Strasbourg, 27 September 2011

CDL(2011)089*

Opinion no. 636 / 2011

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE COMPATIBILITY WITH HUMAN RIGHTS STANDARDS OF THE LEGISLATION ON NON-GOVERNMENTAL ORGANISATIONS

OF THE REPUBLIC OF AZERBAIJAN

by

Ms Veronika BILKOVA (Member, Czech Republic)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

COMMENTS

ON THE COMPATIBILITY WITH HUMAN RIGHTS STANDARDS OF THE LEGISLATION ON NON GOVERMENTAL ORGANISATIONS

OF THE REPUBLIC OF AZERBAIJAN

Background Information and Facts

1. In July 2009, the Republic of Azerbaijan amended its 2000 *Law on Non-Governmental Organisations* (Law No. 401). In March 2011, a decree *On approval of rules for state registration and rules related to the preparation for negotiations with foreign non-governmental organisations and representations in Azerbaijan Republic* (Decree No. 43) was adopted by the Cabinet of Ministers ensure the implementation of this amended law. The main changes pertain to the registration of branches and representatives of international NGOs in Azerbaijan, which is newly conditioned by *"the agreement signed with such organizations"* (Article 12.3 of the Law). The agreement should be an outcome of a negotiation process between the Ministry of Justice and the NGOs, in the course of which the NGOs have to accept a series of conditions and pledges.

2. On 10 March 2011, the Ministry of Justice of the Republic of Azerbaijan issued an order requiring the Human Rights House Azerbaijan, partner of the international Human Rights House Network, to cease its activities. The Human Rights House Azerbaijan was registered in 2007 as an international branch of the Human Rights House Foundation. Its office in Baku, opened in April 2009 with the financial support of the Norwegian Ministry of Foreign Affairs and the Fritt Ord Foundation, served as a platform for meetings for several Azerbaijani NGOs and as a resource and information centre on human rights situation in Azerbaijan. The closure of the Human Rights House Azerbaijan gave rise to criticism from both international and Azerbaijani NGOs.[1] Some of these NGOs also called upon the Parliamentary Assembly of the Council of Europe to request an opinion of the European Commission for Democracy through Law (the Venice Commission) on the compatibility with the European Convention of Human Rights of the Law No. 401 and the Decree No. 43.[2]

3. In his letter of 29 June 2011, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe requested the Venice Commission to assess the compatibility of the Azerbaijani legislation on Non-Governmental Organisations with human rights standards, including the case-law of the European Court of Human Rights. The request drew attention to the provisions of the Law and the Decree relating to the registration of branches and representatives of international NGOs in Azerbaijan and expressed its concern over the impact that such a regulation could have on the state of the freedom of association in the Republic of Azerbaijan.

[1] Human Rights House Network, *Statement on the closing of the Human Rights House Azerbaijan,* available at http://humanrightshouse.org/Articles/16055.html (visited 8 August 2011).
[2] Right to freedom of association in Azerbaijan - call for an opinion from the Venice Commission, 8 April 2011, available at http://humanrightshouse.org/Articles/16237.html (visited 8 August 2011).

National and International Legal Framework

A) National Legal Framework

4. The ***Constitution*** of Azerbaijan, adopted in 1995 and amended in 2002 and 2009, declares that *"to provide rights and liberties of a person and citizen"* is *"the highest priority objective of the state"* (Article 12(I)). It adds that *"rights and liberties of a person and citizen listed in the present Constitution are implemented in accordance with international treaties wherein the Azerbaijan Republic is one of the parties"* (Article 12(II)). The freedom of association is enshrined in Article 58 of the Constitution under which *"everyone has the right to establish any union, including political party, trade union and other public organization or enter existing organizations. Unrestricted activity of all unions is ensured"* (par. II). This provision shall be read in the light of Article 25 of the Constitution which guarantees equality or rights and prohibits any discrimination, and of Article 26 which states that *"everyone has the right to protect his/her rights and liberties using means and methods not prohibited by law"* (par. I) and that *"the state guarantees protection of rights and liberties of all people"* (par. II). The freedom of association is guaranteed to all individuals ("everyone has the right"), citizens and non-citizens equally.

5. The freedom of association is not absolute and unconditional under the Constitution. First, it does not cover unions which are *"intended for forcible overthrow of legal state power"* or which *"violate the Constitution and laws"* (Article 58(IV)). Activities of the former are prohibited, activities of the latter may be discontinued by national courts**.** Second, foreign citizens and stateless persons may have their freedom of association limited, if provided so in national laws or international agreements binding upon Azerbaijan (Article 69(I)). Such limitations would need to be based on sound rationale and be compatible with other human rights obligations of the country. It is important to mention that the Constitution provides for mechanisms to be used when human rights and fundamental freedoms are limited unlawfully. There is a right to appeal to state bodies as well as the right to criticize the work of such bodies explicitly granted by the Constitution (Article 57), though this right only applies to citizens. A more general right to *"appeal to law court regarding decisions and activity (or inactivity) of state bodies"* (Article 65) is on the contrary granted to everyone.

