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SITUATION WITH THE RIGHT TO ASSOCIATION – IN NGOS EXAMPLES

REPORT

On analysis of the legislation

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I. REGULATION OF FREEDOM OF ASSOCIATION IN THE CONSTITUTION OF THE REPUBLIC OF AZERBAIJAN

Article 58 of the Constitution of the Republic of Azerbaijan adopted in 1995 which is “Right to association” states that everyone has a right to join other people. And that shows that any legal or physical person has this right, can enjoy it and that this right is provided by the Constitution. Paragraph 2 of the Article says that “Everyone has the right to establish any union, including political party, trade union and other public organization or join the existing organizations” and shows that the scope of right to association is broad. This includes establishment and activity of the political parties, establishment and activity of the trade unions, establishment and activity of any other union in any form and therefore, adheres to the frames of the classic right to assembly.

The Constitution also guarantees and emphasizes free activity of the unions established within the frameworks of the right to assembly.

Paragraph 3 of Article 58 of the Constitution to emphasize volunteerism of freedom of assembly states that “Nobody may be forced to join any union or remain its member” that implies that it is unacceptable that people are joined or remain members against their will.

Paragraph 4 - “Activity of unions intended for overthrow of legitimate state power by force on the whole territory of the Republic of Azerbaijan or on any of its part is prohibited” determines the limit of assembly from the purpose point of view. The only legitimate purpose that gives a ground for the restriction of the freedom of association is “overthrow of legitimate state power by force” and that clearly shows tracks of 2 overthrows of power and 1 attempt to overthrow the power that occurred between 1991 when the country gained its independence and November 1995 when the Constitution was adopted and only relatively corresponds to one of four different grounds mentioned in paragraph 2 of Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the end of paragraph 4 it is said that activities of the unions may be terminated only with court decision and no executive or any other institution has such an authority.

By ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms in 2001 Azerbaijan undertook to guarantee a right to freedom as set in Article 11. According to this article

1. Everyone has the right to freedom of peaceful assembly and 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.

As it is seen part I of the article describes what freedom of association is and part II clarifies based on which grounds and conditions these freedoms may be restricted.

The most serious problem with implementation of freedom of association is that sometimes legal grounds that are given as reasons for restrictions dominate over freedoms and during application the official institutions accept not freedom but restriction as a ground to eliminate freedom.

Article 11 of the Convention expresses a limited number of cases when the state may limit the determined freedom. They are limited because those cases are concrete and may not be broadened by interpretation. That is something that needs to be especially understood. Azerbaijan is one of the member states that adopted the Convention and that must apply jurisdiction of the European Court of Human Rights must understand this practice both with our institutions that implement the legislative activity and the executive bodies that have to apply these laws and international legal rules. In short, Azerbaijan like any state that joined the Convention when restricting right to freedom of assembly must not base on reasons other than those listed here and must not broaden those reasons as that was undertaken as a national responsibility.

Due to that freedom of assembly may be restricted only based on reasons given in part 2 of Article 11 of the Convention. Those include:

- *in the interests of national security or the public safety;*
- *for the prevention of order or crime;*
- *for the protection of health and morals;*
- *for the protection of rights and freedoms of others.*

Last sentence of Part 2 of Convention 11 - 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” shows to the member states people engaged in which category of professional activity may have freedom of assembly to be restricted. The logics behind this restriction is that persons that work in the armed forces, police and administration of the state first of all administer the activity of the state institutions and with this function to come together for some other reason is supposed to be contradicting the state administration and security.

It is not possible to restrict people’s right to assembly by any other reason than the ones mentioned above. For example, calling “lawful” reasons like workload of the state institutions, lack of sources or other reasons not clearly stated in part 2 of article 11 for restricting freedom of assembly and putting restrictions are unacceptable. As article 11 of the Convention not allowing to give such additional reasons defines very clear framework.

Article 58 of the Constitution of 1995, makes no provision for any other legitimate purpose which may be ground for restriction of freedom of association.

Difference of Constitution of the Republic of Azerbaijan from the European Convention for the Protection of Human Rights and Fundamental Freedoms is not only in the fact that it does not provide a wide list of grounds that limit freedom. Another difference is that, when in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms freedom of association and freedom of assembly are expressed together, in Azerbaijan Constitution these two rights are regulated in separate articles. Article 58 protects rights for association and article 49 guarantees freedom of assembly.

If a provision regulating freedom of association of the Constitution was legitimized in such a way and either opportunities to associate or to implement its activities were reflected on the same bases in laws, then perhaps we did not talk about any problem.

However, Constitutional Law, which was not in the text of the Constitution of 1995, but later was considered as having the same legal force with the Constitution, is one of the first documents creating problem in this direction. In fact, in Article 71 of the Constitution there is a clear expression in provisions reflecting guarantees of human rights and freedoms: “To observe and to protect rights and freedoms of a human being and citizen specified in the Constitution is a responsibility of bodies of legislative, executive and legal powers”. In addition, in that article it is clearly expressed that, no one may restrict implementation of rights and freedoms of a human being and citizen. The existence of these provisions mean that all three branches of government, particularly the legislative body, cannot create laws of any form based on their political opinions, and during adoption of laws they do not have freedom to determine framework more narrowly than determined by the Constitution. However, despite such clear provisions, the legislative body that adopted the Constitutional Law, led to new restrictions by adopting provisions restricting the implementation of human rights and freedoms.

Article 71 of the Constitution provides a general basis for limiting not only right of association, considered in article 58, but also overall implementation of rights and freedoms of a human being and citizen, enshrined in the Constitution. This basis was expressed as “announcement of war, martial law and state of emergency, and also mobilization”. For application of this basis a condition “taking into consideration international obligations of the Republic of Azerbaijan may be partially and temporarily restricted” was emphasized. So even in case of “announcement of war, martial law and state of emergency, and also mobilization” situation, restrictions must be temporal and international obligations of the country must be considered. In other words, commitments, accepted when becoming a member of the Council of Europe, as well as international legal norms, which turned into domestic legal documents by ratification must be protected.

