurmountable obstacle for its founders. Moreover, such an approach runs counter to freedom of association, because, in case it is adopted, the liberty of action which will remain

[51] Paras. 12 and 13.
[52] Article 2.4 provides that an NGO "may not provide financial and other material assistance to political parties ... [but] may come up with proposals on improvement of legal and regulatory acts, according to the rules provided by the laws of the Azerbaijan Republic and by its own statute".
[53] See para. 16.
[54] No. 57045/00, 21 June 2007.

> available to the founders of an association may become either non-existent or so reduced as to be of no practical value ...
> 57. The Court therefore considers that alleged "political" character of the association's aims was also not a sufficient ground to refuse its registration."

65. The Court has also found it unjustified for registration to be refused to an association because the entity concerned - which was not seeking to become a political party - was seeking to distribute propaganda and lobby authorities with their ideas and aims[55].

66. Thus the amendment not only suffers from the vice of vagueness but would unjustifiably limit the pursuit of objectives that are political and religious in character to those entities that were founded specifically as political parties or religious associations.

67. It should be noted that this amendment effectively reinstates a prohibition on political activities that had been deleted in 2000 from the penultimate draft of the NGO Law in order to bring it into compliance with the requirements of the Convention.

Names

68. The amendment to Article 3.1 of the NGO Law supplements the existing requirement that an NGO should have a name that is indicative of its organisational legal form and nature of activity by a stipulation prohibiting the use of names of state agencies or of distinguished people of Azerbaijan, although in respect of the latter this prohibition is not to apply where consent has been given by their close relatives or inheritors.

69. It is legitimate to prevent an NGO from using a name that is patently misleading or is not adequately distinguishable from that of an existing natural or legal person[56], and this could include official bodies[57]. In this respect,

[55] *Koretskyy and Others v Ukraine*, no. 40269/02, 3 April 2008.

[56] See para. 34 of Recommendation CM/Rec(2007)14. See also *X v Switzerland* (dec.), no. 18874/91, 12 January 1994 (76 DR 44 (1994)) (in which it was found that a refusal of registration under the national designation – as opposed to an absolute refusal - could be regarded as necessary in a democratic society for the prevention of disorder and the protection of the rights and freedoms of others where a third person might confuse the applicant association's name with that of a chamber of commerce and another body responsible for bilateral trade relations between Switzerland and Australia; the body 'lacked the necessary integration into national foreign trade policy' (p 49)) and *Basisan for 'Liga Apararii Drepturilor Omului Din Romania' v Romania* (dec.), no. 28973/95, 30 October 1997 (91 DR 29 (1997)) (in which the only difference between the name of the applicant association and the already existing 'League for the Defence of Human Rights' was the addition of 'in Romania' and the former European Commission of Human Rights considered that, having regard to the possibility of confusion, the refusal of registration could be viewed as unreasonable). See *Gorzelik and Others v Poland*, no 44158/98, 17 February 2004, in which it was accepted that an application by the 'Union of People of Silesian nationality' could be rejected because its memorandum of association referred to it as being an 'organisation of a national minority' which was a concept found in the parliamentary elections law governing participation in the distribution of seats and

therefore, the amendment might not seem problematic. However, respect for the right to freedom of expression under Article 10 of the Convention would probably rule out an absolute bar on the inclusion of the names of state agencies as part of those of NGOs where there is clearly a satirical or critical objective and there is thus no risk of confusion by the public of the NGO with the official body[58]. This aspect of the amendment is thus objectionable since its absolute character precludes any allowance for the use for NGOs that have a satirical or critical objective without being misleading.

70. The prohibition on using the names of distinguished people of Azerbaijan is also objectionable in that it is not seeking to prevent confusion with existing institutions named in their honour or the use of the names of living persons without their consent - something that would be permissible both under the Convention and Recommendation CM/Rec(2007)14[59] - but to make the use by an NGO of the names of an imprecise group of persons without the consent of another group of persons that is also imprecise in its composition. Certainly the question of whether or not someone is one of "the distinguished people of Azerbaijan" cannot be regarded as something that can be readily ascertained in advance since the attribution "distinguished" is something over which there is always likely to be considerable argument in any society, as well as being something that is inevitably subject to historical revision. Furthermore, while a "close relative" is not itself an imprecise term, an inheritor is since it is one that can cover many generations of persons. This would thus allow a veto to be exercised over the use of a name in circumstances where there was no personal connection with the "distinguished" person concerned and the expiry of title to copyright or trademark protection meant that no special interest could be claimed to exercise control over the use of a name that may have become part of the heritage of all in the country.

