



International Center for Not-for-Profit Law

1126 16th Street NW, Suite 400

Washington DC 20036

202-452-8600,

202-452-8555 (fax)

www.icnl.org

USAID'S CIVIL SOCIETY PROJECT¹

Analysis of the Law of the Republic of Azerbaijan On Making Changes and Amendments to Some Legislative Acts of the Republic of Azerbaijan

September 8, 2009

The International Center for Not-for-Profit Law (ICNL) is pleased to present this analysis (the “Analysis”) of the Law² of the Republic of Azerbaijan On Making Changes and Amendments to Some Legislative Acts of the Republic of Azerbaijan (hereinafter referred to as the “new law”), which came into effect on September 1, 2009 (the date the new law was published in the official newspaper *Azerbaijan*).³ This new law introduces changes and amendments to four laws, including the Law on Non-governmental Organizations (Public Associations and Foundations) (hereinafter the “NGO Law”), the Law on Mass Media, the Law on Grants and the Code of Administrative Offences. This Analysis focuses on amendments to the NGO Law.

¹ The Civil Society Project is an initiative of the United States Agency for International Development (USAID), implemented by Counterpart International in partnership with the International Center for Not-for-Profit Law (ICNL). The goal of the Civil Society Project is to assist the citizens and government of Azerbaijan to develop a dialogue while working towards the creation of a more representative and better-functioning democracy.

² The new law was adopted by the Parliament (Milli Mejlis) of the Republic of Azerbaijan on June 30, 2009, and signed into law by the President of Azerbaijan on August 27, 2009.

³ Article 98 of the Constitution of the Republic of Azerbaijan.

ICNL's Analysis of the Law of the Republic of Azerbaijan On Making Changes and Amendments to Some Legislative Acts of the Republic of Azerbaijan

September 8, 2009

It is important to acknowledge that the new law omits many restrictive provisions included in the initial draft law, which was submitted to the Parliament by one of its committees in June 2009.⁴ Nonetheless, it is difficult to view the new law as an improvement over the existing regulatory environment for NGOs in Azerbaijan. Certain provisions added in the new law codify existing practices (e.g., providing explicit permission for NGOs to have a flag, emblem, or other symbol, which NGOs have utilized prior to this law; and clarifying that there is no requirement to register branches and representative offices of NGOs, while NGOs were not required to register their branches prior to this law). Other provisions in the new law, e.g., in regard to restriction of the use of the titles of state bodies and names of prominent individuals in the titles of NGOs, will not impact the vast majority of NGOs.

As further set out below, a few provisions in the new law will affect both Azerbaijani and foreign organizations carrying out activities in Azerbaijan. In general, it is difficult to forecast at this time all of the possible ramifications of the new law, as much will depend on how its provisions are implemented. For example, the new law includes a number of ambiguous provisions that may require elaboration in regulations yet to be promulgated. In addition, the development of appropriate regulations, forms, and guidelines could alleviate some of the perceived burdens imposed upon civil society. Further information concerning implementation of the new law will be crucial to a complete assessment of its impact.

There are two primary issues of concern with the new provisions:

1. Introduction of new but undefined financial reporting requirements for Azerbaijani NGOs may create a substantial administrative burden to NGOs.
2. Institutionalization of the requirement that foreign NGOs operating in Azerbaijan may only operate in Azerbaijan on the basis of an agreement negotiated with a government agency without clear guidance and criteria for the agreement.

Additionally, there are several provisions that may potentially violate Azeri and international obligations and have a negative effect on NGOs, including the following:

- Only foreigners and stateless persons who permanently reside in Azerbaijan may establish NGOs.
- NGO charters may not provide for appropriation of powers of state and local self-governing bodies, and may not assume functions of state control and inspection.
- Public associations must establish a registry of members.
- A foundation must provide minimum required capital (endowment) of ten thousand manats (about 12, 500 USD).
- NGOs and their managers may be held liable for failure to submit reports to authorized government bodies.

⁴ ICNL's Analysis of Proposed Amendments to the Law of the Republic of Azerbaijan On Non-governmental Organizations (Public Associations and Foundations) dated June 12, 2009, is available upon request.

- NGOs must bring their charters in compliance with the new law.