Until the referendum, hold in August 2002, to adopt changes and additions to the Constitution, in front of this condition was the expression “only”, which was explaining that it is not possible to restrict rights and freedoms of a human being, enshrined in the Constitution on other bases and conditions at peaceful time.

On 24 December 2002, the Constitutional Law on regulation of implementation of human rights and freedoms in the Republic of Azerbaijan was adopted and new requirements on restriction of human rights and freedoms were laid out in this Constitutional Law. These requirements were not provided in the main text of the Constitution adopted by people through referendum in 1995.

According to article 3.6 of the Constitutional Law, along with the other grounds shown in the Constitution of the Republic of Azerbaijan, also rights and freedoms shown in Article 58 of the Constitution, may be restricted on the basis of the Law:

- *in the interests of the state security;*
- *for the protection of health and moral;*
- *for the protection of rights and freedoms of other persons;*
- *for the prevention of crime;*

- *for the prevention of disorder;*
- *for the protection of the public safety.*

According to Article 3.1 of the Constitutional Law, freedom of association, as well as human rights and freedoms provided in the Constitution of the Republic Azerbaijan and in international treaties, to which party Republic of Azerbaijan is, may only be restricted by law. This provision takes under guarantee that, during regulations on freedom of association, any branch of government, outside the legislative body, cannot lay the ground or apply any basis, not sourcing from the law.

Another requirement of article 3.3 of the Constitutional Law is a ban on change of essence of the human rights and freedoms by the restrictions imposed on those rights and freedoms. This is one of the main conditions preserving the essence of all rights and freedoms including freedom of association.

One of the guarantees of human rights and freedoms is provided in article 3.4. Restrictions to human rights and freedoms should be directed at a lawful purpose imposed in the Constitution of the Republic of Azerbaijan and in this Constitutional Law, and be proportionate to that aim.

At first glance regulations in the Constitution and in Constitutional Law which have the same legal force, seem normal and could be said that this path in national legislation was applied to bring them in accordance with the international regulations. However, when carefully compared, some contradictions arise and it is becoming clear that, main problems arise from these “small differences”.

Paragraph 1 of article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms says that everyone has the right of peaceful assembly, right to freedom of association with others, including freedoms of forming trade unions for protection of their own interest and to join them. Legal bases of restriction of freedom of association are given in paragraph 2 of that article. These bases are defined as: protection of national security and public safety, prevention of disorder and crime, protection of health and morals, and protection of rights and freedoms of other persons.

As it can be seen, legal bases for restrictions of freedom of association are defined approximately the same both in the Convention and the Constitutional Law. There is one difference – when in the Convention it is written for “national security interests”, in the Constitutional Law, restriction base is identified as “state security interests” in place of National security.

Other condition, “to be prescribed by law” is prescribed both in the Convention and in the Constitutional Law as requirement. Restriction of freedom of association is possible only by law.

When to compare Regulation of the European Convention for the protection of human rights and freedoms with the Constitutional Law on regulation of enjoyment of human rights and freedoms in Republic of Azerbaijan, as mentioned above a “small difference” as it could be seen but in essence what is important for realization of rights, is requirement of “necessity in democratic society”. According to the Convention, even in condition of existence of bases for restriction of freedom of association, “necessity in democratic society” does not make legitimate its application. To say figuratively, it means existence of any kind of product in storeroom, where to take those products is free but there is only one key of the storeroom which is a “necessity in democratic society”. If you have this key, you can get products, otherwise it is not possible.

Even if legal reasons for restriction of all rights and freedoms, in the Constitutional Law on regulation of implementation of human rights and freedoms in Republic of Azerbaijan are in accordance with the bases provided in the Convention, requirement of “necessity in democratic society” during application of restrictions, can be characterized as a serious problem.

II. FREEDOM OF ASSOCIATION IN INTERNATIONAL DOCUMENTS

2.1 Documents of United Nations

Article 20 of the United Nations' (UN) Universal Declaration of Human Rights, dated December 10, 1948 covers freedom of association. According to it “Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association”. The article gives the right to establish circles and at the same time considers not to be compelled to join these circles. In the continuation of the article, legal bases of possible restrictions to use this right are given. For protection of state security, for protection of public safety and security, for protection of health and morals, or for protection of rights and freedoms of others, this right may be restricted in size necessary in democratic society. But it is noted that, any other restriction regardless of this framework is unacceptable. Right to form trade unions is protected particularly, in paragraph 4 of article 23 of the Declaration: “Everyone has the right to form and to join trade unions for the protection of his interests”.

There is a provision: “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”, in paragraph 1 of article 22 of the International Covenant on Civil and Political Rights, adopted by the UN resolution dated 16 December 1966. In this article, right of association is determined in a wide coverage and use of all rights of association including trade unions is embraced. Conditions and legal bases of restrictions to this right are given in paragraph 2 of this article: “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, the protection of public health or morals or the protection of the rights and freedoms of others”. At the end part of the paragraph 2 of the article, it is noted that: “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”.

Article 8 of the International Covenant on Economic, Social and Cultural Rights, adopted by the UN resolution dated 16 December 1966, attracts attention to social oriented part of right of association and regulates in a wide coverage right to form trade unions: “The right of everyone is to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.” No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of

national security or public order 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 or of the police or of the administration of the State.”

Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations (UN) General Assembly on 18 December 1979, imposes countries that joined this Convention to take measures on providing women to join non-government organizations and associations according to political and social life of the country.

Article 15 of the UN Convention relating to the Status of Refugees dated 28 July 1951: “As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances”.

III. FREEDOM OF ASSOCIATION IN THE DOCUMENTS OF THE REGIONAL LEVEL

In American Declaration of the Rights and Duties of Man, adopted on 2 May 1948, right of association is given in article 22: “Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labour union or other nature”. As it is seen from the meaning of the article, freedom of association was described in a wide coverage and included both freedom of association in political interests and freedom of association in trade unions, and freedom of association in other interests.