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thus gave the misleading impression that the association and its members would enjoy certain 'electoral privileges to which they were not entitled' (para 103). It was significant that such doubts could have been dispelled by only a slight change in the association's memorandum of association and without having any harmful consequences for its existence as an association or preventing the achievement of its objectives. In such circumstances the restriction could hardly be regarded as disproportionate to the legitimate aim being pursued. In the Chamber judgment the requirement of a slight change in the association's name as a condition for registration was also considered unobjectionable but this issue was not specifically addressed in the Grand Chamber. Only the grounds cited above, together with the failure to submit 'all clearly prescribed documents' are recognised in paragraph 34 of Recommendation CM/Rec(2007)14.

[57] See *Apeh Uldozotteinek Szovetsege, Ivanyi, Roth and Szerdahelyi v Hungary* (dec.), no 32367/96 31 August 1999, in which the Court did not consider there to be an excessive interference with freedom of association in the refusal of a request for a registration by an association whose name in English was the Alliance of APEH's Persecutees (APEH being the abbreviated name of the Hungarian Tax Authority) when there was no obstacle to the formation and registration of an association to promote taxpayers' interests other than the choice of a name that implied a risk of confusion and that was defamatory.

[58] The ruling in the *Apeh* case just cited is certainly questionable since it is doubtful whether anyone might have imagined a body with such a name was an official one and the ready acceptance of the defamation objection is possibly at odds with the protection given to value judgements under Article 10.

[59] See n. 56

71. The restriction on the use of names by NGOs thus goes well beyond what is permissible under international standards.

Branches

72. There are two amendments to the provisions in Article 7 dealing with the branches and representative offices of NGOs. The first - to Article 7.1 - imposes a notification requirement regarding their establishment and the second - to Article 7.5 - introduces a citizenship requirement for the deputy chiefs of branches and representative offices of NGOs founded by aliens or foreign legal entities.

73. The amendment to Article 7.1 firstly stipulates that there is no registration requirement applicable to the branches and representative offices of NGOs. This is not something that previously seemed necessary given the way in which the original version of Article 7 was formulated, notably that they are not legal entities, but it is useful to have this confirmed - which is the position required by paragraph 42 of Recommendation CM/Rec(2007)14 - since there was such a requirement in the legislation replaced by the NGO Law in 2000.

74. The further stipulation that NGOs must notify the relevant executive authority within 10 days of their establishment of a branch or representative office is not, in principle, inconsistent with either the Convention or Recommendation CM/Rec(2007)14. However, such a requirement is not found in the majority of Council of Europe countries[60] and, given the actual practice of regulation of NGOs seen in Azerbaijan, its introduction without any problem manifesting itself since the adoption of the NGO Law is clearly a matter of considerable concern.

75. A requirement that certain office-holders of an NGO be citizens of the country in which it is established - such as is seen in the amendment to Article 7.5 - is not as such incompatible with either the Convention or Recommendation CM/Rec(2007)14 and is something found in the practice of some Council of Europe countries, albeit a small minority of them[61]. However, the scope of the amendment is unclear since, while it establishes a citizenship requirement for deputy chiefs of branches and representative offices, it does not actually stipulate that there must be a deputy chief and it should be noted that the unamended version of Article 7.5 only makes provision for there to be a *chief* of such a branch or representative office. It may be that a duty to have deputy chief is an implied requirement of the amendment but the imposition of any

[60] See 2nd Annual Report of the Expert Council on NGO Law

[61] See 2nd Annual Report. However, paragraph 49 of the Recommendation provides that " NGOs should not be subject to any specific limitation on non-nationals being on their management or staff".

criminal liability for failing to appoint a deputy chief would be in breach of Article 7 of the Convention because of the lack of precision of the obligation involved[62].

Founders

76. The amendment introduced as Article 9.1-1 bars both aliens who do not have the right to permanent residence in the Azerbaijan Republic and stateless persons from being founders of NGOs.

77. The absolute character of this restriction is incompatible with international standards insofar as it precludes the persons concerned from establishing NGOs that are membership-based. This is because the inclusive nature of "everyone" in guarantees of the right to freedom of association such as Article 11 of the Convention mean that this freedom is one that should, in principle, be exercisable by people who are not actually citizens of the country concerned (whether they are citizens of another country or stateless persons)[63]. Moreover the restriction not only affects those enumerated in Article 9.1-1; it also limits the freedom of citizens and aliens having permanent residence to associate with them.