6. The ***Law on Non-Governmental Organisations*****,** adopted in 2000 and amended in 2009, regulates the establishment, operation, management, and liquidation of non-governmental organizations (NGOs) as well as the relations between NGOs and state bodies. The term NGO encompasses public associations and funds. Public association is defined as *"a voluntary, self-governed non-governmental organization, established by the initiative of a number of physical and/or legal persons, joined on the basis of common interests with purposes, defined in its constituent documents, without mainly aiming at gaining profits and distributing them between its members"* (Article 2.1). Fund is *"a non-governmental organization without members, established by one or a number of physical and/or legal persons based on property contribution, and aiming at social, charitable, cultural, educational or other public interest work"* (Article 2.2). The Law does not apply to *"political parties, trade unions, religious unions, local self-governments as well as organizations established with an aim to fulfil the functions of these establishments, and other non-governmental organizations, whose activities are regulated by other laws"* (Article 1.4). There is no special law regulating human rights NGOs and they therefore fall into the ambit of the Law on NGOs.

7. The original 2000 version of the Law on NGOs previewed a uniform system of registration, operation, reestablishment and liquidation for national (republican, regional and local) and international NGOs. All the NGOs, once established on the basis of the decision of their

founders and once their Charter adopted, passed through the process of state registration, which could be denied only in exceptional circumstances (identity of name with another NGO, unlawful, incomplete or false character of documents submitted for registration). The amended 2009 version of the Law of NGOs has brought several changes into the legal regime applicable to the establishment, operation, management, and liquidation of NGOs. Some of these changes are rather positive or, at least neutral – for instance the right of NGOs to use certain symbols, such as a flag or an emblem (Article 3.1). Other changes are, however, more problematic. This is especially the case of new provisions relating to the registration of branches and representations of foreign NGOs (Article 12.3), the requirements relating to the content of the charters of NGOs (Article 13.3) and the liability of NGOs (Article 31).

8. The Law on NGOs has been implemented or complemented by other laws and executive decrees. In 2003, a *Law on State Registration and the State Registry of Legal Entities* was adopted. This law contains details on the registration of various legal entities, including NGOs, and provides a list of reasons on the basis of which registration could be denied. In 2011, the Cabinet of Ministers adopted the decree *On approval of rules for state registration and rules related to the preparation for negotiations with foreign non- governmental organisations and representations in Azerbaijan Republic* (Decree No. 43). The Decree implements the section of the Law on NGOs relating to the registration of branches and representatives of international NGOs in Azerbaijan. It gives a set of conditions that an international NGO has to fulfil in the course of "negotiations" with public authorities before it can be registered. Other legislative acts relevant for the protection of the freedom of associations are the 1999 *Civil Code,* the 2000 *Tax Code,* and the 1998 *Law on Grants* (amended in 2003) as well as various executive decrees implementing these laws.

B) International Legal Framework

9. Azerbaijan is party to all the major international human rights treaties guaranteeing the freedom of association, especially the 1966 International Covenant on Civil and Political Rights and the 1950 European Convention on Human Rights. By virtue of Article 151 of the Constitution, *"international agreements binding upon Azerbaijan"* prevail over domestic legislation, with the exception of the Constitution itself and acts accepted by way of referendum. Thus, in the case of a conflict between the provisions of the ICCPR or the ECHR and the provisions of any of the laws regulating NGOs, the former shall prevail.

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

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

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

> *1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
>
> *2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of*

others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

12. The ***ECHR*** contains a largely similar provision, Article 11,[3] under which

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

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

13. Under all the international human rights instruments, the freedom of association is an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests. It is a complex right which encompasses elements of civil, political and as economic right.[4] Its civil right element protects individual against unlawful intervention by the state into the individual wish to associate with others. The political right element helps individuals defend their interests against the state or other individuals in an organised and hence more efficient way. Finally, the economic right element allows individuals to promote their interests in the area of labour market, especially by means of trade unions. The combination of the three elements makes the freedom of association a unique human right whose respect serves n a way as a barometer of the general standard of the protection of human rights and the level of democracy.

14. The freedom of association encompasses the right to found an association, to join an existing association and to have the association perform its function without any unlawful interference by the state or by other individuals. These rights give rise to a set of obligations on the part of states. States have to *respect* the freedom of association by not interfering, for instance by means of prohibitions, into the operation of associations. They have to *protect* the freedom by ensuring that its exercise is not prevented by actions of individuals. And they have to *fulfil* this freedom by actively creating the legal framework, in which associations can operate. The freedom of association is not an absolute human right. It can be derogated from under Article 4 of the ICCPR and Article 14 of the ECHR. It can also be limited in the conditions specified in the second paragraphs of Articles 22 of the IICPR and 11 of the ECHR. The limitations need to be prescribed by law, pursue one of the permissible purposes stated in the limitation clauses and be necessary in a democratic society.