According to article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted on 4 November 1950 and entered into force on 3 September 1953 and entered in the list of legal documents in our country after ratification by Republic of Azerbaijan on 15 April 2002: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”. Even a right to association in political organizations is not given in a lucid style; it is clearly seen from practices of member countries that, this definition includes right of association in political interests. In the second part of the article bases and conditions of restrictions to right of association are given: “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.”

Right of association is given in paragraph 1 of article 10 of the African Charter on Human and Peoples' Rights, adopted on 29 June 1981: “Every individual shall have the right to

free association provided that he abides by the law”.

In the part named “Human Rights, Democracy and Rule of Law” in Charter of Paris for a New Europe of the Conference on Security and Co-Operation in Europe, dated 21 November 1990, it is noted that everyone have right of organization. Under the same heading in the Charter it is also noted that everyone has right to benefit public rights. The part named “Non-governmental Organizations” of the Charter reminds of the significant roles of non-governmental organizations, religious and other groups and individuals played in the achievement of the objectives of the OSCE.

Article 12 of the Convention on Constitutional Rights of the European Union, adopted on 13 October 2000, provides that, everyone has freedom of association, and it has become a mandatory document for the EU countries.

IV. CRITERIA OF RESTRICTION OF FREEDOM OF ASSOCIATION BASED ON THE EUROPEAN CONVENTION FOR HUMAN RIGHTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, which interprets the Convention together with decisions, has established the most important and functional framework to investigate restrictions on freedom of association of the civil society.

Firstly, if to look at the issue within the framework of article 151 of our Constitution, we see that the European Convention for the Protection of Human Rights and Fundamental Freedoms has more superior legal force and direct effect than our legislations. From standpoints of both civil law and state law, decisions of the European Court of Human Rights can be reason for review or corrections of decisions of local courts. That is why superiority of the Convention is being accepted unquestionably. In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has defined in exact criteria, grounds and conditions of restrictions of freedom of association. These criteria should be taken into account by legislative and executive bodies of our country, either legal framework, or application should be reformed in this framework.

While investigating these rights, it is necessary to ground on exact coverage defined by decisions of the European Court of Human Rights within the framework defined by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Freedom of assembly and association has been taken under guarantee in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to this article:

1. Everyone has the right to freedom of peaceful assembly and 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.*

As it is seen, in the first part of the article the meaning of freedom is described and in the second part grounds and conditions of restrictions of this right is explained. The most serious problem in implementation of freedom is, sometimes putting the situation that is a ground for restrictions before the freedoms and during application by official bodies they don't take freedom but a restriction as a basis and work on removal of freedoms.

Article 11 of the Convention expresses a limited number of cases, when states can restrict defined freedoms. The number of cases is limited because these cases are concrete and cannot be extended by interpretation. Because, Azerbaijan as a member country, which has adopted the Convention and must apply legislation of the European Court of Human Rights, both our organizations implementing legislative activity and executive bodies which should apply these rules and international legislative norms must correctly master this practice. Shortly, as any country that adopted this Convention, Azerbaijan must not ground on other reasons not given here or expand these reasons as Azerbaijan undertook it as a national obligation.

From this reason, only restrictions given in the second part of article 11 of the Convention can be applied to freedom of association. These are:

- *in the interests of national security or public safety ;*
- *for the prevention of disorder or crime;*
- *for the protection of health or morals;*
- *for the protection of the rights and freedoms of others.*

It is not possible to restrict freedom of association by other reasons. For example, it is inadmissible within this framework to give "legal reasons" for registration of freedom of association for reasons like work load of state bodies, lack of source, or other reasons not shown in the 2nd part of Article 11 of the Convention for restriction of freedom of association because according to the article 11 of the Convention it is inadmissible to give this kind of additional reasons.

For all the cases brought to the European Court of Human Rights, the court applies the following tests to define if the country against which the case is brought has violated the Convention or not.

- 1) firstly, if is it possible to apply the article 11 for moot case?
- 2) was there any interference based on the article 11?

If the European Court of Human Rights decides that the case passed these two tests, then the interference should be analyzed if:

- a) the interference is envisaged by the law or not;
- b) it conveys a lawful purpose or not;
- c) it is necessary in democratic society or not.

At the same time, the following tests are also applied whether:

- it is sourcing from public need or not;
- the envisaged sanction is proportional to lawful purpose or not.

Interference

Freedom of association and assembly, guaranteed in article 11 of the Convention can be restricted only in conditions and reasons given in the second part of the article. If any restriction is not in accordance with the second part, then it will be considered as breach of the article 11 of the Convention. But before defining if restriction is in accordance with the second part of Article 11, it is necessary to define if there is any interference to freedom of association or not. Generally, it is not difficult to define existence of interference. Any action or operation restricting formation or activity of organization can be considered as interference. In this situation, the fundamental principle related to human rights and freedoms is being taken as basement. In other words, freedom is basis, restriction is only exception. Any step restricting freedom is interference.

To be prescribed by law

If the European Court of Human Rights defines any interference to freedom of association, it analyses existence of legal basis of this interference. To be mentioned by law means existence of ground of this interference in internal legislation. But, it is not possible to talk about satisfaction of one legal ground. The European Court of Human Rights clearly notes necessity of existence of certain characteristics of legal means, on which interference grounds, with precedents it created.

As the European Court of Human Rights noted in case “Rekveyni vs. Hungary”, “to be prescribed by law” means not only measures to have basis in internal legislation but also this legal regulation to be approachable for related persons.

In other words, legislation should be accessible and clear; people will be informed about existence of norm (e.g. availability of the published text) and will understand meaning of these regulations, if needed with lawyer's help. If legislation restricting the freedom of association does not have these characteristics, then interference will be considered as not mentioned by law and will be indirectly announced as breach of Article 11.

Lawful purpose

After defining if interference is mentioned by law or not, the European Court of Human Rights will try to find if restriction is on one of the lawful purposes given in the second part of Article 11 or not. As mentioned above, lawful purposes, on which restrictions could be grounded are given in a

limited number in the second part of Article 11. So, it is not possible to extend them or add new ones to them.