Below, we provide a detailed analysis of the provisions of greatest concern to civil society, followed by a brief analysis of other potentially problematic provisions. Because the application of the new law will present a number of interesting questions, we will not only discuss the international and comparative analysis of the text, but also consider the practical consequences of these provisions for Azerbaijani civil society. We will first summarize selected provisions of the new law, then present an analysis of the provisions and their potential consequences.

1. New Financial Reporting Requirements for NGOs.

Article 29.4 of the new law states that “*A non-governmental organization shall submit an annual financial report to the relevant body of executive power of the Republic of Azerbaijan no later than April 1st of each year. The form, content and procedure of submission of these reports shall be determined by the relevant body of executive power.*”

Analysis

The new requirement to submit an annual financial report supplements existing tax reporting requirements. The new law contemplates that regulations will be issued establishing the reporting procedure, but does not specify what should be included in the reporting procedure, other than that it should provide for “form, content and procedure of submission.” The Cabinet of Ministers of Azerbaijan is responsible for developing the relevant procedures and forms within two months (by October 28, 2009).⁵

One of the principal concerns about the new law is that it vests the government with authority to collect information that does not appear to be tied to any specific regulatory goal articulated in this or other laws. For example, when an organization receives tax benefits, such as exemptions, it is certainly reasonable for the state to seek a report on to the use of these benefits. Similarly, where the state has provided funding to an organization through grants or contracts, it may seek reporting to ensure that the funds are used appropriately and in accordance with the purpose for which they were provided.

By contrast, the new law requires that all NGOs provide an undefined range of financial information, in addition to information that they already submit in tax reports. The new law does not attempt to tie this requirement to a particular regulatory purpose, and does not give any indication of how the regulatory authorities may interpret or use the information. For example, suppose that upon review, the authorized government determines that a public association is receiving grant funds from the Eurasia Foundation. Is it permitted to give warnings or otherwise

⁵ Section 1 of the Decree of the President of the Republic of Azerbaijan On implementation of the Law of the Republic of Azerbaijan ‘On making changes and amendments to some legislative acts of the Republic of Azerbaijan’ dated August 27, 2009.

question the public association regarding its sources of funding, and if so, on what authority, given that there is nothing illegal or improper about the funding source on its face? How does the new reporting relate to the information that the government already receives through its tax reports? These will be issues of concern not only to NGOs, but also to the government itself. In addition, processing new reports, as well as enforcing new reporting requirements, would certainly require substantial expenditures of the state budget.

We hope that the new regulation will not be overly burdensome, and that it would provide for the availability of less burdensome means of reporting for small organizations, as well as for the availability of exemptions from the requirement for small amounts of funding. A regulation that addresses these issues might ameliorate some of the burden of complying with the requirement imposed on both the government and the NGO community.

We are also concerned that the financial reporting requirement may have unintended consequences. If overly burdensome, it may make many NGOs into unintentional violators of the new law. Further, government bodies may find themselves unable to process all of the information received through the new financial reporting requirement, or to adequately enforce implementation of the new provisions, creating grounds for selective prosecution of NGOs and for corruption.

2. State Registration of Branches and Representative Offices of Foreign NGOs.

Article 12.3 of the new law provides that “*State registration of branches and representative offices of foreign NGOs in the Republic of Azerbaijan shall be carried out on the basis of an agreement signed with such organizations.*”

Analysis

In addition to the standard registration procedures, the new law requires a foreign NGO and the Ministry of Justice⁶ to reach agreement in order for such foreign NGO to operate in Azerbaijan. This requirement is highly unusual in international practice. It potentially allows for restriction of the freedom of association and subsidiary rights, as well as for unlimited governmental discretion, which might result in rise of government's corruption and harassment of foreign NGOs. The uncertainty about whether a foreign NGO might be able to legally operate in Azerbaijan could have a chilling effect on the activities of foreign NGOs, including humanitarian NGOs, resulting in reduction of assistance in vital social areas, such as poverty reduction or refugee assistance.

