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**USAID's CIVIL SOCIETY PROJECT  
ANALYSIS**

**of Proposed Amendments to the Law of the Republic of Azerbaijan  
On Non-governmental Organizations (Public Associations and Foundations)**

**June 12, 2009**

**Executive Summary**

In June 2009, the Chairman of the Committee of the Parliament (Milli Mejlis) of the Republic of Azerbaijan for legal policy and statehood submitted to the Parliament amendments to five laws including the Law on Non-governmental Organizations (Public Associations and Foundations) (hereinafter NGO Law). The International Center for Not-for-Profit Law (ICNL) respectfully submits these comments on the Draft Law. ICNL was requested by the Counterpart International in Azerbaijan to provide this Analysis. Because of the severe time limitations, this analysis is by necessity summary rather than comprehensive; it provides comparative analysis only on several key issues presented by the Draft Law.

The Draft Law contains serious shortcomings that contradict fundamental democratic principles of human rights and equality. Many of the provisions of the Draft Law contradict the provisions of the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Protection of Human Rights and Fundamental Freedoms (ECHR).

If adopted in its present version, the Draft Law will have a profoundly negative impact on all NGOs, including branches and representations of foreign NGOs. It will likely result in the termination of the invaluable assistance to Azerbaijan provided by many foreign and international organizations and undermine the development of civil society.

## Analysis

### I. Restrictions on Foreign Founders of NGOs and Managers of Branch Offices.

Article 9.4. Foreigners who do not have a permanent residence right in the Republic of Azerbaijan and stateless persons cannot be founders of an NGO in the territory of the Republic of Azerbaijan.

Article 7.5. The managers of a branch office and representation shall be appointed by the NGO among citizens of the Republic of Azerbaijan and act within the power provided by the NGO.

#### Discussion:

Barring foreigners from establishing NGOs contravenes Azerbaijan's obligations under international law, specifically the ECHR. The provisions of the ECHR are secured to "everyone within the jurisdiction" of the member-states. Thus, a foreigner may not be excluded from the fundamental rights protected under the Convention. Barring foreigners from serving as founders is a clear infringement of the right to association protected by Article 11 of the ECHR. Article 11 provides:

- 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . .*
- 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 . . .*

Article 22 of the ICCPR contains almost identical language.

As the government has the burden under the ECHR to justify any restriction, the Azerbaijani Government if challenged must demonstrate why restrictions on foreign founders are 'necessary in a democratic society' to achieve particular state interests. Here, it is far from clear what state interest is being served by the bar on foreign founders with permanent residence, or the requirement that managers of foreign offices be citizens of Azerbaijan, or how these requirements can be justified as necessary in a democratic society.

Moreover, the proposed discriminatory provisions contained in the Draft Law appear to violate Azerbaijan's own Constitution, which guarantees "*equality of rights and liberties of everyone, irrespective of . . . nationality . . .*" (Article 25.3), including the right to

found an association:

*“Every Person shall have the right to unite with others. Every Person shall have the right to set up any association, including a political party, trade union and any other public association, or to enter an already existing association. Independent performing of all associations shall be guaranteed.”*

(Article 58.)

In the *Case of the Moscow Branch of the Salvation Army v. Russia* the European Court of Human Rights rejected Russia's discriminatory treatment of foreign organizations as a violation of the right to association. The Court found “no reasonable and objective justification for a difference in treatment of Russian and foreign nationals from being founders of Russian religious organizations,” and concluded that Russia's "arguments pertaining to the applicant’s alleged ‘foreign origin’ were neither 'relevant and sufficient' for refusing its registration, nor 'prescribed by law.'"

In a review of restrictive provisions similar to those in the Draft Law, the Croatian Constitutional Court held that nationality requirements applicable to founders of association were unconstitutional and violated Article 11 of the Convention. The 1997 Croatian Law on Associations provided that foreign citizens who permanently resided in Croatia, or who have legally resided in Croatia for more than one year, could be founders of a registered association, under the condition of reciprocity. The Court found that the reciprocity requirement violated Article 11 of the Convention, which guarantees freedom of association to “everyone,” without further reference to the country of citizenship or other conditions. According to the Court, “there are no legitimate reasons which would justify restrictions imposed on foreign domestic and legal persons in exercising the freedom of association.”