But it should be emphasized that in concrete event, defining that the European Court of Human Rights refers to one of these lawful purposes will automatically mean that the court came to the conclusion that interference is in accordance with Article 11.

If interference is based on one of these legal aims, then the European Court of Human Rights will apply “on the spot” – “adequacy” test, that is, will look if there is a balance between pursued legal aim and applied restriction.

Necessity in democratic society

After the Court comes to conclusion that, interference is based on one of the legal aims given in the second part of Article 11, it will investigate if this interference or restriction is necessary in a democratic society. The Court expressed this condition in the following way: “The only type of necessity capable of justifying interference to any of these rights can be “necessity in democratic society”.

“Necessity in democratic society” is expressed in two conditions:

- a) existence of serious and necessary public pressure
- b) interference should be adequate to the considered lawful purpose.

Necessity – social and public pressure

According to the Court precedent, “necessary” means “pressing social need”. In other words, from view of point of one or several of aims defined in the second part, interference to freedom of association will answer to “pressing public need”; from this need, government will earn.

The main criterion during evaluation of overstep of the “necessity” borders by the country that adopted the Convention, is whether an action restricting rights and freedoms is proportional to the pursued purpose, in other words, can it be measured.

Even if a test on lawful purpose and legality criteria to evaluate interferences of Government, does not create difficulties; analyzing of “necessity in democratic society” factor, which comes to front during evaluation of proportionality, demands more complex evaluation. When evaluating necessity in democratic society, the Court comes to a conclusion, by checking adequacy of an action that constitutes restriction on pressing social need, “proper, convincing, satisfactory reasons” which prove this need, adequacy of interference, balance between individual and common benefits, and, selection criteria to the required case.

It is clearly seen from this investigation that, it is necessary for any interference to freedom of association to be legal, to have strong and safe grounds. Shortly, even if interference seems required by the legislation, if it is not in accordance with criteria given above, then it will be considered as a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to the changes and amendments to the Law on Non-governmental Organizations (Public Associations and Foundations) adopted by the Parliament (Milli Mejlis) of the Republic of Azerbaijan on 30 June 2009 : “*State registration of branches and representations of foreign NGOs in the Republic of Azerbaijan can be carried out on the basis of the agreement, signed with such organizations*”. This criterion is contrary to criterion given in Article 58 and article 25 of the Constitution of the Republic of Azerbaijan: “*All people are equal with respect to the law and law court*”; “*Equal rights shall be provided for everyone in relationship to the state institutions making decisions on rights and responsibilities and those having the competencies of state authority*”. When the Constitution gives equal rights for everyone, in the Law on Non-governmental Organizations (Public Associations and Foundations) different regulations are applied to the branches and representations of the foreign NGOs.

V. CONSTITUTIONAL REGULATIONS OF OTHER COUNTRIES

Freedom of association is regulated in different forms in constitutions of different countries. Constitutions of some countries take under guarantee only freedom of association and do not include regulations on political parties and trade unions. For example: Constitution of Belgium, Constitution of Denmark, Constitution of Sweden, Constitution of Hungary.

In some Constitutions freedoms of assembly and trade unions are given in separate articles or freedom of trade unions is guaranteed under article on freedom of assembly. Freedom of political party if not given separately is indirectly guaranteed within the freedom of assembly. Examples of such Constitutions are Constitutions of Russia, Switzerland, Greece, Spain, Finland, Luxemburg and Poland.

Constitutions of Italy, Portugal, Bulgaria and Romania have separate articles for freedoms of assembly, trade unions and political parties.

The Norway Constitution does not have any provision on freedom of association.

According to Article 27 of the Belgium Constitution of 1970 "Belgians have the right to enter into association or partnership; this right cannot be subject to any preventative measure".

The Danish Constitution of 1953 regulates freedom of assembly in Article 78. According to paragraph 1 of this article "Citizens shall, without previous permission, be free to form associations for any lawful purpose." The next paragraph of the article determines aspects that prohibit associations, provide regimes of dissolution of the public unions and political associations.

Article 1 of the Swiss Constitution of 1975 ensures a number of rights and freedoms jointly. Paragraph 5 of the of Article covers regulations on freedom of association. That's why freedom of association is union of people for public or special purposes.

According to **Article 8 of the Dutch Constitution of 1975** "Freedom of association is protected. This right may be restricted by the law for the purposes of protection of the public order."

Article 30 of the Constitution of the Russian Federation of 1993 regulates freedom of association. For this “Everybody has a right to association, including the right to create trade unions for protection of their interests”.

Article 23 of the Swedish Constitution of 1998 protects a freedom of association. According to this article "Freedom of association is guaranteed. Everyone has the right to form, join or belong to an association and to participate in the activities of an association...». Article 28 regulates freedom of trade unions. According to the first paragraph of Article 28 "Employees, employers or their organizations have a right to come together, to establish a trade union, to become their members or refuse from the membership.

Article 12 of the Greek Constitution of 1975 determines that all the Greeks have the right in accordance with the laws without previous permission to establish unions that do not pursue a goal of earning money. Unions may not be dissolved without court judgement. Article 23 of the Constitution ensures freedom of trade unions and right to holidays.

According to paragraph 2 of article 13 of the Finnish Constitution of 1999 called freedom of assembly "Everyone has the freedom of association. Freedom of association entails the right to form an association without a permit, to be a member or not to be a member of an association and to participate in the activities of an association».

At the same time the freedom to form trade unions and to organise in order to look after other interests is likewise guaranteed.

Luxemburg Constitution of 1868 guarantees a number of rights and freedoms and with its paragraph 5 of Article 11 called "constitutional rights" guarantees freedom of trade unions. Article 26 is called "union" and according to it "The Luxemburg have a freedom of assembly. This right may not be linked to the condition of an initial permit".

According to Article 12 of the Polish Constitution of 1997 "The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens' movements or other voluntary associations and foundations». According to article 58 freedom of association is everybody's right.