This new provision continues and extends the existing practice of *ad hoc* registration of foreign NGOs. According to some foreign NGOs that have tried to register in Azerbaijan, the current

⁶ Section 2.2 of the Decree of the President of the Republic of Azerbaijan On implementation of the Law of the Republic of Azerbaijan ‘On making changes and amendments to some legislative acts of the Republic of Azerbaijan’ dated August 27, 2009.

registration process is long and the results are unpredictable. Based on this poor experience, we hope that there will not be further deteriorations in the procedure for registration of foreign NGOs. Unfortunately, the new law does not provide guidance on negotiating such an agreement; nor does it provide definitive criteria that, if met by the foreign NGO, would require the authorized government agency to conclude such an agreement. Remarkably, the Presidential Decree On implementation of the Law of the Republic of Azerbaijan 'On making changes and amendments to some legislative acts of the Republic of Azerbaijan' also fails to require the establishment of a procedure or publication of criteria relating to registration and legalization of foreign NGOs.

Most countries in Europe and the G8 have established procedures to facilitate the operation of foreign NGOs. 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 must submit a declaration to the prefecture (the 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,⁷ neither registration nor notification is required. We hope that the government of Azerbaijan will take another look at the registration procedure for foreign NGOs, taking into account these practices, and establish a clear and simple procedure in Azerbaijan.

3. Other new provisions with potential negative effect on NGOs include:

- **Only foreigners and stateless persons who permanently reside in Azerbaijan may establish NGOs.⁸**

Barring foreigners and stateless persons from establishing NGOs contravenes Azerbaijan's obligations under international law, specifically the European Convention on Human Rights ("ECHR"). The provisions of the ECHR are secured to "everyone within the jurisdiction" of the member-states. Thus, a foreigner or a stateless person may not be excluded from the fundamental rights protected under the Convention. Moreover, the proposed discriminatory provisions contained in the new 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:

⁷ This Convention of 1986 was ratified by 11 state-members of the Council of Europe as of September 2009.

⁸ A more detailed analysis of why this provision contradicts international law is provided in ICNL's Analysis of Proposed Amendments to the Law of the Republic of Azerbaijan On Non-governmental Organizations (Public Associations and Foundations) dated June 12, 2009 (updated on June 16, 2009). It is available upon request.

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. (Article 58.)

As a general rule, any natural or legal person may establish and participate in an NGO in European or G8 countries.

Potential consequences for existing NGOs. The new law does not address specifically the obligations of existing NGOs with foreign founders. Under the law, the founding documents of NGOs are required to identify the founders. We leave to Azerbaijani experts with greater experience in the Azerbaijani law to opine on whether this provision can be applied retroactively. On its face, it would appear that the restriction on foreign founders cannot be applied retroactively, since the founding of an organization is an historical act that cannot at this point be changed. The only other alternative would be the involuntary liquidation of the many organizations with foreign founders already in existence, which is clearly a drastic solution to the problem, and should be avoided.

- **The new law requires that NGO charters may not provide for appropriation of powers of state and local self-governing bodies, and may not assume functions of state control and inspection.**

It is unlikely that an NGO charter would state that it “appropriates, or otherwise, deprives” a certain government body of its authority. Instead, the issue of concern is when an NGO charter would include reference to activities that also fall under the competence of state and/or local self-governing bodies. Some powers of state and local self-governing bodies are very broadly defined, and may not exclusively be “state” or “governmental” in nature. For example, the power to conduct public hearings, or the power to review the actions government bodies actions to determine whether they are in compliance with the law. These are the legally permissible activities that are the core purpose of many watchdog and advocacy groups. We hope that this provision of the new law will not be used to limit the activities of NGOs.

- **The new law requires that public associations establish a registry of members.**

Article 10.4 of the new law states that “[o]nce the public association completes state registration, within 30 days it shall ensure that the registry of members is created.” On the surface, this provision is not problematic. In fact, the matter of establishing and maintaining an up-to-date registry of members is often a matter of good governance for many associations. Our concern is based on the fact that such matters are internal to the association itself, and not generally of concern to the government, as long as some specific law requirements are met. For example, it would be reasonable for the authorized government body or court to demand that an association provide evidence that the number of the members meets the legally-established minimum number of required members.

The legal provision in article 10.4 does not directly provide government access to the registry. However, it is difficult to imagine how else an association would demonstrate that this requirement has been met. Communicating members' personal information contained in the registry can be a problem. Registries established by various associations might contain varying types of information about their members. Some such information might not be appropriate to disclose to the government (i.e. the names of members of the association of HIV-positive individuals). Members may not be interested in identifying themselves to the government. These are some of the reasons why the registry *per se* should not be a governmental concern.

