CONFERENCE OF INGOs
OF THE COUNCIL OF EUROPE

CONFERENCE DES OING DU
CONSEIL DE L'EUROPE

Comments prepared by the Expert Council regarding the remarks of the Ministry of Justice on the Expert Council's opinion on the 2009 Amendments to the NGO Law in Azerbaijan and their application.

12 April 2012

Introduction

1. These observations concern the comments of the Ministry of Justice of Azerbaijan transmitted on 30 March 2012 ('the comments') in respect of the opinion prepared by the Expert Council on NGO Law on the amendments to the NGO Law in Azerbaijan and their application ('the opinion')[1].

2. The comments begin with a general appraisal and then more specific comments related to various paragraphs (referred to as 'items') in the opinion. The latter will be addressed first as it will be easier to evaluate the general appraisal in the light of the evaluation of the specific comments.

Specific comments

Items 7-9

3. The substance of these comments is no more than a confirmation of what is stated in the relevant paragraphs, except for the failure to mention the legalisation process envisaged by Article 15 the NGO Law. The latter is discussed under Items 21-24 but the absence of any mention of it here leaves unaddressed the comment made in paragraph 8 about the position of informal groupings being at best tolerated where they have not gone through the legalisation process.

[1] OING Conf/Exp (2011) 2, September 2011.

Items 11-13

4. The comments refer to the fact that the NGO and Registration Laws were prepared with experts of the Council of Europe but fail to mention that the author of the opinion was actually the expert concerned.

5. There is also an indication of the different basis for founding funds and public associations. The latter are said to require 'several individuals' whereas the former require only one physical or legal person. This implicitly indicates an error in the drafting of paragraph 12 of the opinion as this states that funds also require 'several individuals' to found them. This error is a reflection of what is stated in the translation of the NGO Law placed by the OSCE's Office of Democratic Institutions and Human Rights on its Legislationonline site (http://legislationonline.org) and which was used in preparing the opinion.

6. This error is not material to the content of the opinion as there is no criticism regarding this in it.

7. The comments do not address the point made in the opinion that there is a failure to be precise about the numbers needed to found a public association but this point was coupled with the observation that this did not appear to be an obstacle in practice to the creation of NGOs.

Item 14

8. This comment is solely directed at making the point that it is a matter of choice for NGOs whether they are permanent or temporary in their formation, which is facilitated by Article 5 of the NGO Law.

9. This is, in fact, what the opinion also says, even if the formulation 'permanent or temporary' used in the comments is clearer than 'for fundamental reasons, or in order to achieve certain objectives' which is used in the translation found on Legislationonline.

10. However, the opinion did not comment negatively on the choice allowed and was more concerned with the difference between the language used in Articles 2 and 5 concerning objectives, being clearly misled by the reference to foundation 'for fundamental reasons' being something potentially different than the specific objectives set out in Article 2. Nonetheless, it was also observed that the apparent difference in the formulations did not seem to be of any significance in practice.

Item 19

11. This comment is to the effect that the need for NGOs to opt when registering to be national, regional or local is of no consequence as registering a change takes only 5 days and is without charge. Furthermore it is emphasised that indicating an NGO's area of activity facilitates the development of co-operation between governmental and non-governmental organisations.

12. The former point may be questionable given the actual practice concerning registration discussed in the opinion[2].

13. The latter one is legitimate but it does not address the concern in the opinion that this over-formalises the position and could inhibit NGOs from responding quickly to fresh opportunities and changing situations.

Item 20

14. This comment correctly states that there is no need the statute of NGOs to contain information on their subsidiary branches and representative offices. Paragraph 20 thus wrongly suggests that this is a requirement and this error seems to have arisen from reliance on the text included in the First Annual Report of the Expert Council. Clearly this error should be acknowledged.

Items 21-24

15. There is no conflict between this comment explaining the process of legalisation and its statistical relevance for NGOs and that of the relevant paragraphs. However, the comment fails to address the observations in the opinion as to need for a 30-day deadline and as to the value of legalisation for NGOs, as well as the concern expressed in the opinion of the position of informal entities that are not legalised.

Items 25-27

16. This set of comments begins by appearing to suggest that the observation in the opinion that the detailed regulation of registration was not included in the NGO Law was a criticism, which it clearly was not.

17. There is an assertion that there are effective safeguards against 'illegal actions' in the registration process but there is no discussion either of the case law of the

[2] See paras. 25-41and 48-56.

European Court of Human Rights which suggests the contrary or of any efforts to implement the judgments concerned[3].