A 1999 case against Belgium in the European Court of Justice illustrates this same principle. Belgium was chastised by the court over nationality requirements contained in two separate laws governing non-profit associations. (Kingdom of Belgium v. Commission, Case C-172/98, June 29, 1999). Belgium’s 1921 law on non-profit associations (NPA law) required that the membership of a non-profit association should consist of at least 75% Belgian nationals; associations failing this requirement were deprived of legal personality. Similarly, the 1919 law on international associations required at least one Belgian national in the management of the association. The European Court of Justice, considering the argument that these requirements violated the rights of citizens of other EU Member States by discriminating on the basis of nationality, held:

*... by requiring the presence of a Belgian member in the administration of an*

*association or a minimum, and majority, presence of members of Belgian nationality in order for the legal personality of an association to be recognised, the Kingdom of Belgium has failed to fulfill its obligations under Article 6 of the Treaty.*

As a general rule, any natural or legal person may establish and participate in an NGO in European or G8 countries. In Germany, foreigners are permitted to found associations, foundations and other forms of NGOs. No restrictions apply to founders in the Netherlands. In the United States, where founding requirements are regulated at the state level, there are generally no restrictions against the ability of foreigners to serve as founders. Also in the EU's new member states, there are few restrictions on foreigners. In Hungary, for example, there are no citizenship or residency requirements to establish either associations or foundations (the two primary NGO organizational forms).

## II. Limitation on foreign funding

Article 24.2. No more than 50% of the property of NGO can be formed by foreign sources.

### **Discussion:**

Foreign funding is an important source of support to Azerbaijani NGOs, as domestic philanthropy is almost nonexistent and only since 2008 has public funding – in the form of a new fund for civil society – been a viable option. The restriction on the amount of an NGO's property that can be constituted from foreign sources will thus be a serious impediment to the work of many NGOs. This restriction also convenes Azerbaijan's international obligations.

*The UN Declaration on Human Rights Defenders.* The restrictions on an NGO's property outlined above are inconsistent with the United Nations *Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, which affirms that each state has the responsibility to protect human rights and fundamental freedoms by “adopting such steps as may be necessary to create all conditions necessary... as well as the legal guarantees required to ensure” that all persons are able to enjoy these rights and freedoms (Article 2). Among these rights is the “right, individually and in association with others, to solicit, receive, and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms.” The UN High Commissioner

for Human Rights has explicitly stated that the *Declaration*'s protections extend to the "receipt of funds from abroad." In placing restrictions on the source of property, including foreign funding, to human rights defenders, Article 24.2 is inconsistent with the *Declaration*.

Article 22 of the ICCPR and Article 11 of the ECHR. Under some circumstances, the Draft Law could also restrict the right to associate protected by the ECHR and ICCPR. Organizations that currently rely almost exclusively on foreign funding, and that have little prospect for domestic support (e.g., they cannot access the new government civil society fund because their activities are disfavored by the government), may essentially be starved of resources. Where the inability to access resources is tantamount to an involuntarily dissolution, it may restrict the right to associate. It is difficult to see how this legislative scheme can be deemed "necessary in a democratic society" for one of the limited purposes articulated in the ICCPR Article 22 and ECHR Article 11, discussed above.

*U.S.- Azerbaijan Bilateral Investment Treaty.* Restrictions on foreign funding of associations and foundations could potentially expose of the Government of Azerbaijan to claims under the US-Azerbaijan Bilateral Investment Treaty (BIT), which entered into force on August 2, 2001. Article I(a) of the BIT defines 'company' for the purpose of the treaty as covering all types of legal entities "constituted or organized under applicable law, **whether or not for profit**, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, **association, or other organization.**" It would therefore appear that a legally-registered not-for-profit organization or foundation is covered by this definition. Investments of a company [or national] are guaranteed protection under the BIT. (Article II). An investment is "every kind of investment... and includes, but is not limited to, an investments consisting or taking the form of: (i) a company" as defined above or "(iii) contractual rights, such as... production or revenue-sharing contracts...; and (iv) tangible . . . and intangible property; (v) intellectual property; and (vi) rights conferred pursuant to law.