15. Both the UN Human Rights Committee and the European Court of Human Rights have developed a reasonably rich ***case-law*** relating to the freedom of association. This case-law, thought mostly related to the freedom to join or not to join trade unions, has further clarified the extent and limits of the freedom of association. None of the cases considered so far by the UN HRC has concerned Azerbaijan, though the country became party to the Optional Protocol to the ICCPR in 2001. The ECtHR on the contrary has already dealt with the freedom of association in the Azerbaijani context in more than a dozen of cases, out of which

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

[4] See also *Article 22* in M. Nowak (ed.), *UN Covenant on Civil and Political Rights. CCPR Commentary,* Engel, Kehl am Rheim, Strasbourg, Arlington, 1993, pp. 384-400.

the leading cases are *Ramazanova and Others* (2007),[5] *Ismaylov* (2008),[6] and *Tebieti Mühafize Cemiyyeti and Israfilov* (2009).[7] In all these three cases, the Court found violations of Article 11 of the ECHR, which consisted, in the first two cases, in the failure of the Ministry of Justice to register public associations in a timely manner and, in the third case, in an unjustified dissolution of an NGO.

16. Over the past three decades, special instruments related to the legal status of NGOs have been adopted in the Council of Europe framework. The most important of them is the *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations* (Convention No. 124), adopted in 1986 and entered into force in 1991. The Convention has so far secured only a limited number of ratifications and the Azerbaijan´s one is not among them. Yet, it is often quoted as an authoritative source with respect to the definition of an NGO and the mutual recognition of their legal status and capacity in various European countries. The legal status of NGOs is also the subject of two non-binding Council of Europe instruments, namely the 2002 *Fundamental Principles on the Status of Non-governmental Organisations in Europe* and the 2007 *Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.* The two documents contain a comprehensive set of recommendations that should serve as minimum standards guiding member states of the Council of Europe in their legislation, policies and practice towards NGOs.[8]

Problematic Aspects of the 2009 Amended Law on NGOs and the 2011 Decree

17. The most problematic aspects of the 2009 Amended Law on NGOs and the 2011 Decree pertain to the registration of NGOs generally; the registration of branches and representatives of international NGOs specifically; the requirements relating to the content of the charters of NGOs; and the liability and dissolution of NGOs.

A) Registration of NGOs

18. Under the Azerbaijani legislation, NGOs need to be registered to acquire legal personality. While NGOs can operate without legal personality, on an informal basis, the acquisition of the personality is the precondition for various benefits. Most importantly, only registered NGOs can be recipients of grants under the 1998 *Law on Grants,* and only they can enjoy tax preferences under the 2000 *Tax Code.* Since grants are the main source of revenues for many NGOs, the act of registration is far from being a mere formality devoid of any practical import. The registration is currently ensured by the Ministry of Justice in a rather complicated procedure which is regulated by the 2000 *Law on NGOs* and the 2003 *Law on State Registration and the State Registry of Legal Entities.* The importance of the acquisition of a legal personality for NGOs has been stressed by the ECtHR holding that *"the most important aspect of the right to freedom of association is that citizens should be able to create a legal entity in order to act collectively in a field of mutual interest. Without this, that right would have no practical meaning"*.[9]

[5] ECtHR, *Ramazanova and Others v. Azerbaijan,* Application no. 44363/02, 1 February 2007.
[6] ECtHR, *Ismaylov v. Azerbaijan,* Application no. 4439/04, Judgment, 17 January 2008.
[7] ECtHR, *Tebieti Mühafize Cemiyyeti And Israfilov v. Azerbaijan,* Application no. 37083/03, 8 October 2009.
[8] See also CoE, CM/Monitor(2005)1 Volume I-III, *Freedom of Association,* Thematic monitoring report presented by the Secretary General and decisions on follow-up action taken by the Committee of Ministers, 11 October 2005.
[9] EctHR, *Sidiropoulos and Others v. Greece,* Application No. 26695/95, 10 July 1998, par. 40. See also ECtHR, *Gorzelik and Others v. Poland,* Application No. 44158/98, 20 December 2001, par. 55.