18. There is a suggestion that the reference in paragraph 27 of the opinion to additional documentation being required as having 'nothing in common with reality'. It should be noted that the comment asserts that the opinion includes requests for originals of the documents when in fact paragraph 20 commends the practice of requiring copies. It is possible that there may be some linguistic confusion about the word 'passport' as that can be used to refer to identification documents (which are required with respect to founders for the purpose of registration), although it seems improbable that those who have cited this practice are unaware of the distinction. Moreover the comment does not beyond asserting that there is no practice of requiring additional documentation.

Item 28

19. This comment denies that the suggestion in the opinion that the need for registration to take place in Baku is a disincentive for some potential founders of NGOs but this might be seen as being undermined by the planning underway for computer-based registration and the establishment of a single information network of registry authorities. Such a development is, of course, commendable but it does not reflect the present situation.

Items 29-31

20. In this comment there is clarification as to the entity responsible for registration, which the opinion had noted as being apparently unclear.

21. There is also a denial that the obligation under article 17 of the NGO Law and Article 11 of the Registration Law is not being fulfilled. It is stated that this information is published each month in *Justice*, the Ministry of Justice's newspaper. It is also asserted that it is easy to check with the registry whether a certain name has already been adopted by an NGO. These are clearly matters that need to be double-checked with NGO contacts, ideally before the meetings in Baku.

Items 32-40

22. In this set of comments it is first asserted that the suggestion in the opinion that minor careless mistakes or inaccuracies can be used to conclude that there is false information in a registration application is groundless. This view was based on information from NGOs but the rebuttal relies only on the assertion that there are

[3] See paras. 48-56 of the opinion.

effective safeguards against abuse, which has already been seen to be questionable[4].

23. The next two comments state the position in the legislation about giving reasons for refusal, the time allowed for rectifying mistakes and the illegality of disallowing registration on grounds not specified. The opinion recognises the formal position but suggests the practice is different. In doing so it is dependent on information from NGOs but there is support for that in the rulings of the European Court of Human Rights, even if they do not concern the last few years.

24. The fourth comment simply sets out the grounds for refusing registration.

25. The final comment suggests that formal prolongation of a decision on registration is exceptional but does not deal with point made in the opinion that the prolongation period is of no consequence because of the delays in registration effected by repeated requests to correct documents and the failure even to take a decision on applications.

26. The comments do not address observations in the opinion as to approach adopted when assessing whether there is a constitutional or legal defect in an NGO's statutes, the apparent practice of invoking expediency as a basis for refusal despite the clear terms of the legislation, the failure to give legal basis for refusal despite the legal obligation to do so and the inadequacy of the courts as a safeguard against abuse.

Items 42-47

27. The first of these comments is simply a statement as to how NGOs can acquire property, something also found in paragraph 40 of the opinion.

28. The remaining three comments set out the power to issue warnings in respect of alleged breaches of the requirements of the NGO law, the right of appeal against such warnings and assertions that no legal-normative act governs responsibility for breaches of the NGO Law and that warnings cannot 'be assessed as a type of liability due to its nature of recommendation and prevention'.

29. The two assertions seem strange given that Article 31 provides that failure to comply with warnings on two occasions within a year can be the basis for dissolving the NGO concerned.

[4] See para. 17.

Items 58-67

30. This comment is the first relating to the 2009 amendments to the NGO Law. It explains that Article 1.4 of the unamended law did not apply to political parties, trades unions, religious associations and local self-governments because, as the opinion noted, these were regulated by other legislation. It goes on to state that the 'assessment of Article 1.4 as restrictive and vain [*sic*] is unclear', presumably referring to the observations about the effect of the amendment.

31. It is not evident why the explanation of the point about vagueness in paragraphs 60 and 61 cannot be understood; the problem is with the extension of the exclusion to entities assessed as having been established to carry out the functions of the excluded entities while not formally being them. This allows for a subjective assessment of the intention of the founders without any guiding criteria and is thus objectionable.

32. The comment does not address the other objection to the amendment to Article 1.4 of the NGO Law, namely, that it would force entities with objectives that are political or religious in character to become political parties or religious associations.

Items 68-71

33. The comments seek to justify the extension on the restriction on the names that can be used by NGOs to those of state agencies and of distinguished people of Azerbaijan.

34. The opinion did not object to the former part of the extension in absolute terms but suggested that it was too broad as it could prevent the use of names with a legitimate satirical or critical objective. This point was not addressed in the comment.