To illustrate the issues that could arise, consider a US organization that seeks to co-found a not-for-profit organization with an Azeri partner in order to provide services to the disabled. Further assume that the US organization commits capital to the enterprise, assuming substantial financial risk if the organization proves unsuccessful. This would appear to be a covered investment under the BIT. Now, if limited in its right to receive funds or property from abroad under Article 24.2 of the Draft Law, the not-for-profit organization could potentially bring a claim for arbitration against the Government of Azerbaijan under the BIT on multiple grounds:

- *Free Transfers.* Article V (1) of the BIT requires the US and Azerbaijan to permit

“all transfers” of funds “relating to a covered investment to be made freely and without delay into and out of its territory.” An argument can be made that restricting the share of an NGO’s property that may be foreign-sourced violates this provision by interfering with free transfer of funds.

- *Fair and Equitable Treatment.* Each party to the BIT is obliged to provide “fair and equitable treatment and full protection and security” to covered investments. (Article II (3)(a)). Limiting the foreign sourced property of an organization that had previously operated with more than 50% of its property from a foreign source, and thus legitimately expected that it could continue its operations on that basis, arguably denies the organization fair and equitable treatment.
- *Unreasonable or Discriminatory Impairment.* Restricting foreign funding or foreign sources of property could give rise to a claim that the government has “impair[ed] by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered assets.” (Article II (3) (b)).

Furthermore, while each of the scenarios above involve would-be *recipients* of foreign funding, similar claims may arise if foreign *funders* establish branch offices in Azerbaijan with the intention of funding local development through grants. Any restriction on the foreign funder’s ability to provide grants to local actors can subject the government to the BIT claims outlined above. Similar issues may arise under bilateral investment agreements with other countries.

### III. Discriminatory Treatment of Foreign NGOs

Article 7.7. The state registration of foreign NGOs and their branches and representations shall be carried out on the basis of opinion of the relevant body of executive power except the cases provided for by articles 12.5 and 16.2 of the present Law.

Article 12.5. Opening in the Republic of Azerbaijan of branches and representations of foreign NGOs which are constantly financed by foreign states, foreign legal and natural persons shall be carried out only if the relevant international agreement signed with such states exists.

Article 16.2 The state registration of branches and representations of NGOs which are constantly funded by foreign states, foreign legal and natural persons shall be carried out on the basis of an international agreement signed between the very state and the Republic of Azerbaijan.

#### **Discussion:**

The Draft Law prohibits foreign organizations from opening branches or representative

offices that are financed by foreign states, organizations, or individuals unless Azerbaijan has an international agreement with the organization's home state.

This Draft Law's provisions on branch and representative offices of foreign organization, while unclear, appear to pose a number of practical obstacles to the delivery of necessary social services, and charitable, humanitarian and relief work in Azerbaijan. The provision would potentially hamstring the Azerbaijan government from allowing foreign assistance even where the government desired such assistance. Suppose, for example, that a wealthy donor in Country A wished to fund construction of an orphanage, a project that the Government of Azerbaijan favored and hoped to cultivate. If Country A lacked the requisite treaty with Azerbaijan, the project could not go forward, even if the Government wanted to proceed.

Moreover, the provisions on foreign branches and representative offices are unclear, and raise a number of questions. The Draft Law does not state, for instance, what kind of international agreement between Azerbaijan and another country must exist before that country's NGOs may establish branches. Would any type of agreement satisfy the requirement, or only agreements on certain subjects? Moreover, the provisions do not make clear whether a foreign NGO may carry out any activities, however limited in time, in Azerbaijan without registering a branch or representative office. For example, if a foreign NGO wishes to send a representative to Azerbaijan to conduct a two week assessment visit, must it first register a branch or provide notification of a representative office? Or taking into account that article 12.5 covers only branches and representations of foreign NGOs '*which are constantly funded by foreign governments, foreign legal entities or individuals*' can we say that for a short-time activities no registration of branches or representation is needed?