According to Article 18 of the Italian Constitution of 1947 "Citizens have the right to form associations freely, without authorization, for purposes not forbidden by the Criminal Code. Secret associations and those which pursue, even indirectly, political ends by means of organizations of a military character, are forbidden." Article 39 provides freedom of being organized in trade unions and article 49 says that everybody has the right to become a member of the political parties.

Article 46 of the Portuguese Constitution of 1976 guarantees freedom of association. According to paragraph 1 of that article “Citizens shall possess the right to freely associate with one another without requiring any authorisation, on condition that such associations are not intended to promote violence and their purposes are not contrary to the criminal law. Article 51 of the Constitution is entitled “Political associations and parties”. According to paragraph 1 of the article “Freedom of association entails creation and jointing the political unions and parties...” Article 55 is entitled freedom of trade union. According to paragraph 1 “Employees are free to form a trade union...”

According to Article 44 of the Constitution of Bulgaria of 1991, "Citizens shall be free to associate." Article 49 guarantees the right of employees and employers to form trade unions. Article 11 of the Constitution is related to prohibitions related to political parties.

According to paragraph 1 of Article 37 of the Constitution of Romania of 1991, "Citizens have the right to join the political parties, trade unions or other forms of unions freely".

VI. LEGAL BASIS OF THE FREEDOM OF ASSOCIATION IN PUBLIC ORGANIZATIONS

To guarantee the right to associations ensured by the Constitution of Azerbaijan a number of laws were adopted. Law on Political Parties of the Republic of Azerbaijan regulates the right to be united and act in the political parties. The right to form trade unions and activity of trade unions characterized as one of the most essential rights are regulated by the Law on Trade Unions of the Republic of Azerbaijan. Activity of the religious unions and institutions that are formed as non-governmental organizations and which are non-commercial and non-governmental organizations by their essence, are regulated by the Law on the Freedom of Religious Faith. Separately, the Law on the State Registration of the Legal Persons and the State Registry regulates state registration of all the legal persons, including the commercial and non-commercial legal persons and issues of the state registry.

a. Issues of creation, registration and dissolution of the non-governmental organizations within the frameworks of the right of association

The legislative authority body by adopting the "Law on the Non-Governmental Organizations (public unions and foundations) of the Republic of Azerbaijan on 13 June 2000 significantly narrowed the provision of paragraph 2 of Article 58 of the Constitution of the Republic of Azerbaijan "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" and significantly narrowed the scope of non-governmental organizations. In Article 1.2 of the Law when it says "In this Law definition of "Non-governmental organization" includes public unions and foundations" that means that this Law does not apply to all the non-governmental organizations but only to public unions and foundations, so we observe that the scope of the law is significantly limited.

One of the first limitations in the Law can be seen in the definitions in Article 2 of the Law. Paragraph 4 of the Article says "Non-governmental organization ... may not provide financial or other material assistance to political parties". By its essence conduct of free training by a public union established for promotion of democratic, legal values to the youth of some political party, for example teaching them how to use computers or use of new media may be regarded as a provision of assistance of the material value. The essence of this article is that it is prohibited for NGOs to be engaged in this kind of activities. However, here it is impossible to explain the legal interest on which the legislation sees ground to base restrictions of the fundamental rights and freedoms. As it is impossible to figure out this meaning from Article 58 of the Constitution of the Republic of Azerbaijan, Article 71 which shows bases that allow to restrict human rights and freedoms, Article 3 of the Constitutional Law adopted in 2002 that determines additional grounds for restricting human rights and freedoms, Article 11 of the European Convention for the Protection of Human Rights, that determines grounds for restricting freedom of association, that was ratified by Azerbaijan and is considered as a part of the national legislation.

The aspect that draws attention in paragraph 4 of Article 2, is an attempt to enlist the activities in which NGOs may be engaged. *“In accordance with the election legislation of the Republic of Azerbaijan the non-governmental organizations may monitor Presidential Elections, Milli Mejlis (Parliamentary) Elections and Municipal Elections and conduct exit-polls.”* From description of this article we can see that non-governmental organizations may neither monitor nor conduct exit-polls during the Referendums that are conducted for realization of very important changes to the Constitution in Azerbaijan. As there are only elections enlisted in the article, not the referendum.

In fact by stating that freedoms of association and functioning are free, a restricted list of limitations to be applied to this freedom must be indicated as exceptions and must be clearly expressed with a condition of clear determination of the bases that make it necessary and that it will be applied as a last resort in the democratic society. Freedom must be maximum. Enlisting in the law what the NGOs can do leads to interpretation that all other activities are unacceptable as they are not mentioned in the law and that by its essence lacks any logics and contradicts the dominating legal norms that regulate human rights and freedoms.

The first sentence of Article 3.1. of the Law on the Non-Governmental Organizations of the Republic of Azerbaijan gives a place to the imperative provision – *“The non-governmental organization must have a name that indicates its organizational and legal form and **nature of its activity**”*. Putting artificial obstacles not leading from the international legal norms and Constitution before people as a “legal requirement” when they enjoy freedom of association is a serious damage to freedom of association. Lack of words indicating *“nature of its activity”* in the name of the public union is considered as a violation of the legislation and as a result the Union may be refused to get registered. So lack of this expression will be considered as a ground that will restrict a right of the persons who enjoying freedom of association want to be united for some purpose.