78. Although Article 16 of the Convention does accept the possibility of some restrictions being imposed on the political activity of those who are not citizens and this is defined to cover freedom of association, such restrictions ought to be compatible with the Convention's overall objectives of political democracy, freedom and the rule of law and they ought not to be disproportionate[64]. It might, therefore, be possible to justify the exclusion of persons who are not citizens from establishing national political parties but it would certainly be harder to do so where the body was concerned with either local or non-party issues or ones that were international in character. In some instances there might also be a case for requiring founders to comprise at least some citizens or permanent residents.

79. Nonetheless there is likely to be a reluctance to accept restrictions as being justified under Article 16 where they relate to persons from a country with which the one imposing them has close political and institutional links[65].

[62] See, e.g., *Jorgic v. Germany*, no. 74613/01, 12 July 2007 and *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008.
[63] Paragraph 16 of Recommendation CM/Rec(2007)14 lists non-nationals as potential founders of an NGO.
[64] See *Piermont v. France*, nos. 15773/89 and 15774/89, 27 April 1995.
[65] In *Piermont v France* Article 16 was not accepted as justifying restrictions on the exercise of freedom of expression by someone from another European Union member State and who was also a Member of the European Parliament. It is at least arguable that a similar approach would be appropriate where the country imposing the restriction and the country of those affected are both members of the Council of Europe. See also Paragraph 56 of the Explanatory Memorandum to Recommendation CM/Rec(2007)14.

80. However, it is impossible to discern any justification for the blanket bar on being founders of NGOs that was introduced by Article 9.1-1, particularly as there is no comparable restriction on non-resident aliens or stateless persons establishing companies[66].

81. Furthermore, insofar as it affects stateless persons, this bar on founding membership-based NGOs is also contrary to Article 15 of the 1954 Convention relating to the Status of Stateless Persons which requires, as regards non-political and non-profit-making associations and trade unions, Contracting States to "accord to stateless persons lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances"[67].

Members

82. The addition of Article 10.4 introduces a requirement that a 'public union'[68] must, within 30 days of receiving state registration, "ensure the establishment of the register of its members".

83. Establishing such a register is something to be expected of any responsible membership-based NGO since, without one, it would clearly be impossible to give effect to the rights of members in the running of the NGO concerned, notably participation in its supreme governing body[69].

84. However, there is a need to clarify the circumstances in which there might be an obligation to disclose the contents of such a register once established as it is important to ensure compliance with both the right to respect for private life and to freedom of association under, respectively, Articles 8 and 11 of the Convention. The NGO Law is silent on this point but there ought to be a guarantee that this register is not subject to inspection by public authorities or to any other disclosure requirement except pursuant to a court order issued for compelling reasons. It should be noted in this connection that it is well-established that the existence of unconstrained requirements for NGOs to disclose their membership lists to public authorities could operate as a

[66] See http://www.bridgewest.eu/article/set-up-company-azerbaijan and http://www.doingbusiness.org/data/exploreeconomies/azerbaijan/starting-a-business.
[67] The Convention was acceded to by Azerbaijan, without reservation, on 16 October 1996.
[68] The term used in the English translation which is taken to be the term 'public association' used elsewhere in this opinion.
[69] Thus paragraph 20 of Recommendation CM/Rec(2007)14 provides that " The highest governing body of a membership-based NGO should be the membership".

discouragement to individuals joining them and thus constitute an unacceptable inhibition on their freedom of association[70].

Establishment

85. Article 12 has been amended to add a new sub-clause - 12-1.1 - that requires foundations to have an authorised capital of at least 10,000 AZN, which is approximately 8,738 EUR.

86. There are no international standards governing the minimum capital required to establish a foundation but the amount specified is more than twenty-seven times the average monthly salary of 319 AZN (277 EUR)[71]. This is likely to mean that this form of NGO will not be generally available. Indeed it may not even be used by those with the required capital as there appears to be no incentive in the form of tax breaks to offset the liability to which a donor otherwise be liable. The combination of this new capital requirement with the absence of such incentives runs counter to the requirement in Recommendation CM/Rec(2007)14 that "the legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation" and that NGOs "should be assisted in the pursuit of their objectives through public funding and other forms of support, such as exemption from income and other taxes or duties on membership fees, funds and goods received from donors"[72].

87. The introduction of the capital requirement for foundations will mean that public associations will be the only form of NGO that will be practicable for most persons to establish and thus the need for there to be minimal restrictions in law and practice on its use becomes all the more important.

Registration of foreign NGOs

88. The 2009 amendments include a new Article 12.3 which provides that the state registration of NGOs of foreign states is to be "carried out upon the agreement signed with those organisations".