In addition, there does not appear to be any justification for barring foreign not-for-profit organizations from establishing branch offices unless there is an international agreement in place, while simultaneously allowing foreign for-profit companies to operate through branch offices without such an agreement. Where the foreign organization (whether for-profit or not-for-profit) is pursuing legitimate activities, it would seem appropriate for the host country to facilitate its operation in country.

Most countries in Europe and the G8 have established procedures to facilitate the operation of foreign NGOs in the respective countries. These procedures allow for the simple registration and operation of the branches and representative offices of foreign organizations, as well as allow their participation as founders and members/participants in different organizational legal forms available for non-profits in the respective countries. The registration procedure for representative offices of foreign organizations varies from country to country, but in general, is simple and straightforward. For

example, in France, a foreign organization shall submit a declaration to the prefecture (territorial sub-division of the Ministry of Interior) where its headquarters are located. In the U.S., registration of foreign NGOs is a simple process that involves providing the name and address of an agent within the state and paying a modest fee. In the case of foreign organizations whose headquarters are located on the territory of a State Party that has ratified the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, neither registration nor notification is required.

#### IV. Prohibition of Informal NGOs and Sanctions

Article 16.4. NGO can start functioning only upon passing the state registration as a legal entity.

Article 16.5. If NGO functions without passing the state registration as a legal entity, person(s) speaking or acting on its behalf can be brought to administrative responsibility. If NGO continues to function after the person(s) was/were brought to administrative responsibility for speaking or acting on behalf of an NGO that functioned without passing the state registration as a legal entity, the operation of this NGO can be prohibited by the court on the basis of application of the relevant body of executive power.

A new article, Article 299-1 (Speaking or acting on behalf of a non-registered nongovernmental organization) will be introduced in the Azerbaijan Code on Administrative Offences and it will provide that: *For speaking or acting on behalf of a non-registered nongovernmental organization – physical persons shall be fined for the amount of eight hundred to one thousand manats, officials – from three to five thousand manats, legal persons – from forty thousand manats to fifty thousand manats, and foreigners and stateless persons can be also removed from the boundaries of the Republic of Azerbaijan in an administrative manner.*

#### Discussion:

Under Article 22 of the ICCPR and Article 11 of the ECHR, “freedom of association is a right, and not something that must first be granted by the government to citizens.” Consequently, formal registration of an organization is not required in order for individuals to exercise their rights to associate. Requiring a group of persons that has come together for a common purpose to register with the government, thereby submitting itself to state supervision, is antithetical to the notion of free association. The Human Rights Committee of the ICCPR has recognized this principle, stating on multiple occasions that mandatory registration of civil society organizations is not allowed under

Article 22 of the ICCPR. The Committee found, for example, that Lebanon's *de facto* practice of requiring prior licensing and control before a group may operate restricted the right to freedom of association under Article 22. In addition, the Committee expressed concern over Lithuania's laws requiring that associations or organizations must comply with registration requirements in order to operate. \_\_

The Cabinet of Ministers of Council of Europe recognized this principle as well in its "Recommendations on the legal status of non-governmental organisations in Europe:"

*3. NGOs can be either informal bodies or organisations or ones which have legal personality.*

Taking into account the broad definition of the term "public association" in Article 2.1 of the NGO Law, any informal group of people, such as fans of the games of dominos or chess who meet periodically to play in the public park, will have to seek registration from Ministry of Justice. Similarly, the restriction would impede "imedjik" the tradition for people to come together in advance of big national holidays and celebrations and to clean their neighborhoods, plant new trees, etc. Moreover, any persons who engaged in these activities would be subject to substantial fines under the new provision of the Administrative Code. It is unlikely that the Ministry of Justice in practice has the capacity or the need to enforce those provisions, and monitor all groups of people who meet either to jointly solve social problems or just pursue their common interests.

Azerbaijan has so far been a positive example in the region in allowing the operation of unregistered NGOs. If adopted, the mandatory registration requirement will place Azerbaijan in the company of some of the most restrictive countries in the world, such as Uzbekistan and Belarus.