- **A foundation must provide minimum required capital (endowment) of ten thousand manats (about 12, 500 USD).**

The requirement that a foundation establish an endowment of ten thousand manats (Article 12.1-1 of the new law) certainly limits the availability of the foundation as a legal organizational form, and thus makes the foundation less democratic. Fewer will be able to establish such a form. However, this approach is acceptable as long as there are other legal organizational forms of NGOs that allow individuals to freely and easily establish NGOs. In Azerbaijan, as long as the registration process for public associations remains simple and accessible to everybody, the special requirements for establishing a foundation might be acceptable.

We are also concerned that the new requirement is not accompanied by exemptions for certain foundations under the tax laws. While several European countries require a certain minimal endowment for foundations, such requirement is usually accompanied, for example, by special exemptions from income tax for founders contributing into the endowment, and/or by income tax exemptions of the foundations' investment income generated from the use of the endowment. We recognize that tax preferences are not addressed in the NGO Law, but in the tax laws. We hope that Azerbaijani legislation will continue the chosen path, and, after introducing the new requirement for an endowment minimum, will introduce new incentives for establishing such foundations. Otherwise, we fear that the legal organizational form of a foundation will not be utilized.

- **NGOs and their managers may be held liable for failure to submit reports to authorized government bodies.**

Article 31 of the Law states that:

31.2-1. An NGO shall be warned for failure to submit necessary information for the state registry of legal entities or submission of false information.

31.2. In case of actions contradicting the objectives of the present Law, the relevant body of executive power (the Ministry of Justice of Azerbaijan) may in writing notify the NGO or instruct the latter to remove the violations.

31.3. An NGO has the right to appeal to court against such notification or instruction.

31.4. In case an NGO is notified or instructed in writing on removal of violations more than twice a year, the NGO may be liquidated under a court order.

31.5. The activity of an NGO that impedes liquidation of circumstances of the state of emergency may be suspended according to the procedure prescribed by law.

31.6. If an NGO fails to submit within the deadlines an annual financial report, the relevant body of executive power may, by means of writing a written warning to the organization, issue an instruction to submit the relevant report within 30 days. A non-governmental organization that fails to submit the report within this period may be held responsible in accordance with the legislation of the Republic of Azerbaijan.

Other than sections 31.2-1 and 31.6, Article 31 is not a new article, and has been in place since adoption of the new law. The failure to submit a financial report, as newly required, may be penalized in accordance with the legislation of the Republic of Azerbaijan. In particular, the law amending the Code of Administrative Offences (Article 36.1) establishes a penalty for the manager of an NGO that failed to submit a financial report. It is not clear from the text of the law whether a written warning by the Ministry of Finance addressed to an NGO will count against the two written notifications required in Article 31 before the Ministry of Justice can proceed with the liquidation of the NGO based on a violation. It is also not clear whether the warning by the Ministry of Finance may be appealed to court.

Thus far, we are not aware of many instances in which Azerbaijani government agencies (the Ministry of Justice or the Ministry of Finance) have applied the sanction of liquidation of NGOs set out in Article 31. We hope for continued restraint in this area. The sanction of applying to a court to liquidate NGOs based on the mere fact of non-submission of some information, even if repeated, is not justified under international law and best practices.⁹

- **Need to bring charters of registered NGOs in compliance with the new law.**

Registered NGOs will not be required to re-register under the law. However, it is expected that they will be required to bring their founding documents into compliance with the new law's provisions. If so, this requirement is likely to affect many organizations, and all organizations will need to review their documents in order to determine whether changes may need to be made. For example, all registered foundations will most likely need to increase their endowment in order to bring it into compliance with the new law.

Neither the NGO Law nor the Presidential Decree establish the term within which NGOs must bring their founding documents into compliance with the new law. We hope that the compliance timelines eventually set by the Azerbaijani government will be reasonable.

⁹ A more detailed analysis of why this provision contradicts international law is provided in ICNL's Analysis of Proposed Amendments to the Law of the Republic of Azerbaijan On Non-governmental Organizations (Public Associations and Foundations) dated June 12, 2009 (updated on June 16, 2009). It is available upon request.