[70] Thus in *National Association of Teachers in Further and Higher Education v United Kingdom* (dec.), no. 28910/95, 16 April 1998 (93 DR 63 (1998)) the former European Commission of Human Rights 'accepted that there might be specific circumstances in which a legal requirement of an association to reveal the names of its members to a third party could give rise to an unjustified interference with the rights under Article 11 or other provisions of the Convention' (p 71). These did not exist in this case – which concerned an obligation of a union to disclose the names of members who would be involved in industrial action – as it was not considered likely to impair the union's ability to protect its members, the employer was in any event aware of the names of most members through payroll deduction of membership fees and there was nothing inherently secret about membership of a union.

[71] This figure is for September 2010; see http://www.news.az/articles/economy/25168

[72] Paragraphs 8 and 57 respectively.

89. This provision supplements the existing arrangements for registration of foreign NGOs found in the Registration Law, Article 11.3 of which provides for refusal of registration on the following grounds:

> 11.3.1. when documents submitted to the relevant executive power body of the Azerbaijan Republic contradict the Constitution of the Azerbaijan republic, this Law and other legal acts;
>
> 11.3.2. when purposes, targets and forms of activity of the institutions that wish to obtain the legal entity status contradict the legislation;
>
> 11.3.3. when provisions of the legislation on protection of company names are violated, or a non-commercial organization with a similar name is registered;
>
> 11.3.4. if the drawbacks revealed in documents by the relevant executive power body of the Azerbaijan Republic, are not removed within the period specified in Article 8.3 of this Law

90. In the absence of a ratification of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations[73] there is no obligation under international law for a state to recognise the legal personality of foreign NGOs or to allow them to operate in its territory. However, pursuant to Recommendation CM/Rec(2007)14, any requirement to obtain approval to operate should be consistent with the general requirements for the registration of an NGO[74].

91. The latter requirement thus sets out clear criteria governing the basis on which foreign NGOs can be authorised to operate within a country. In particular the only basis for refusing permission to operate would be that in paragraph 34 of Recommendation CM/Rec(2007)14, namely, "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". These conditions - which are respected in Article 11.3 of the Registration Law - are not reflected in Article 12.3 of the NGO Law, which provides an open-ended power to reach an agreement, i.e., without any criteria governing the terms of an agreement that might be reached.

92. Although the 2009 Decree gave the Ministry of Justice the power "to hold negotiations on preparation of agreement in connection with the state registration of branches or representations of non-governmental organizations of foreign states in the order provided for by the legislation", the omission of any governing criteria for such an agreement was only purportedly addressed in the 2011 Decree.

[73] ETS No. 124.
[74] Paragraph 45.

93. Rule 3 of the 2011 Decree thus provides that

> 3.1 Information about the organization and its activities during the negotiations the purposes of the Republic of Azerbaijan, the Azerbaijani society and the importance of this activity should be discussed during negotiations.
>
> 3.2. The organization's future activities in the territory of the Republic of Azerbaijan should include the following conditions:
>
> 3.2.1. Comply with Constitution of the Republic of Azerbaijan, with laws and other normative legal acts;
>
> 3.2.2 Respect National and moral values, respect the people of Azerbaijan;
>
> 3.2.3. Should have no activities in occupied territories after Armenia-Azerbaijan, Nagorno-Karabakh conflict in the occupied territories as a result of any operations carried out , as well as no contacts with the separatist regime of Nagorno-Karabakh ;
>
> 3.2.4. not involved in the political and religious propaganda;
>
> 3.2.5. provide information required to state registry within the timeframe established by the legislation on non-profit legal entities.
>
> 3.3. Within the competence of the parties during negotiations or other matters of mutual interest can be discussed.
>
> 3.4. Proposals are contrary to the legislation of the Republic of Azerbaijan can not be the subject of negotiations.
>
> 3.5. As a result of negotiations by the conditions in paragraph 3.2 of these Regulations is not achieved, the Ministry of Foreign Affairs of the Republic of Azerbaijan will be informed on this, and the negotiations stopped.

94. However, although the requirements to comply with the Constitution and the law and not to have activities in occupied territories are consistent with international standards, other terms used in the Decree are overly broad and could entail restrictions that go beyond those admissible under those standards. This is especially so of the provisions regarding respect in Article 3.2.2 and propaganda in Article 3.2.4, both of which can be subjectively interpreted and applied inconsistently with international guarantees of freedom of expression. As the Court has made clear, the fact that someone comes from outside the country does not dispense a state from the obligation to ensure that restrictions on this freedom are prescribed by law, have a legitimate aim and are necessary in a democratic society, respecting in particular the principle of proportionality[75]. The fact that these provisions are used to supplement the requirement that a foreign NGO's activities are in accordance with the law and the Constitution and are to be applied on the

[75] See *Piermont v. France*, nos. 15773/89 and 15774/89, 27 April 1995.

basis of "feedbacks (opinions)" of different state bodies does not afford any confidence that the those provisions will be applied in a manner consistent with international standards.