This is not to say that informal groups are always treated equally to registered organizations in all respects under the law. Organizations that are formally registered are often afforded the status of "legal persons," and as such are entitled to the benefits of that status—typically including the right to enter into contracts, open bank accounts, hire employees, and receive funding. The laws of many countries recognize this principle, and explicitly protect the right of unregistered, informal groups to exist. These include Tajikistan's Law on Public Associations (recognizing that the primary purpose of registration is to acquire the benefits that come with status as a legal person); Kyrgyzstan (specifically recognizing unregistered associations); and Laos (draft decree on associations states that the "Decree is not issued with the aim to limit freedom of Laos citizens in forming associations").

The new provision of the Code on Administrative Offences, which introduces significant fines for individuals or legal persons "speaking or acting" on behalf of an unregistered NGO, burdens the right of expression and thus raises concerns under Article 19 of the

ICCPR and Article 10 of the ECHR as well. Article 10 of the ECHR provides:

*1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

ICCPR Article 19 contains similar wording. Restrictions on the right to expression must be “proportionate to the legitimate aim pursued” and can only be justified by “imperative necessity.”

The substantial penalties on “speaking” on behalf of an unregistered group clearly will burden the right to expression, deterring groups from speaking out on issues of common interest. As such, it is inconsistent with Azerbaijan’s obligations under the ICCPR and the ECHR.

## **V. Ambiguous and Discretionary Grounds for Denying Registration**

Article 16.3. The body of state registration shall send a survey to the relevant bodies of executive power in order to check if NGO which applied for state registration complies with article 12.3 of the present Law, and also if it is connected with legalization of financial means or other property obtained by criminal ways, terrorism and (or) financing of terrorism. The relevant bodies of executive power shall submit their opinion on the issue to the state registration body within 30 days. If the opinion would contain sufficient grounds that NGO endangers the basics of the state constitutional order and safety, public safety or public order, promotes racial, national or religious discrimination or has links with financial means obtained by criminal ways or legalization of other property, with terrorism and (or) financing of terrorism, then the state registration of that NGO shall be refused.

**Discussion:**

The right to form an NGO to pursue common goals has been recognized under international law as protected by the right to free association. This right may not be limited except where prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Only “convincing and compelling” reasons can justify restrictions on the right to associate and restrictions must be “construed strictly.” *Sidirououlos v. Greece*, 4 Eur. Ct. H.R. 500 (1998); *United Communist Party v. Turkey*, 4 Eur. Ct. H.R. 1 (1998).

The ambiguous and subjective grounds for denial provided by the Draft Law do not meet these strict limitations. Article 16.3’s grounds for denial are ambiguous and subjective, and leave broad discretion in the hands of government officials to determine whether an organization’s activities are problematic, thereby placing a burden on association.

In Western Europe and G8 countries, the grounds for refusal of registration of a non-profit organization are quite limited. In the United States, state registration officials deny registration where the articles of incorporation fail to contain the information required by law. In England and Wales, the Charity Commission registers organizations defined as “charities”; the Commission does not have discretion to deny registration, except where an organization fails to meet the basic legal requirements (such as the exclusive pursuit of charitable purposes). In Canada, registration authorities have no real discretion to deny registration except in the case of failure to meet basic legal requirements. Germany adheres to a similar principle, namely that the grounds for denial of registration (or, more correctly for Germany, acquisition of legal personality) of an association is limited to a failure to meet the basic legal requirements.

Article 12.4. It shall be prohibited to establish a nongovernmental organization whose name can mislead the population or if there is another nongovernmental organization with the same name.

**Discussion:**

Article 12.4 allows registration officials to deny registration if an organization's name would "mislead the population." This provision is too vague and can easily be manipulated by the registration body. As such, it raises concerns under ECHR Article 11 and ICCPR Article 22.

In the European Court case of *United Communist Party of Turkey and others v. Turkey*, the applicant political party claimed that its dissolution by the Turkish Constitutional Court violated the ECHR. That court had dissolved the party as being unconstitutional immediately upon its registration, because of the word "**communist**" in its name, but also because of drawing a distinction in its constitution and program between the Kurdish and Turkish nations, thereby allegedly promoting separatism. The European Court considered that a political party's choice of name cannot in principle justify a measure as drastic as dissolution, in the absence of other circumstances posing a serious danger. The Court found that the dissolution of the party was not proportionate, i.e. "necessary in a democratic society" for achieving the legitimate aim that the state claimed to pursue -- the interests of national security -- and the Court accordingly found a violation of Article 11 of the ECHR.