35. The justification given for the second part of the extension was the discontent of close relatives but fails to address the observations in the opinion that the veto power over using the names of distinguished people is given not just to close relatives but also to 'successors' or 'inheritors' and that the latter terms, as well as 'distinguished people' are too imprecise or uncertain to be the basis for a justifiable restriction.

Items 72-75

36. The comment suggests that the introduction of the requirement that the deputy chiefs of branches and representative offices of NGOs founded by aliens or

foreign legal entities be citizens was aimed at improving the knowledge of citizens in the field and developing their career opportunities, as well as assisting the NGOs fulfil their objectives. However, the opinion did not object to this amendment in principle but pointed out that there was no explicit requirement to have a deputy chief whereas Article 7.5 does provide for the appointment of a chief. The resulting imprecision is not addressed in the comment.

37. The concern expressed in the opinion about the 10-day deadline for notification of the establishment of a branch or representative office is not addressed in the comment.

Items 76-81

38. The comment merely states that the amendment introduced as Article 9.1-1 determines the basis for aliens and stateless persons with permanent residence to found NGOs. As such it does not address the observations in the opinion that a permanent residence requirement, at least for NGOs that are membership-based, could be incompatible with Article 11 of the European Convention on Human Rights and that no justification for its absolute character had been advanced.

39. However, paragraph 81 of the opinion should be deleted as it was drafted by reference to one version of the translation of the amendments that linked permanent residence to aliens but not stateless persons and thus appeared to bar stateless persons from founding NGOs entirely, which is not the case.

Items 82-84

40. In this comment it is explained that disputes over membership are the reason for introducing a requirement to establish a register of members. No objection to this requirement was made in the opinion but clarification as to the circumstances in which there might be an obligation to disclose it or allow its inspection. The comment states that there is no requirement to submit the register to the authorities but does not really address the issue of what, if any, are the circumstances in which disclosure or submission to inspection might be possible.

Items 85-87

41. This comment suggests that a 'minimal amount of nominal capital' has been stipulated for funds because lack of finance has meant that they have not been able to achieve their goals and thereby damaged 'both their declared aims and prestige'.

42. There is no attempt to explain why the particular amount of capital specified - twenty-seven times the average monthly salary - was chosen or to respond to concern expressed in the opinion about the lack of tax breaks to encourage the provision of finance for funds.

Items 88-96

43. In this comment the content of Article 12.3 on registering foreign NGOs is effectively rehearsed and it is stated that decisions on registration are taken 'one the basis of collegial opinion' rather than one body so as to prevent 'subjectivism'.

44. However, no explanation is given as to how the risk of such subjectivism can be excluded from the role of the Ministry of Justice, the single body charged with negotiating the agreement required before registration can be undertaken. Certainly the comment does not address the concern expressed in the opinion as to the breadth of the criteria belatedly introduced for the negotiation of agreements, as well the scope for inconsistent approaches in the feedback submitted to the Ministry of Justice by other entities.

45. Furthermore the comment does not address the concern expressed in the opinion about the absence of any proper time-frame or process for reaching an agreement.

Items 97-105

46. This comment merely restates in abbreviated form the content of Article 13.3, which was introduced into the NGO Law by the amendments.

47. There is thus no attempt to address the observation in the opinion that the language used in this provision is both inappropriate and lacking in precision.

Items 106-108

48. The first comment correctly states, as the opinion also observed, that the reporting requirement for grants is not new.

49. The second comment suggests that the increase in the fine for non-compliance made by amendments to the Code of Administrative Offences has nothing to do with the 2009 amendments. This was not, however, the point of the observation in the opinion that the combined effect of the increased penalty and the restatement of the reporting requirement effected by the 2009 amendments could result in the latter becoming a significant instrument of control over NGOs. There is no consideration of this point in these comments.

Items 109-117

50. In this comment it is said that the introduction of the requirement to submit financial statements is linked to the implementation of a law on money-laundering and the financing of terrorism. It is also stated supervision over the use of grants is intended to give an opportunity for determining the directions of resources spent on developing civil society and related matters.

51. As such, these comments do not address the concerns expressed in the opinion as to the issue of compliance of the reporting requirement with Recommendation CM/Rec(2007)14, the failure to distinguish between registered and legalised NGOs and the possible administrative burden being imposed on NGOs, as well as about the accuracy of an aspect of the translation of Article 31.2-1 and about the lack of clarity concerning the penalty for non-compliance with the reporting requirement.