19. The Azerbaijani registration system has been over the past years repeatedly ***criticised*** by international organisations, NGOs and scholars.[10] The main deficiencies relate to the fact that the registration of NGOs is a lengthy and complicated procedure, whose outcomes are somewhat difficult to predict. Recorded practice shows that some of the NGOs which applied for registration have never got formal decision, and those that have got it, often needed to wait for an extensive period of time. Moreover, in the course of the registration period, NGOs were repeatedly asked to provide additional documents, sometimes even documents not requested by the law itself. Finally, in some cases, the applications seem to have been rejected without any specification of the legal basis or without any reasons for rejection being given.[11] Some of these aspects, namely the length of the registration procedure caused by repeated requests for additional information and by the failure by the Ministry of Justice to respond in a timely manner, were scrutinized by the ECtHR in the *Ramazanova and Others* (2007)[12] and *Ismaylov* (2008) cases.[13] The Court found that the significant delays in the registration, which prevented the NGOs from acquiring legal personality and made it impossible for them to fulfil their mandate, amounted to amounting to *"a* de facto *refusal to register an association"* (par. 58 Ramazanova). Such a *de facto* refusal constituted an interference with the freedom of association. This interference could not according to the Court be justified, because it lacked the legal basis, the delays contravening the time-limits set by the Law on NGOs itself. By failing to register the NGOs in a timely manner, Azerbaijan violated their freedom of association under Article 11 of the ECHR.

20. It has to be stressed that some of the deficiencies in the registration procedure were related to the application of the old 1996 Law *On State Registration of Legal Entities.* In 2003, this law was replaced by a new ***Law on State Registration and the State Registry of Legal Entities*****,** which brought some changes into the system. First, the time-limit for the registration was extended from ten up to thirty days to make it more realistic for the state authorities to meet it. In exceptional cases, the period may be extended for additional 30 days. While the new time-limit is rather long when compared to the regulation in other countries of the Council of Europe, it could be accepted, were it meticulously respected and were the extension of the period truly reserved for "exceptional cases". Yet, several studies realised by the OSCE show that this is not always the case and that the applications of many NGOs, especially human rights NGOs, are for some reasons or even without any reasons treated as "exceptional".[14] The Azerbaijani authorities should strive to reduce the number of cases treated in this way and they should also, ideally in an amendment to the 2003 law, define the features of an "exceptional case".[15]

---

[10] See OSCE, *Problems of NGO Registration in Azerbaijan,* 2002, available at http://www.osce.org/baku/42386 (visited 11 August 2011); PILI, *Enabling Civil Society: Practical Aspects of Freedom of Association, A Source Book,* 2003; UN Doc. E/CN.4/2006/95/Add.5, *Promotion And Protection Of Human Rights Human Rights Defenders,* Report submitted by the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, 6 March 2006, pp. 28-432 (Azerbaijan); A. Kazimov, H. Hasanov, *Report on the Registration Procedures of Non-Governmental Organizations,* OSCE Office in Baku, 2006; International Centre for Not-For-Profit Law, *Assessment of the Legal Framework for Non-Governmental Organizations in the Republic of Azerbaijan,* June 2007; and G. Bayramov, *Registration and Operation of NGOs, Taxation of NGOs, Public Funding for NGOs and NGO Participation in Decision-making,* 2009, available at http://blacksea.bcnl.org/en/nav/22-azerbaijan.html (visited 11 August 2011).

[11] See OSCE, *Problems of NGO Registration in Azerbaijan,* 2002, available at http://www.osce.org/baku/42386 (visited 11 August 2011).

[12] ECtHR, *Ramazanova and Others v. Azerbaijan,* Application no. 44363/02, 1 February 2007.

[13] ECtHR, *Ismaylov v. Azerbaijan,* Application no. 4439/04, Judgment, 17 January 2008.

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

[15] See EctHR, *Sidiropoulos and Others v. Greece,* Application No. 26695/95, 10 July 1998; ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* Application Nos. 29221/95 and 29225/95, 2 October 2001; HRC, *Boris Zvozskov et al. v. Belarus,* Communication No. 1039/2001, 17 October 2006.

21. Second, the 2003 Law requires that *"all deficiencies not providing basis for refusal shall be identified at once and submitted to the applicant for resolution"* (Article 8.3). In this way, it directly addresses one of the weak points of the 1996 Law, namely that *"the law did not specify a limit on the number of times the Ministry could return documents to the founders"* (par. 66 Ramazanova). Yet, again, the reports show that the practice of repeated requests for the completion of the dossier has not been completely abandoned so far.[16] Doing so as quickly as possible is another aim that the Azerbaijani authorities should strive for. Thirdly, the 2003 Law specifies that *"in the event if within the term established under this clause, no refusal will be submitted on state registration, these structures shall be deemed as registered by the state"* (Article 8.5). In that it again differs from the 1996 Law which *"did not establish with sufficient precision the consequences of the Ministry's failure to take action within the statutory time-limits"* (par. 66 Ramazanova). Information is missing to verify whether this provision has been truly applied in practice. On the positive note, it is important to mention that the legislative changes go in the right direction and that, moreover, they were brought into the Azerbaijani legal order several years before the ECtHR judgments, testifying to a proactive approach on the part of the Azerbaijani authorities. It remains to be ensured that this approach be also taken vis-à-vis the implementation and application of the 2003 Law.