## **VI. Restrictions on an NGO's Activities**

Article 13.3. The charters of NGOs shall not provide for appropriation of state or local self-governed bodies, interference to these powers, as well as implying of functions of state control and revision.

### **Discussion:**

The Draft Law (Article 13.3) uses vague term 'interference,' which may lead to broad interpretation by the government and could become a dangerous ground for liquidation of an NGO. In all countries of the world with established democratic traditions, NGOs have a right to carry out a wide range of activities relating to public policy formation, including activities directed to promote legislative reforms, to oppose state policy on different issues, to participate as observers during elections or to assist the state in development of the policy in certain areas. If an NGO includes these types of activities in

its charter, could it be deemed to “interfere” with state or local government? If so, Article 13.3 would appear to impinge upon the rights of association and expression, protected by Articles 10 and 11 of the ECHR.

## VII. Minimum Capital for Establishment of Foundations

Article 12.1-1. The minimum nominal capital for the establishment of the foundation shall be fifty thousand manats.

### Discussion:

The requirement set forth in Article 12.1-1 will be a serious impediment for establishment and development of foundations in Azerbaijan (50,000 manats is approximately \$ 62,500 US) and could raise a barrier to development of corporate philanthropy.

In Europe, foundations are based on the Roman law concept of *universitas rerum*, requiring the designation of property for a particular purpose. The approach for determining what constitutes sufficient capitalization varies throughout Europe. Three approaches, however, are most common:

- (1) A fixed amount explicitly stated in law;
- (2) A general requirement that capital be sufficient to accomplish the foundation’s purposes;
- (3) No initial property requirement.

Among countries requiring a fixed amount of minimum capital at establishment, most countries require between 5,000 and 100,000 Euro. In several other countries, the law sets no fixed minimum capital amount, but instead requires that minimum assets at establishment be sufficient or appropriate to meet the foundation’s purposes. The trend among the recently acceding EU countries is not to require a fixed minimum endowment. Hungary and Poland, as well as Estonia, Latvia, Lithuania and Slovenia generally require that minimum assets be appropriate for the purposes of the foundation.

In Azerbaijan, where domestic philanthropy is limited, a minimum capital of 50,000 manats will discourage the creation of foundations. We would therefore recommend

consideration of either no or very limited fixed minimum capital for the establishment of a foundation.

### VIII. Restriction on NGO Economic Activities

Article 22.4. If more than 50% of the funds at disposal of an NGO are obtained as a result of commercial activity, NGO shall be transformed to a commercial organization on the basis of a written application of the relevant body of executive power.

#### **Discussion:**

Under Article 22.4, an NGO that obtains more than 50% of its funds from economic activity, apparently even for a single year, would be subject to losing its not-for-profit status. While it is appropriate for laws governing NGOs to place some limitations on their economic activity, Article 22.4 is not appropriately tailored and will burden the ability of NGOs to conduct economic activities to sustain themselves.

Laws permitting NGOs to engage in economic activities play a critical role in encouraging the sustainability of the NGO sector. Put quite simply, the income from economic activities is an important source of funding that allows NGOs to operate, pursue their statutory goals, and engage in services and activities in the public interest. Without the ability to subsidize public grants and private donations with earned income, many NGOs would not be able to function or grow. In some countries, private philanthropy is not sufficiently developed or economically feasible and public funds may be scarce and spread thin. Even where that is not true, there are likely to be NGOs that cannot tap such sources, due to the invisibility or unpopularity of their causes. Moreover, allowing service providing NGOs to subsidize their funding base with income from economic activities may enable them to provide more, better, and less expensive services, at a savings to both the government and the individual beneficiaries of the services.

Most countries broadly permit NGOs to engage in economic activities, but then use tax laws to insure that NGOs do not engage in economic activities to the extent that they become, essentially, commercial enterprises. But tax laws are not the only mechanisms that limit economic activities by NGOs.