95. The Decree is also problematic in that it does not provide for any proper time-frame or clear process for reaching an agreement that would allow the existing process of registration under the Registration Law then to be pursued. Thus there is no deadline for the relevant state bodies to provide their feedback or for the Ministry of Justice to reach a conclusion that the gathered opinions are positive and there is no indication as to manner in which negotiations are to be conducted. Indeed the process of negotiations with the Ministry of Justice could be prolonged for as long as that Ministry wants since, while there is provision for termination in the event of a refusal to accept the conditions laid down in Article 3.2 of the Decree, acceptance of those conditions does not result in a favourable conclusion to them.

96. Furthermore the provision for negotiations introduced by Article 12.3 of the NGO Law, and only slightly elaborated on by the Decree, as a supplementary requirement for obtaining registration runs counter to the stipulation in Recommendation CM/Rec(2007)14 that the granting of approval for foreign NGOs to operate should be determined in a manner consistent with the provisions governing the acquisition of legal personality by domestic NGOs[76]. This was something already achieved by the Registration Law. This is thus an additional basis for concluding that the changes introduced by Article 12.3 of the NGO Law and the Decree are in breach of international standards.

Statutes

97. The provisions concerning the statutes of NGOs in Article 13 have been supplemented by a new paragraph - 13.3 - stipulating that such statutes do not "allow to usurp the powers of state and local self-governments, and to envisage state control and inspection functions as well".

98. The aim of this new paragraph is undoubtedly to set limits on the objectives and activities of NGOs but, while its scope is not particularly clear, it would seem to do so in a manner that is incompatible with international standards.

99. The use of the words "usurp", "powers" and "functions" together with the terms "state and local self-governments" and "state control and inspection" is positing the notion that there are certain activities that are exclusive to public authorities, which cannot therefore be performed by NGOs. However, the nature of governmental powers and functions is something that continually evolves and indeed what is sometimes seen as governmental at one point in time may well be something that at another point is either not undertaken by it

[76] Paragraph 45.

at all or is performed by the private sector. Moreover, it is a feature of modern society for NGOs to work collaboratively with public authorities and to carry out activities which facilitate the achievement of public policy objectives. This is recognised in the Preamble to Recommendation CM/Rec(2007)14[77].

100. As there is no clear indication in Article 13.3 as to what is in the exclusive domain of public authorities, the limitation that it purports to impose on the objectives and activities of NGOs lacks the necessary precision for a restriction on the right to freedom of association and it is thus incompatible with Article 11 of the Convention.

101. However, even if there were greater precision regarding the powers and functions concerned, it is improbable that it would be consistent with international standards to provide by law that certain of these are exclusive to government. It would, of course, be entirely legitimate for the law to prohibit an NGO from portraying itself as a public authority when pursuing an objective. Moreover international standards do not require that NGOs be given all the powers that may be enjoyed by public authorities. Nonetheless, subject to these limitations, NGOs should be free to pursue any objectives, and use any means for this purpose, that are consistent with the requirements of a democratic society[78].

102. The legitimacy of NGOs undertaking activities and pursuing objectives that might be entwined with what public authorities do is underlined by provisions in both Recommendation CM/Rec(2007)14 and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[79].

103. Thus paragraph 12 of the former states 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". Moreover the latter instrument underlines the entitlement of NGOs to engage in a wide range of activities concerned with the conduct of public authorities:

Article 6

[77] As is seen in the following clause: "Noting that the contributions of NGOs are made through an extremely diverse body of activities which can range from acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and on to the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others".

[78] See *Refah Partisi (The Welfare Party) and Others v Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003 and paragraph 11 of Recommendation CM/Rec(2007)14.

[79] General Assembly resolution 53/144.

Everyone has the right, individually and in association with others:
(*a*) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
(*b*) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

(*c*) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.

Article 7

Everyone has the right, individually and in association with others, to develop and discuss new human rights ideas and principles and to advocate their acceptance.

Article 8

1. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.
2. This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.
2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, everyone has the right, individually and in association with others, *inter alia*:

(*a*) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay;
(*b*) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

(*c*) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

104. The permissibility of NGOs being concerned in matters seen by some as "governmental" is also secured by the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[80].