22. The 2009 ***Law on NGOs*** sends however a rather contradictory signal in this regard. In addition to creating a special procedure for the registration of branches and representatives of international NGOs in Azerbaijan, it also introduces the requirement of the minimal nominal capital that is necessary for the establishment of funds – one of the two forms of NGOs. This minimal nominal capital amounts to 10.000 manats, which is approximately 9000Euro (Article 12.1-1). Fears have been expressed that *"in Azerbaijan, where domestic philanthropy is limited, a minimum capital of 10,000 manats will discourage the creation of foundations".*[17] The Azerbaijani authority should monitor whether these fears prove true and if they do, they should consider a modification of the provision. Moreover, the 2009 amended Law on NGOs failed to address some of the objections which had been raised against the registration system. One of such objections relate to the centralised nature of the procedure: all the NGOs – including the regional and local ones – need to be registered in a special office of the Ministry of Justice in Baku. It is believed that *"this makes registration even more difficult for NGOs based outside of Baku"*[18] and the decentralisation of the registration had therefore been repeatedly suggested, the regional departments of the State Register of Legal Entities being the most obvious candidates for ensuring the registration at the regional level.[19] Yet, the 2009 amended Law on NGOs did not introduce any changes in this regard.

B) Registration of Branches and Representatives of International NGOs

23. Unlike the original 2000 Law on NGOs, the 2009 amended version contains a special provision relating to the registration of branches and representatives of international NGOs in Azerbaijan. The need for such a procedure, i.e. for international NGOs to create local branches and representatives and have them registered, is in itself questionable. When the Russian Federation contemplated to introduce a similar procedure in the mid-2000s, it got under severe criticism from foreign states[20] which argued that the practice was incompatible with the European legal standards as reflected in the 1986 *European Convention on the*

[16] Ibid.
[17] G. Bayramov, *Registration and Operation of NGOs, Taxation of NGOs, Public Funding for NGOs and NGO Participation in Decision-making,* 2009, available at http://blacksea.bcnl.org/en/nav/22-azerbaijan.html (visited 11 August 2011).
[18] Ibid.
[19] Ibid., see also A. Kazimov, H. Hasanov, *Report on the Registration Procedures of Non-Governmental Organizations,* OSCE Office in Baku, 2006.
[20] See J. Machleder, *Contextual and Legislative Analysis of the Russian Law on NGOs,* INDEM Foundation, 2006, p. 13.

Recognition of the Legal Personality of International Non-Governmental Organisations. Although Azerbaijan is not party to this Convention, the requirement that foreign NGOs should *"not have to establish a new and separate entity"* (paragraph 45) is also enshrined in the 2007 Recommendation. The Russian Federation in the end dropped the draft provision on the registration of branches and representatives of international NGOs and such a provision seems to be absent from the laws on NGOs of other countries of the Council of Europe as well. Since its inclusion into the 2009 amended Law of NGOs could give – and indeed already has given – rise to doubts as to whether international NGOs are truly welcome in Azerbaijan, the public authorities should reconsider its import and relevance.

24. Under the 2009 amended Law on NGOs, the registration of branches and representatives of international NGOs *"shall be carried out on the basis of the agreement signed with such organizations"* (Article 12(3)). Details are specified in the 2011 Decree, which declares that the agreement should be the outcome of "negotiations" between the NGO and the Ministry of Justice. It is not completely clear why the term "negotiations" is used here. The purpose of the procedure described by the term is to have the NGO accept the conditions set by the Decree and prove its social utility. No true "bargaining" is involved in the process.

25. Even before the formal "negotiations" are started, NGOs have to show that their activities would bring some contribution to the society in Azerbaijan (paragraph 2.2 of the Decree). Depending on how this requirement is interpreted it can be either a mere formality, or a serious obstacle to the operation of foreign NGOs in Azerbaijan. In the course of the "negotiations", NGOs have to accept ***several conditions.*** Since the non-compliance with these conditions could lead to the denial of the registration, the 2011 Decree could be viewed as an informal amendment to the 2003 *Law on State Registration and the State Registry of Legal Entities*. It is not fully clear whether this is compatible with the normative premises of the Azerbaijani legal order, i.e. whether limitations on human rights could be imposed by mere executive decrees. The content of the conditions is problematic as well. While two of them, the compliance with the national legal order or the provision of certain information, are relatively standard ones, the three others are rather unusual.