At a very basic level, the ability of NGOs to act as commercial enterprises is limited by laws governing their registration and operation, which generally require that they be organized as not-for-profit organizations as defined by law, and must comply with the

non-distribution constraint. Thus, none of the organization's income, including profits from economic activities, may be distributed for the private benefit of any person.

Most countries impose additional restrictions. Their laws contain requirements designed to ensure that economic activity serves and supports, rather than becomes, the main purpose and activity of an organization. The most common restriction adopted in the laws of the region is that all income from economic activities be used to support the statutory goals of the organization. Other laws require that economic activity be "incidental" or accessory to an NGO's primary purpose, and be "related" or in conformity with its statutory goals and activities. These requirements seek to ensure that economic activity is not pursued for its own sake.

Accordingly, most countries do not cap NGO economic activities. NGOs are permitted to engage in income-generating activities to support their non-profit purposes throughout Europe and North America, as well as in many countries in Latin America. Indeed, the NGO sector in 22 of the 34 countries studied in *The Johns Hopkins Comparative Nonprofit Sector Project* received more than 50% of its support from fees for services and goods provided. For example, in Colombia the percentage is 70%, in Brazil the percentage is 74%, and the United States the percentage is 57%.

Allowing NGOs broad discretion to engage in economic activities increases their ability to carry out successful programs. Evidence shows that when beneficiaries are charged fees for services or goods received (even if the fee is a nominal one), they place a higher value on those services or goods. Helen Keller International, for example, has found that when it charges people who had cataract operations for their post-operation eyeglasses, they wore them more often and lost them less frequently than had it given the glasses away for free.

We therefore recommend that the 50% cap on economic activities be eliminated from Article 22.4. We would pleased to provide further guidance on appropriate limitations on economic activities, as well as rules for taxation of income from such activities.

## **IX. New Burdensome Reporting Requirements and Sanctions for NGOs.**

29.5. The relevant body of executive power of the Republic of Azerbaijan shall carry out the control over NGO's observance of the legislation in the course of its activity. The procedure of realization of such a control shall be determined by the relevant body of executive power of the Republic of Azerbaijan.

### **Discussion:**

Laws regulating organizations have to strike the right balance between the government's right to receive information on the organization's activities and the organization's right to operate without government interference. Transparency and accountability should be the shared goals of the government and civil society. The unbounded discretion provided by Article 29.5 gives no guidance to implementing officials as to any limitations on the ability of officials to demand documents or carry out control over NGOs' activity, and could be subject to abuse.

The Draft Law increases the reporting burden on organizations by among other things requiring them to prepare and submit financial reports and Auditor's reports, in addition to currently required reports to tax authorities.

The new reporting requirements in the Draft Law are likely to have unintended consequences. We can look for precedents at similar reporting requirements introduced by the 2006 NGO Law in Russia. During the first two years of implementation of the Russian NGO law, the government authority in charge of enforcing and reviewing such reports failed to implement the new reporting requirements in a useful manner. Even though the efforts to enforce the Russian NGO law were accompanied by a substantial increase in the staff of the Ministry of Justice, which required new budget expenditures, the additional staff was unable to digest the "tsunami" of information received from NGOs or to enforce the submission of all these reports by thousands of NGOs. At the same time, many NGOs failed to submit reports for a variety of reasons, including because they never received information about new requirements and lacked the capacity to prepare such reports. In recognition of these facts, the Russian Ministry of Justice has

now prepared a set of revisions substantially simplifying the reporting requirements enforced in 2006.

Article 31.6. If NGO fails to submit within the deadlines an annual financial report along with the auditor's report, the relevant body of executive power can, by means of writing a written warning to the organization, issues an instruction to submit the relevant report and auditor's report within 30 days. If the report and auditor's report are not submitted within this period, the relevant body of executive power shall address the court for liquidation of an NGO.

### **Discussion:**

Articles 29.4 and 31.6 of the Draft Law require all NGOs to submit not only financial reports but also Auditor's report. These provision may create practical problems, as many NGOs in Azerbaijan cannot afford a full time staff, and therefore may not be able to hire a skilled accountant and other personnel needed to prepare an annual financial report. In addition, auditor's reports are usually extremely expensive, and small grassroots or community based NGOs may not be able to afford an auditor.