105. Both the formulation and the intended effect of Article 13.3 are thus entirely incompatible with international standards.

Sources of property

106. Article 24.0.2 has been amended to insert the word "voluntary" before "donations" in the itemisation of the different sources of property for NGOs, mirroring the deletion of the word 'voluntary' before 'property shares' in the definition of a foundation by Article 2.2..

107. As a donation is by definition something that is voluntary it is not evident that these changes are doing anything more than state the obvious but there is nothing problematic about these amendments.

108. Although the registration requirement before any transactions can be undertaken with grant funds is not new[81], its restatement in the 2009 Decree has been followed by a substantial increase[82] in the fine for failure to submit a copy of each grant contract to the Ministry of Justice from 50 AZN (44 EUR) to between 1,000 and 2,500 AZN (879-2197 EUR). This change will not affect the ability to receive grants but will necessitate timely reporting and this has been problematic because of the requirement that the contracts be notarised and the failure to specify the documents required for the purpose of registration. The restated requirement with the more significant penalty has the potential to become an instrument of control over NGOs that may not be able to get their grants registered without any fault on their part..

Supervision and responsibility

109. Three changes are made by the 2009 amendments to the provisions in Articles 29 and 30 of the NGO Law concerning supervision and responsibility of NGOs.

110. The first - by the introduction of Article 29.4 - is the establishment of a requirement to submit annual financial statements by 1 April each year. The second is the provision in Article 31.2-1 for NGOs to be notified of a failure

[80] Notably Articles 2, 3, 4, 6, 7, 8 and 9.
[81] It is to be found in Articles 4.4 and 4. of the Law on Grants.5
[82] Through amendments to Article 233-1 of the Administrative Code in February 2010.

"to provide necessary information for the state register or to present incorrect information by legal entities". The third is the provision in Article 31.6 for NGOs to be notified where they have not submitted the annual financial statement in time and to bear responsibility if this is not then presented within 30 days.

111. A requirement for NGOs to submit a financial statement to a public authority - in this instance specified by the 2009 Decree to be the Ministry of Finance - is not inherently problematic. However, the requirement under Article 29.4 is not linked in any way to the receipt of public support, which is the basis on which a financial reporting obligation is authorised by Recommendation CM/Rec(2007)14[83]. Moreover no distinction is made in applying the requirement between those NGOs that are registered and thus are legal entities and those that have only been legalised and thus relatively informal.

112. The Presidential Decree instructed the Cabinet of Ministers "to determine forms, content and procedure of submission of annual financial report of non-governmental organisations as provided for by the second sentence of article 29.4". This has been provided by the financial reporting Rule. This requires annual financial accounting in compliance with the National Accounting Standards for NGOs., The accounting period is normally the calendar year but runs from the date of registration until 31 December where an NGO is established before 1 October in a given year and from the date of registration until 31 December in the following year in the case of an NGO established after 1 October. The accounts must deal with the financial condition of the NGO concerned, covering all its assets, income, expenditure, gains or losses on commercial activities and any surplus or deficit on non-commercial activities. There are four forms to complete, one on the NGO's financial state, a second on the results of financial action, a third on changes in real assets or capital and a fourth on the process of funds.

113. It is impossible at this stage to assess whether or not this requirement will be particularly burdensome. Nonetheless this requirement is being added to the existing requirement to submit reports to the tax authorities, it applies to all NGOs whatever their size and level of activity and it fails to clarify the object of the exercise. As such the requirement has the potential to be unduly intrusive and could ultimately provide the basis for interference with the operation of at least some NGOs. The introduction of the requirement in Article 29.4 certainly seems to be running counter to the principle that reporting obligations for NGOs "should not be unduly burdensome and should not require the submission of excessive detail about either the activities or the accounts"[84]. Moreover the penalty of 2,000 AZN (1,757 EUR) for non-compliance is substantial.

[83] Paragraph 62.
[84] Paragraph 114 of the Explanatory Memorandum to Recommendation CM/Rec(2007)14.

114. It is also unlikely that the waiver of the need for a compulsory audit in the case of NGOs, as a result of amendments to the Law on Audit Services on 11 February 2011, will mitigate this burden as much of the work required for an audit would be needed in order to discharge the financial reporting obligation. This waiver will, however, save NGOs the cost of audit fees.

115. The provision introduced by Article 31.2-1 is, in the English translation at least, partly unclear as the phrase "to present incorrect information by legal entities" is meaningless. However, there is nothing objectionable in providing for a duty of notification by a public authority to an NGO that has failed to comply with an obligation applicable to it regarding the provision of information.