26. NGOs have to pledge that their future activities will *"respect national and moral values, respect the people of Azerbaijan"* (paragraph 3.2.2.) and that they will not be *"involved in the political and religious propaganda"* (paragraph 3.2.2.). The Decree does not specify, how the general terms "national and moral values" and "political and religious propaganda" are to be defined and what an NGO should do to "respect the people of Azerbaijan". In the absence of any specification, it is doubtful whether a rejection of a registration based on one of these conditions could be ever found compatible with Article 11 of the ECHR. It is also to be recall that the ECtHR has so far taken a rather prudent approach towards *ex ante* concerns about the compatibility of the purposes of an association with the national legal order. The Court has also made it clear that Article 11 of the ECHR is to be interpreted in the light of Article 10 of the Convention, as the *"protection of opinions and the freedom to express them is one of the objectives of the freedoms /…/ association"*.[21] The final condition to 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"* (paragraph 3.2.2.) could turn out to be problematic as well. As a minimum, it should be made clear in the decree that the condition applies to the local Azerbaijani branch or representatives and not to the international NGOs as such.

[21] See EctHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria,* Application Nos. 29221/95 and 29225/95, 2 October 2001, par. 85.

27. Another problem consists in the absence in the Decree of any specific time-frame, within which the "negotiations" should be concluded and the agreement signed. The reference to *"the period specified by law and order"* (paragraph 4.2) should be read as a confirmation that the general time-limit of the 2003 *Law on State Registration and the State Registry of Legal Entities* applies here. As already stated, under this law *"State registration of non-profit structures wishing to obtain the status of legal entity, as well as representations or branches of foreign non-profit legal entities is performed as a rule no later than within 40 days"* (Article 8.1). There is no doubt that the ECtHR claim that states have the duty to *"organise /the/ domestic state-registration system and take necessary remedial measures so as to allow the relevant authorities to comply with the time limits imposed by /their/ own law and to avoid any unreasonable delays in this respect"* (par. 65) is valid here as well. Not concluding the whole procedure within the time-frame without any substantive reasons would thus violate both the 2003 Law and Article 11 of the ECHR.

C) Requirements Relating to the Content of the Charters of NGOs

28. In its new Article 13.3, the 2009 amended Law on NGOs stipulates that *"/t/he charters of NGOs shall not provide for appropriation of powers of state and local self-governed bodies, as well as implying of functions of state control and revision".* This provision, especially in view of its general and vague terms, could be read in a way, which would seriously hamper the capacity of NGOs to exercise their functions. This is particularly true for human rights NGOs which by their very mandate have to fulfil functions which might be seen as those of "state control". It is also not clear what the "appropriation" of powers of state and local self-governed bodies should mean in this context. Taking into account that these powers may be quite broad and may encompass such activities as ensuring public welfare or monitoring the state of human rights in the country, there is again a risk of many NGOs finding themselves in violation of Article 13.3 just by exercising their common functions.

29. It may be presumed that what the Azerbaijani legislator had in mind when drafting the provision was to avoid the situation in which NGOs would seek to actually replace state organs in the exercise of their function. Such an effort is certainly legitimate, since NGOs as non-elected entities cannot (and most of them certainly do not) aspire to get formal political powers in a state. Yet, this does not mean that they have no role to play in the *res publica.* On the contrary, as the 2007 Recommendation explicitly states, NGOs bring an *"essential contribution /.../ to the development and realisation of democracy and human rights, in particular through the promotion of public awareness, participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies"* (par. 3 of the Preamble). The Recommendation also specifies that "*NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law"* (par. 12). It is important that the Azerbaijani authorities have these premises in mind when interpreting Article 13.3 of the Law on NGOs.

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

of the human rights situation in Azerbaijan by NGOs is not truly desired by the Azerbaijani authorities. As a country considering the provision of human rights and liberties as its highest priority objective (Article 12(I) of the Constitution), Azerbaijan should have a strong motivation to manifest in practical terms that such an impression is wholly incorrect.

D) Liability and Dissolution of NGOs

31. The operation of NGOs *"entails responsibilities as well as rights"* (par. 9 of the Preamble of the Recommendation). The fact that the Law on NGOs imposes some obligations on NGOs and devotes a special section to NGOs liability is thus *prima facie* not incompatible with human rights standards. The relevant provisions are, however, drafted in a rather unclear manner and could lend themselves to various interpretations. Article 31 distinguishes between *"violations of the requirements arising out of the provisions of the present law"* (par. 1) and *"violation of the objectives of the Law"* (par. 3) – this distinction, which appears already in the original 2000 version of the Law on NGOs, remains unexplained. Moreover, the 2011 Decree stipulates that *"/b/ranches or representative offices registered in the case of violation of the terms mentioned in paragraph 3.2 of the Rules, shall bear responsibility in accordance with the legislation of the Azerbaijan Republic"* (par. 5). As already stated, the terms mentioned in paragraph 3.2 include the requirements for branches and representatives of international NGOs to *"respect National and moral values, respect the people of Azerbaijan"* (par. 3.2.2) and *"not /to/ be involved in the political and religious propaganda"* (par. 3.2.4). Since the terms used in these provisions are quite elusive, the liability of NGOs could be activated easily, entailing as the outmost sanction the liquidation of the NGO. Once again, it is doubtful whether such a sanction would withstand the test of Article 11(2) of the ECHR. Its compatibility with Article 20 of the Recommendation under which *"/t/he legal personality of NGOs can only be terminated /.../ in the event of bankruptcy, prolonged inactivity or serious misconduct",* would also be questionable.