An NGO may be required to have its financial statements audited by an independent accountant if it receives public funding (e.g. in France, associations which received at least €150,000 of public funding annually must establish a balance sheet and statement of income according to specific accounting standards and have those financial statements audited by an certified professional). The requirement of audited financial statements may be linked to the size of the organizations (e.g. in Belgium for associations and foundations above a certain number of full time employee or level of gross income or assets).

At a minimum, Articles 29.5 and 31.6 should be revised to exempt small NGOs, particularly those that receive no public funding, from the reporting and auditing requirements.

Article 31.6 also provides for liquidation of an NGO that does not file its reports after a

warning. This sanction is much more severe than that imposed on commercial organizations that fail to report. By comparison, failures to submit financial reports under the Azerbaijan Code on Administrative offences is punishable by fines, not by liquidation of a legal entity.

Article 10.4. Once the public association passes the state registration, within 30 days it shall ensure that the registry of members is conducted and the information about this registry is submitted to the relevant body of executive power within 15 days. Public association shall within 15 days inform the relevant body of executive power of the changes made to the registry of members.

### **Discussion:**

Both the ICCPR and the ECHR protect the right to privacy. The ICCPR, Article 17, provides that:

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- (2) Everyone has the right to the protection of the law against such interference or attacks.

The ECHR, in Article 8, also enshrines the right to privacy:

“Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.”

The European Court of Human Rights has interpreted the scope of the right to privacy in numerous decisions, stressing that it protects "a right to identity and personal development, and *the right to establish and develop relationships with other human beings* and the outside world and it may include activities of a professional or business nature." Leading European scholars have argued that privacy claims:

can arise against obligations to supply government authorities with

(possibly) confidential data, such as *names and addresses of donors* of the organization, *or a list of members*. Obviously, obligations of this nature may be, in a climate of political unrest, particularly detrimental to organizations with (unpopular) advocacy purposes.

The requirement of Article 10.4 of that NGOs submit to the government a registry of all members infringes on their right to privacy, and will likely deter some individuals from joining NGOs. For these reasons, the requirement should be eliminated.

## **X. Transitional Provisions.**

The provisions of the present Law shall also apply to nongovernmental organizations which passed the state registration prior to the entry into force of the present Law.

Nongovernmental organizations which passed the state registration prior to the entry into force of the present Law shall adjust their activities as well as founders to the requirements of the present Law.

The state registration of nongovernmental organizations which do not adjust their activities to the requirements of the present Law within 1 year since the entry into force of the present Law, shall be liquidated by court on the basis of the application of the relevant body of executive power.

**Discussion:**

As we see from the Transitional Provisions, this Draft Law will be retroactive and all NGOs who were registered prior to the entry into force of these changes will have to follow its provisions in fear of possible liquidation through the court. Adjustment of activities or founders as required by the Transitional Provisions would lead to change in the statutory documents of an NGO and changes to the statutory documents need to be registered with the Ministry of Justice. However, this procedure is more simple than re-registration of NGOs and takes only 5 working days.

## **XI. Conclusion.**

Analysis of the Draft Law shows that proposed amendments to the NGO Law of Azerbaijan are a step back in building the civil and democratic society. The proposed amendments contradict the ICCPR and other major international human rights treaties. They are discriminative, or/and they limit the rights of NGOs, and individuals who are founders and members of NGOs.

Adoption of proposed amendments will lead to inevitable applications to the European Court of human rights and UN Committee on Human Rights, which will likely embarrass the Republic of Azerbaijan before the world community. In a worst-case scenario, the Law may result in refusals by international donors to lend external economic assistance, which is granted only to the countries with democratic regimes.

ICNL appreciates the opportunity to comment on the proposed amendments to the Law of the Republic of Azerbaijan “On Non-governmental Organizations (Public Associations and Foundations)”. We would be pleased to provide additional reference materials and follow-up technical assistance to the extent that this would be helpful for Azerbaijan civil society organizations, members of parliament, and government and ministry officials.