By some other amendment made to Article 3.1. on 30 June 2009 a provision was added that says *“In the names of the non-governmental organizations names of the state bodies of the Republic of Azerbaijan as well as names of the outstanding Azerbaijani people (without consent of their close relatives and heirs)”* cannot be used. Adding this provision to the legislation and prevention of freedom of association as an imperative norm directly contradicts to the dominating legal norms described above. For example, the law will not allow the people who want to establish an NGO in the cultural area or literature promotion to promote or study heritage of Nizami Ganjavi and to indicate *“nature of its activity”* in its name as there should be a consent “of their close relatives or heirs” and that is something not possible. And there is no list of the outstanding persons of Azerbaijan in any normative act so that the persons that want to found an NGO could look at it and determine to whose heirs they should address. If a group that wants to build its activities around monitoring of some state institution, for example, an organization with a name Monitoring Centre of the Transparency of the Licences of the TV-Radio Council, then the law will not allow that. So restrictions without any legal grounds and not based on the Constitution are brought to the freedom of association.

b. NGO registration

According to Article 16 of the Law on Non-Governmental Organizations (public unions and foundations) of the Republic of Azerbaijan, state registration of the Non-governmental organizations is implemented by the Ministry of Justice of the Republic of Azerbaijan as a relevant body of the executive power. By stating in paragraph 2 of that article: *“The non-governmental*

organization receives a status of the legal person only after state registration” means that for NGOs a receipt of a status of the legal person in Azerbaijan is conditioned with its obtaining the official state registration. By stating in Article 7.1 of the Law that “Registered non-governmental organization can open branches and representative offices on the territory of the Republic of Azerbaijan and abroad”, it once again emphasizes that a registration is important for NGO activity.

According to Article 3 of the Law on Grants of the Republic of Azerbaijan of 17 April 1998, in its relations with donors, the party receiving grant is considered as a recipient and the following could be recipients - **legal persons**, their branches, representations and departments that are residents or non-residents, that function in the Republic of Azerbaijan, according to whose Charter the main purpose is charity activities or implementation of the projects and programs that could be a subject of the grant and not interested in making profits by taking grants.

This law that regulates the issues of receipt of the grants and is considered as the main and only source for activities of NGOs in Azerbaijan shows that those who do not have a status of the legal persons cannot be considered as recipients. This means that none of the NGOs that does not have a state registration may receive grants.

Article 13.2.2 of the Tax Code determines a legal person as an enterprise and organization established as a legal person in accordance with the legislation of the Republic of Azerbaijan or a foreign state; Article 13.2.13 for registering as a tax payer demands “*a name of the legal person as it was registered by the state*”.

A part of the exemptions and concessions provided in Article 106 of the Tax Code states that “gratuitous transfers, membership fees and donations” are stated to be exempt from taxes. Article 13.2.42 of that Code states that “*Non-commercial legal entity — structure defined as such by the Civil Code of the Azerbaijan Republic.*” and refers to Articles 43.5 and 43.6 of the Civil Code. That provision says that “Legal persons may be institutions whose main purpose of the activity is to gain profits (commercial legal persons) or whose main purpose is not to gain profits and not to share the gained profits among the participants (non-commercial legal persons) and clearly shows that non-commercial organizations should be considered in fact as non-commercial legal persons.

All the above-mentioned provisions show that people may not enjoy freedom of association freely. To this purpose this initiative of the persons who enjoy right of association must be recognized by official state institutions, be registered in the state registry and they should be issued with certificates. Only after that an NGO that was created with this initiative, will get a status of a legal person and may use rights and sometimes privileges of the legal persons. From this point of view registration of the NGOs is a very important procedure and this procedure must be conducted totally in accordance with the principles of the international law as well as the Azerbaijani Constitution, the registration must be turned into the initial procedure.

Not all the countries require registration for enjoying right of association and starting activities. For example, local legislation of Italy, Portugal, Denmark, Finland, Belgium, Greece, Luxemburg does not require a permission of the state institutions to enjoy right of association. This procedure in Azerbaijan became required, in 2001 when it joined the Council of Europe, for foundation of newspapers and journals, after changes were made to the Law on Mass Media. Those who want to found newspapers and journals must address with a notification letter to the Ministry of Justice and 1 week after the official notification, newspapers and journals may start their activities. Unlike to that, a foundation of NGOs is a more complicated procedure subject to a special permission system.

Article 16 of the Law regulates the issue of the state registration of non-governmental organizations. In this provision we see that enjoyment of freedom of association is linked to a serious permission system. From the experience of the developed countries above we see that at a modern time almost none of the countries is subject to the permission system and a state registration is not a condition. In the legislation of Azerbaijan activities of NGOs subordinate to serious formalities both in Article 16 of this Law and in the Law on the State Registration and State Registry of the Legal Persons. In addition, along with a high number of required procedures, another serious problem is that a long period is required for registration. While for registration of commercial legal persons 3 working days are required, for registration of NGOs, voluntarily unions, functioning on public bases, 40 days are required and when additional research is added this period may be extended to 30 more days. After that to eliminate certain gaps, the founders are given 20 days and after they eliminate the identified gaps within 10 days that organization is registered. According to the requirement of Article 4.5 of the Law on the State Registration and State Registry of the Legal Persons for all the periods determined in the law for registration of NGOs “When counting periods determined by this Law only working days are counted” principle applies. 100 working days mean at least 20 weeks’ period and when transferring that to the calendar days that equals to 140 calendar days. So when the Ministry of Justice registers an NGO that has not violated any procedural laws following all the periods, this period may cover approximately 5 months’ period. In practice this period is exceeded numerous times, many appeals are outstanding for months, even years and the registration is not implemented. Registration of NGOs in an average takes 8-10 months after their foundation. For organizations that were refused registration this period lasts for years. It is not coincidence that a sufficient number of judgements were made by the European Court against Azerbaijan. As registration of the public union for assistance of homeless Bakuivians was implemented approximately in 4 years’ period, a complaint was sent to the European Court and it was accepted that there was an interference in the right of association. The judgement of the European Court of Human Rights dated 11 January 2007 on the case “**Ramazanova and others vs. Azerbaijan**” (Complaint № 44363/02) says “60. The Court found that as the applicants were founders of the union delay of the state registration that resulted in not giving a status of a legal person to the union for a long period constitutes interference in implementation of applicants’ right to freedom of association by the authorities”. Other judgements of the European Court of Human Rights against Azerbaijan on interference in the right of association this aspect is also emphasized.