116. Similarly, even if the financial reporting obligation being established might be excessive, the provision in Article 31.6 of a duty to notify NGOs of non-compliance and to allow a period of 30 days to submit the report is not inconsistent with international standards. There is, however, a need to clarify what are the consequences of non-compliance as this provision only refers to responsibility being "in accordance with the legislation of the Republic of Azerbaijan". Certainly a heavy financial penalty could prove devastating for some NGOs and would be disproportionate where there finances are at the lower end of the scale. Moreover a notification given under article 31.6 could count as one for the purpose of the power of liquidation under Article 31.4 where more than two notifications have been given.

117. In view of these potential consequences for NGOs the introduction in Article 31 of the financial reporting obligation without details as to what is entailed and any clear regulatory objective could be regarded as inconsistent with the requirement in to Recommendation CM/Rec(2007)14 that the "legal and fiscal framework applicable to NGOs should encourage their establishment and continued operation"[85].

Amending statutes of existing NGOs

118. The 2009 amendments did not require existing NGOs to re-register or re-legalise and there was no explicit requirement to bring their statutes into conformity with their provisions but it does seem to be assumed that the latter must be done by them. There is, however, no indication as to the time-frame within which this must be achieved or as to how this can be judged to have been satisfactorily done. As a result NGOs will be at the mercy of notifications being issued by the Ministry of Justice under Article 31.2 and the possibility of this leading to their liquidation if discrete notifications are issued for failure to amend different provisions in their statutes.

[85] Paragraph 8.

119. This lack of precision in the 2009 amendments necessarily means that the restrictions on rights and freedoms of NGOs and their members entailed by them are insufficiently prescribed by law and thus incompatible with the Convention and other relevant international standards.

Application of the 2009 amendments

120. There is only limited information available about the impact of the 2009 amendments. Many NGOs appear to be endeavouring to comply with the requirements that have been introduced notwithstanding the incompatibility of aspects of them with international standards.

121. Thus there appears to be increasing compliance with the obligations on financial reporting and, although the 2009 amendments were silent on the need for existing foreign NGOs to comply with the new requirements on registration, many of them have applied for a registration agreement in order to avoid possible problems with the Ministry of Justice.

122. However, ICNL has estimated that about 50% of NGOs have not submitted their financial statements and that 30% of the statements that were submitted have been returned for alleged deficiencies. Sanctions for non-submission appear only to have been imposed in the case of a very few NGOs but the Ministry of Finance has indicated that all NGOs who do not submit the statements for 2011 will be penalised.

123. One foreign NGO which was not registered, the National Democratic Institute (NDI), was told after it had submitted its application to the Ministry of Justice to conclude a registration agreement that it had failed to submit all the required documents. The documents said to be missing were ones required at the registration stage - such as proof of payment of a state fee, the document on a legal address, the Board's decision on establishing a representative office - rather than as part of the negotiation on concluding an agreement. This was followed by the police evicting NDI's staff from its office and then locking it.

124. There have been several instances of the 2009 amendments being invoked as the basis for action against foreign NGOs that have not applied for a registration agreement.

125. The first and most prominent instance concerns the use of Article 12.3 with respect to the Branch of "Human Rights House Foundation" ('the Branch') - an independent meeting place, resource centre and coordinator for human rights organisations - which received a notification from the Ministry of Justice on 10 March 2011 ordering that its activities be stopped purportedly on the basis

of the Branch not having applied to organise its activities in accordance with NGO Law, as amended.

126. This notification appears defective in several respects. Firstly it was issued before the Decree governing the terms of agreements to be reached between foreign NGOs and the Ministry of Justice prior to registration was actually adopted. Secondly, neither Article 12.3 nor any of the other provisions in the 2009 amendments indicated that there was any requirement for foreign NGOs already operating in Azerbaijan to enter into an agreement with the Ministry of Justice. Thirdly the notification power in Article 31.4 in respect of actions by NGOs contrary to the NGO Law provides either for the possibility of issuing a warning or an instruction to eliminate the violations and not to desist operation entirely so that an instruction to enter into negotiations would have been the legally correct action to be taken by the Ministry of Justice.

127. The action taken by the Ministry of Justice thus cannot be regarded as having an appropriate legal basis and the resulting interference with the activities of the Branch is necessarily contrary to international standards.