Items 118-119

52. This comment asserts that there was no need for a time-frame for NGOs to bring their statutes into compliance with the 2009 amendments to the NGO Law and that no NGO had been dissolved on the basis of the NGO Law (presumably meant to mean non-compliance with two warnings about not submitting pursuant to Article 31(2) necessary information within a year).

53. The latter is certainly welcome news. However, it does not alter the fact that it is good law-making practice to specify a deadline for compliance with changes to the requirements applicable to an entity and this is all the more important where, as the opinion noted, those requirements are insufficiently precise.

Items 120-136

54. These comments concern the application of the 2009 amendments to the NGO Law.

55. The first indicates that there were 73 cases of failure to submit all necessary documents for state registration but that no registration was held responsible for that. It is not clear what this means since such a failure should preclude registration of the NGOs concerned. At the same time there does not appear to be any penalty other than non-registration for such a failure and so there would seem to be nothing exceptional in the content of this comment. Clarification as to what is meant might be something to seek at the meeting.

56. The second comment is that in 2011 that 'only 9 organizations were held responsible 15 administrative offences committed by 13 NGOs' but that in an unspecified number of cases fines were replaced by warnings. This suggests some restraint in applying the amendments but gives no indication as to the nature of the offences being committed or the nature of the NGOs alleged to have committed. This might also be a matter on which clarification could usefully be sought.

57. In the third comment it is stated that National Democratic Institute ('NDI') was functioning without state registration and that both it and the Human Rights House Foundation had, after being informed of the need to bring their activities into line with the legislative requirements, submitted documentation for the purpose of negotiating the agreement required prior to registration.

58. This last comment underlines the inadequacy of the comment above that there was no need for a time-frame for compliance with the changes effected by the 2009 amendments[5].

59. However that comment does not address the observation made in the opinion that the NDI had been told that it had not submitted documents required for negotiating an agreement which were, in fact, ones only required by the legislation at the actual registration stage[6].

60. Also this comment does not address the order issued to the Human Rights House Foundation to stop its activities, the suggestion in the opinion that this order was legally defective and other events affecting this non-governmental organisation also discussed in the opinion[7].

61. It must also be a matter of concern that the comments do not address the fact that nearly a year has elapsed since the negotiation process for the two non-governmental organisations mentioned above was initiated and that the failure to conclude it means that registration is still not possible.

62. It should also be noted that the comments on this part of the opinion do not address the observation in the opinion that:

> 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

[5] See paras. 52 and 53.
[6] See para. 123 of the opinion.
[7] See paras. 126-132.

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 ...[8]

General appraisal

63. From the above observations it can be seen that the comments leave unaddressed most of the significant points made in the opinion about both the NGO Law and the 2009 amendments to it.

64. Furthermore the comments are remarkable for failing even to mention the part of the opinion dealing with the cases in which the European Court of Human Rights has found violations by Azerbaijan of Article 11 of the European Convention on Human Rights in respect of the registration and dissolution of NGOs, as well as the continued delay in executing the judgments concerned.

65. Most of the comments are no more than restatements of provisions in the NGO Law as amended, neither adding nor detracting from points made in the opinion.
66. Such critique as there is in the comments of points made in the opinion does not appear to be justified.

67. However, there are some aspects of the comments for which clarification should be sought[9].

68. Moreover, the comments do show that the opinion is in error - mainly for translation reasons - as regards the number of founders, the need for subsidiary branches and representative offices to be included in the statutes of NGOs and the position of stateless persons as founders of NGOs[10]. Nonetheless these errors cannot be regarded as undermining the thrust of the criticism in the opinion.

69. As regards actual practice, the opinion was reliant on information from NGOs but, while further efforts to confirm this would be appropriate, the response in the comments is no more than that what is said to occur is not the case. No supporting evidence is adduced for the purported rejection of the observations in the opinion based on the information from NGOs.

[8] Para. 136 of the opinion.
[9] See paras. 21, 55 and 56.
[10] See paras. 5,6, 14 and 39.

70. As a consequence the general appraisal in the comments, namely,

> In general it should be noted that the Opinion reflects expert's personal approach and subjective observations. In a number of occasion expert's ideas are not based on requirements of the legislation, but on assumptions or contradict legislative provisions at all. It seems like wrong assessment of the legislative requirements and contradictory and misrepresented assumptions are the result of the translation, theoretical approach and superficial interpretation of the relevant norms.

does not, notwithstanding the three errors already noted, seem at all warranted. Indeed the comments evade the principal issues covered by the opinion and fail to show that concerns about the 2009 amendments, as well as the context in which they were introduced, are not justified.