32. The dissolution of an NGO is an extreme measure and it is well established under the international case-law that it can only be resorted to in exceptional situations and needs to be based on a well-founded rationale.[22] The dissolution of an NGO in the specific context of Azerbaijan – under the original, pre-2009 legislation – was commented upon by the ECtHR in the *Tebieti Mühafize Cemiyyeti and Israfilov* (2009).[23] The case concerned a non-profit-making NGO which was registered in 1995 and focused its activities on the environmental agenda. In 2003, the organisation was dissolved at the request of the Ministry of Justice by the order of a court for repeated violations of domestic law. These alleged repeated violations were partly formal in nature (delays in holding a general assembly in regular intervals) but partly more substantive. The organisation was accused of having frequently overstepped the limits of the scope of its activities and interfered with the competence of state authorities by carrying out unlawful environmental inspections on the premises of various state and commercial enterprises and by collecting membership fees from them. The dissolution order was upheld by the Court of Appeal and the Supreme Court of Azerbaijan.

33. The ECtHR found that the dissolution took place in violation of Article 11 of the ECHR. While accepting that the interference into the NGOs freedom of association might have pursued the legitimate aim of *"protection of the rights and freedoms of others"* (par. 66), the Court found *"a strong indication that the provisions of the NGO Act did not meet the "quality of law" requirement"* (par. 65); moreover, it held that the interference was not *"necessary in a democratic society"* (par. 92). The analysis of Article 31 of the Law on NGOs (par. 56-65) is still relevant, since the provision has remained almost unchanged by the 2009 amendment.

[22] ECtHR, *United Communist Party of Turkey and Others v. Turkey,* Applications No. 133/1996/752/951, 20 January 1998.
[23] ECtHR, *Tebieti Mühafize Cemiyyeti And Israfilov v. Azerbaijan,* Application no. 37083/03, 8 October 2009.

The ECtHR held that *"the provisions /.../ 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"* (par. 61) and that *"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"* (par. 62). The reference in Article 31.3 of the Law to *"violation of the objectives of the Law"* was also criticised, since those objectives are not enumerated in the text.

34. During the amendment of the 2000 Law on NGOs, only minor changes were brought into Article 31. Those changes, moreover, refer mainly to the liability of NGOs in case of the failure to submit an annual financial report. Article 1 specifying the Purpose (objectives?) of the Law remained also unchanged. With respect to the liability (and dissolution) of NGOs, the text of the 2009 amended Law on NGOs is therefore open to the same objections as the version scrutinized by the ECtHR in 2009 and it can be claimed that it still does not meet the "quality of law" requirement under Article 11.2 of the ECHR.[24] This would *a fortiori* apply to the 2011 Decree, which added one more ground for liability and (potential) dissolution of an NGO, namely the failure to comply with certain conditions stated in the Decree. Since both the liability provision (Paragraph 5) and the conditions themselves (Paragraph 3.2) are drafted in vague and unclear terms, the Decree certainly fails to meet the "quality of law" required by Article 11 of the ECHR as well. In fact, as a mere executive order, the Decree most probably would have a problem to meet the quality of "law" in any case.

35. The part of the judgment relating to the standard of the "necessity in a democratic society" is equally relevant.[25] The ECtHR discussed two groups of arguments that the Azerbaijani Government suggested as the ground justifying the interference into the freedom of association. The first ground consisted in the breach of the legal requirements on international management. Accepting that *"the States' margin of appreciation may include a right to interfere – subject to the condition of proportionality – with freedom of association in the event of non-compliance by an association with reasonable legal formalities"* (par. 72), the Court nonetheless found that sanctioning such a non-compliance by the dissolution of the NGOs was *"not justified by compelling reasons and was disproportionate to the legitimate aim pursued"* (par. 83). The conclusion and the line of argumentation should be taken into account by the Azerbaijani Ministry of Justice and national courts when considering further cases of NGOs under Article 31 of the Law of NGOs.