In judgement of 18 October 2007 (Complaint № 4407/04) on the case “Nasibova vs. Azerbaijan”, I. Aliyev and others vs. Azerbaijan we see repetition of these aspects. An aspect which is unclear and difficult to comprehend is that for start of activities of the commercial legal persons that administer millions of dollars it is required only 3 days, for a number of people who united voluntarily with some purpose and who don’t have a big responsibility from financial point of view, don’t pursue gaining profits, it requires 50 times longer period.

The bases for refusal to register non-governmental organizations must be in accordance with bases provided for restricting freedom of association. However, one of the bases for refusals in accordance with Article 11.3.2 of the Law on the State registration of the Legal Persons is “if the statutes of the non-governmental organizations include appropriation of the authorities of the state

and local self-governance bodies as well as functions of the state control and checks”. The ground for refusal provided in this provision which was added to the law on 12 February 2010 does not correspond to any of the legal reasons that is a basis for restrictions determined in Articles 58, 71 of the Constitution, Article 3 of the Constitutional Law adopted in 2002 or Article 11 of the European Convention.

Reasons for refusals from the state registrations provided in Article 11.3.3 of the Law on State Registration and State Registry of the legal persons include a provision “in case of use of the names of the state bodies of the Republic of Azerbaijan as well as names of the outstanding persons of Azerbaijan (without consent of their close relatives or heirs) in names of the non-governmental organizations is a repetition of Article 3.1 of the Law of the Republic of Azerbaijan on Non-Governmental Organizations (Public Unions and Foundations). Above we mentioned that this provision leads to ungrounded restrictions of freedom of association.

There are quite a lot of regulations provided by the law that are considered as interference in human rights and freedoms. The provision “*Foreign legal persons may participate in activities related to exit-poll during the Presidential Elections of the Republic of Azerbaijan, Milli Mejlis Elections of the Republic of Azerbaijan and municipal elections only jointly with the non-governmental organizations of the Republic of Azerbaijan*” of Article 2.4 of the Law about Non-Governmental Organizations (public unions and foundations), provision “*Deputy Chairmen of the branches or representations of the non-governmental organizations whose founders are foreigners or foreign legal persons must be citizens of the Republic of Azerbaijan*” of Article 7.5 of the same Law may be interpreted as discrimination when enjoying a right related to everyone. Article 11 of the European Convention for the Protection of Human Rights as well as Article 58 of Constitution of the Republic of Azerbaijan recognize everybody’s right to associations. When we read provision “*Everyone has a right to found any union, including political party, trade union or other public union or join any existing union. All the union are guaranteed free activity*” we once again see that clearly. By stating in the article “everyone” discrimination against citizenship is removed. Word “everyone” entails all the people. However, application of a different norm to those whose founders are foreigners and foreign legal persons means violation of right to equality as provided in Article 25 of the Constitution of the Republic of Azerbaijan. According to Article 25 of the Constitution

“The state guarantees equality of rights and freedoms to everyone, irrespective of race, nationality, religion, language, sex, origin, financial position, occupation, conviction, affiliations in political parties, trade unions and other public organizations. Rights and freedoms of a person, citizen cannot be restricted due to race, nationality, religion, language, sex, origin, conviction, political and social belonging”.

After changes to the Constitution in 2009 were made, paragraph 5 “*Everyone’s equal rights are ensured in relations with the state bodies that make decisions related to rights and duties and holders of the authorities of the state power*” was added to Article 25 and that regulation made a decision to have different requirements contradicting the Constitution of the Republic of Azerbaijan. In spite of that, paragraph 12.3 “*The state*

registration of the branches and representations of the foreign non-governmental organizations in the Republic of Azerbaijan is conducted on a basis of the agreement signed with those organizations” which was added to Article 12 of the Law on Non-Governmental Organizations (Public Unions and Foundations) subordinated registration of the branches and representations of the foreign non-governmental organizations to norms different from those that are applied to everyone.

It is impossible to understand logics and purpose of the legislation in these regulations. The legitimate purpose of bringing restrictions to the foreign legal persons for engagement in activities which are free to everyone, of subordination to formalities that are different from other people’s formalities or a legal reason for bringing citizenship discrimination are not clear and contradict paragraphs 3 and 5 of Article 25 of the Constitution. Last sentence “Free activity of all the unions are ensured” of the Article 58 of the Constitution that regulates freedom of association clearly shows that defining discrimination against local and international organizations by law contradicts the Constitution.

Unfortunately, recently norms damaging essence of human rights and freedoms and contradicting the overall harmony of the legislation continue to be adopted at various instances. One of such documents is a decision of the Cabinet of Ministers of the Republic of Azerbaijan **"On approval of rules for conduct of negotiations for preparation and signature of the agreement related to the state registration of the branches or representations of the non-governmental organizations of the foreign states in the Republic of Azerbaijan"**, which was adopted on 16 March 2011. This decision approved and put into effect **"Rules for conduct of negotiations for preparation and signature of the agreement related to the state registration of the branches or representations of the non-governmental organizations of the foreign states in the Republic of Azerbaijan"**.

Abstract conditions are given under the title “General requirements for commencement of negotiations” in these rules, and it is legally impossible to ground them. There is an expression in paragraph 2.2: “The application must specify information about NGO's activity, the purpose of the NGO's activity in Azerbaijan, how urgent the activity is, and how it benefits Azerbaijan society”. In this expression “information about NGO's activity, the purpose of the NGO's activity in Azerbaijan” is clear, but indefinite, unexplainable from legal logics, requirement, like “how urgent the activity is, and how it benefits Azerbaijan society”, is a requirement causing serious manipulation, discretion. As registration of foreign NGO for its activity in Azerbaijan is necessary, the organization has to sign agreement. For agreement, “benefits of the activity of this organization here, for the Azerbaijani society” must be grounded. The appeal of the organization, which supports democratization and wants to contribute in the country, to register may be refused by a government representative, who is anxious about democratic activity of such kind of organization here and s/he may create a “legal reason” not to register. He can bar the ways of commencement of agreement, pretending that, the organization is not keeping to the requirements of signing of agreement, that is to say, “cannot substantiate its contribution to the Azerbaijani society”. This answer will be in accordance with the law, but will also contradict the legal public interests, lead to illegal, ungrounded restriction of right to association, which is one of the fundamental rights and freedoms.