128. It is important in this connection to note three previous events involving the Branch. Firstly, its manager - Vugar Gojayev - had been warned by the Azerbaijan delegation to the OSCE not to speak at a human rights conference in Vienna on 10 December 2010. The delegation had questioned him about articles published on the website of the Human Rights House and his participation the month before in the International Partnership Group joint delegation to the Council of Europe. Secondly, the Branch had been one of a number of human rights organisations denounced on 1 February 2011 by Oktay Asadov, the Speaker of the Parliament of the Republic of Azerbaijan, for causing a "bad image to the country" because they had organised a side event on the human rights situation in Azerbaijan at a session of the Parliamentary Assembly of the Council of Europe. Thirdly, a police inspection was conducted of the Branch's premises on 10 February 2011, during which police officers threatened the Branch with eviction and requested Mr Gojayev to inform the police in advance about all gatherings on the premises and to provide the list of participants.

129. All such action is incompatible with international standards governing freedom of expression and, in particular, those relating to the rights of human rights defenders to draw attention to human rights problems and to be protected from harassment[86].

130. In these circumstances the application of Article 12.3 to the Branch without any legal foundation in domestic or international law ought to be seen as an

[86] See paras. 103-104 as to the former right and Article 12.2 and 12.3 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms as regards the latter one.

unjustified attempt to stifle freedom of expression and to hinder the legitimate activities of human rights defenders.

131. It should also be noted that, as no action had previously been taken against the Branch for breach of the Constitution or the law in the conduct of its activities, it can hardly be suggested that there was a pressing need to stop its activities after waiting nearly twenty-one months after the adoption of Article 12.3 and without previously drawing attention under Article 31.1 to the failure to commence negotiations with the Ministry of Justice, even assuming that Article 12.3 could be applicable to the situation of the Branch. Indeed, as the Court observed in the case of a refusal of re-registration to an organisation that had lawfully existed and operated for some seven years before the introduction of the requirement that this be sought required reasons for such a refusal that were "particularly weighty and compelling"[87]. None were provided in that case and they are equally absent from the notification to the Branch.

132. The action against the Branch not only underlines the concerns expressed in the previous section about the nature of the provision introduced by Article 12.3 but it is entirely incompatible with international standards applicable to NGOs.

133. Subsequently, on 17 March 2011, the Branch wrote to the Ministry of Justice requesting clarification of the notification and of how to proceed with the negotiations. It has since had two meetings with this ministry - on 21 April and 2 May 2011 - and has been invited to start the negotiation process. The required documents were delivered on 24 May 2011 but there has been no progress in finalising the agreement required by the 2009 amendments; the Branch has been told that it will be contacted once the documents have been studied. Furthermore the Branch's manager was interrogated for four hours by the Ministry of Interior with regard to a letter from a European Union official - Heiddi Hautala -about the police inspection of its premises in February.

134. There are unconfirmed reports of several other foreign NGOs operating in Azerbaijan that have received notifications that they are not allowed to operate without an agreement and registration. However, they do not seem to be willing to make this publicly known out of concern that this could be prejudicial to their situation.

135. Although there are no other reported instances of the application of the 2009 amendments, the dangers that many of them pose for the legitimate activities of NGOs is undoubtedly underscored by the purported use made of Article 12.3.

[87] Moscow Branch of The Salvation Army v. Russia, no. 72881/01, 5 October 2006, at para. 96.

136. Furthermore the generally retrograde nature of the 2009 amendments needs to be appreciated in the context of (a) the problem of delay in registration remaining unresolved, particularly as regards NGOs working in the field of human rights, the situation of internally displaced persons and social issues that are seen as reflecting criticism of government policy, (b) the continued failure of the courts to operate as an effective control over both the registration process and other action taken against NGOs and (c) the reports of various forms of harassment of both domestic and foreign NGOs such as:

i. the eviction on 3 March 2011 without reason of three NGOs - the Election Monitoring and Democracy Training Center, Demos Public union and Ganja Regional Information Centre - from their offices in Ganja and the police not intervening on 13 June 2011 while someone attacked employees of the Institute of Peace and Democracy who were painting a message on the wall of its office;
ii. the warning received on 19 April 2011 by the Media Rights Institute from the Ministry of Justice about a possible administrative sanction for allegedly having failed to inform the Ministry about a change in its Chairman, although the person concerned had actually only been re-elected to that position
iii. threats and smear campaigns against human rights lawyers working for human rights organisations after defending detained youth activists;
iv. police searches of the premises of the Institute for Reporters' freedom and safety in February and April 2011, the interrogation of its staff members in March 2011 and the beating up of one of its employees on 16 June 2011; and
v. the search of the offices of the Herbert Neymann Stiftung in April 2011.

Conclusion

137. 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.

138. 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.

139. 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.

140. 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.

141. 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.