36. The second ground for the interference put forward by the Government had to do with the engagement of activities prescribed by law. Here, the Court made it clear that any allegations of such an engagement needed to be well evidenced; otherwise the dissolution cannot but be seen as arbitrary. This finding, again, has to be kept in mind in the interpretation of both Article 31 of the Law on NGOs and Article 5 of the Decree. In the light of the *Tebieti Mühafize Cemiyyeti and Israfilov* (2009) Case, it is possible to conclude that the provisions of the 2009 amended Law on NGOs and the 2011 Decree relating to the liability and dissolution of NGOs pose problems of compatibility with the European human rights standards. The Azerbaijani authorities should seek to make the text of the relevant provisions less ambiguous and should see to it so that the instruments are interpreted and applied in the way not colliding with the requirements of Article 11 of the ECHR.

[24] See also ECtHR, *Maestri v. Italy,* Application no. 39748/98, Judgment, 17 February 2004.
[25] See also ECtHR, *United Communist Party of Turkey and Others v. Turkey,* Application No. 133/1996/752/951, Judgment, 30 January 1998; ECtHR, *Freedom And Democracy Party (Özdep) v. Turkey,* Application no. 23885/94, 8 December 1999; ECtHR, *Association of Citizens "Radko" & Paunkovski v. "the former Yugoslav Republic of Macedonia",* Application No. 74651/01, 15 January 2009; HRC, *Viktor Korneenko et al. v. Belarus,* Communication No. 1274/2004, 31 October 2006; HRC, *Aleksander Belyatsky et al. v. Belarus,* Communication No. 1296/2004, 24 July 2007.

Conclusions

37. Many positive steps have been taken by the Republic of Azerbaijan since its accession to independence in 1991 to enhance the respect for human rights and fundamental freedoms and to build up a democratic society based on the rule of law. Many of these steps have been built on the conviction that, as the 2005 *Warsaw Declaration,* adopted at the Third Summit of Heads of State and Government of the Council of Europe member states, stated, *"democracy and good governance /.../ can only be achieved through the active involvement of citizens and civil society"* (par. 3). More than 2 000 NGOs have been registered in the country over the past years, including several dozens of human rights NGOs. The legislation relating to their legal status has been improved in some important aspects, making the Azerbaijani legislation on NGOs more compatible *de iure* with the European standards in the area of the freedom of association.

38. Yet, some challenges still persist. First, the registration of NGOs, which in many countries is a rather formal procedure, remains lengthy and complicated. The 2009 amended version of the Law on NGOs and the 2011 Decree have further added to this by introducing the condition of the minimal nominal capital for funds and by creating a special procedure for the registration of branches and representatives of international NGOs. The requirement for international NGOs to create branches and representatives and have them registered is of itself problematic. Moreover, the 2011 Decree makes this registration subject to the conclusion of an agreement stemming from "negotiations" between the NGO and the Ministry of Justice. In the course of these "negotiations", the NGOs have to prove their utility for Azerbaijan and to show that they meet a set of conditions which are of a rather vague content. Finally, there are no clear time-limits set for the negotiations procedure and though the general regulation of the 2003 Law applies here, it is to be recalled that even after the extension of the time-limit for the consideration of the application, instances of considerable delays in the registration by the public authorities have been recorded in Azerbaijan.

39. Secondly, the 2009 amended Law on NGOs added a new requirement relating to the content of the charters of NGOs. Due to the general and unclear way in which it is drafted, the requirement could lend itself to many interpretations, which makes it difficult for NGOs to draft their Charters without running the risk of having it rejected for the incompatibility with the 2009 Law. Thirdly, even after its amendment in 2009, the Law on NGOs poses problems of compatibility with Article 11 of the ECHR as far as the liability and dissolution of NGOs are concerned. The relevant provision, Article 31, is again drafted in vague terms which might not meet the quality of law requirement under Article 11 of the ECHR. Fourthly, the practical implementation and application of the legislation pertaining to the freedom of association gives rise to concerns. The Ministry of Justice still fails to meticulously stick to the time-limits in all cases and to inform the applicants about any fact that is relevant for the final decision. Indeed, it still sometimes fails to inform them about this final decision itself. Numerous problems persist and it is to be regretted that instead of addressing these problems, the 2009 amended Law and the 2011 Decree have created new ones.

40. In his letter of 21 March 2011 to the President of the Republic of Azerbaijan, Thorbjørn Jagland, Secretary General of the Council of Europe, recalled that by becoming a member of the Council of Europe Azerbaijan has committed itself to protection and promotion of human rights, to a pluralist democracy and to the rule of law. Since *"the existence of many NGOs is a manifestation of the right of their members to freedom of association under Article 11 of the /ECHR/ and of their host country's adherence to principles of democratic pluralism"* (Par. 7 of the Preamble of the 2007 Recommendation), members states of the Council of Europe including Azerbaijan should pay special attention when adopting or amending laws relating to the establishment, operation, management, and liquidation of NGOs.

41. The 2009 amended Law on NGOs and the 2011 Decree do not seem to meet this standard and their content as well as potential impact should be reconsidered by the Azerbaijani authorities.