Another non-legitimate interference possibility to freedom of association is given in paragraphs 2.5 and 2.6 of the rules:

"2.5. If the required documents are submitted, an enquiry is sent to the relevant bodies, to find out their opinions on conclusion of the agreement on state registration of the branch or representation.

2.6. If the results of the collected opinions are positive, the Ministry of Justice of the Republic of Azerbaijan launches negotiations."

It is clearly seen from these regulations that, a decision will be made according to the results of the collected opinions. In other words, it is considered that the opinions will create a legal reason. "Relevant bodies" definition, which can be understood in a broad sense is a non-specific definition.

"Conditions of the future activity of the organization in the territory of Azerbaijan in negotiations process" envisaged in paragraph 3.2 of the rules, is counted under 5 headings, and 2 of them are more controversial conditions:

"3.2.2. Respect to national and moral values of the Azerbaijani people;
3.2.4. Non-involvement in political and religious propaganda;"

To require "respect to national and moral values" condition for legal registration of the organization is not a legal reason, and this is a requirement that could be broadly interpreted. As for "non-involvement in political and religious propaganda", this also consists of many arguable points. For example, democracy is a form of a political regime.

Registration of a branch or representation of the NGO of a foreign country, which aims at promotion of democracy, propaganda of democratic habits in governance may be considered as "undesired" activity under this heading and be a "legal" ground for refusal to register. Any branch or representation of any NGO of any foreign country, registered by adopting to comply with these Regulations, bears responsibility according to legislation of the Republic of Azerbaijan for violations of the terms mentioned in paragraph 3.2 of these Regulations. That is, it is possible their liquidation on court base.

c. Termination of NGO activity

Provision on termination of the NGO activity by a court decision as provided in article 31.4 of the Law of the Republic of Azerbaijan on the Non-Governmental Organizations (public unions and foundations): "If a non-governmental organization received more than two warnings in writing or instructions on elimination of violations within a year, then the court may abolish the non-governmental organization", also contradicts freedom of association. That is to say, having just instructions on eliminations of violations", and showing it as a reason to abolish the organization regardless of this violation was eliminated or not, is a serious breach of legislation and is not a "lawful purpose" from the point of view of restrictions of freedoms.

With additions dated 30 June 2009 to Law of the Republic of Azerbaijan on the Non-Governmental Organizations, article 31.2-1 was added, and noticed that in case of not providing information, necessary for state registration of legal persons, or incorrect information, NGOs will be issued a warning. Article 31.4 defines that, "If a non-governmental organization received more than two warnings in writing or instructions on elimination of violations within a year, then the court may abolish the non-governmental organization". The part of this article that draws attention is a rapid increase in number of warnings to NGOs, and it becomes a serious threat for NGOs.

In case if an NGO does not submit an annual financial report at a defined time, a relevant executive authority by issuing a written warning to that organization, instructs to submit a proper report within 30 days. An NGO that fails to submit the report within this period bears responsibility in accordance with the legislation of the Republic of Azerbaijan.

Another case of warnings is in case of changing juridical address of the non-governmental organization, an NGO has to inform the Ministry of Justice in writing within 7 days. The NGO that does not inform about change of the address within this period will receive a warning.

Another situation, an NGO not providing the notarized copy of the contract on grant to the Ministry of Justice, within 30 days, will receive a warning, and at the same time, will be charged to penalty from 1000 manats to 2500 manats, according to article 223.1 (on non-provision of the copies of grant contracts and decisions for registration) of the Code of the Administrative Offences.

Existence of the above mentioned warning conditions more than 2 times within a year, is a condition restricting or removing freedom of association, exceeding the lawful purposes restricting freedom of association, and this sanction does not fit with "necessity in democratic society" test.

Overall, existence of regulations, damaging freedom of association, reasonless elimination of its essence, seriously restricting freedom, giving unlimited privileges and responsibilities to executive bodies, not fitting with "necessity in democratic society" principle, linking freedom to permission system, in the Law of the Republic of Azerbaijan on Non Governmental Organizations (public unions, foundations), or Law on State Registration and State Registry of Legal Persons, makes necessary to regulate these laws again in accordance with the practice of the democratic states.

VII. CONCLUSION

As a result of research, it is seen that, in Azerbaijan a concept is dominated with the mutually refuting legal documents on regulation of freedom of association that don't give any significance to the superior legal norms, provisions of ratified international documents. In regulations on freedom of association a common legal approach is not being observed. While freedoms are given more inviolable in general norms of the Constitution, later adopted documents – Constitutional Law on regulation of implementation of human rights and freedoms in Republic of Azerbaijan, dated 24 December 2002; Law of the Republic of Azerbaijan on Political Parties, dated 3 June 1992; Law of the Republic of Azerbaijan on Trade Unions, dated 24 February 1994, in particular, the changes made to it later; Law of the Republic of Azerbaijan on Non Governmental Organizations (public unions and foundations) dated 13 June 2000, in particular, provisions added to it last 3 years; and Law of the Republic of Azerbaijan on State Registration and State Registry of Legal Persons, seriously damage freedom of association by applying norms that completely remove essence of numerous freedoms, leaving them under will of the relevant executive bodies, imposing restrictions, not based on any legitimate grounds. New complex approach to human rights and freedoms is needed in Azerbaijan. At the same time, freedom of association, freedom of assembly, freedom of expression, which have been taken under guarantee by Article 11 of the European Convention and UN Covenant on Civil and Political Rights, should be regulated carefully, legislation should be worked out again, a technical restriction removing freedoms or damaging

their ground that contradicts the essence of freedoms, removes or damages its grounds, that is not necessary in the democratic society and is not based on lawful purposes should not be determined and no application arising from the artificial obstacles, norms having dubious meanings should be applied.

VIII. RECOMMENDATIONS

In accordance with the essence of Article 58 of the Constitution, it is necessary to work out the legislation that determines the legal regulation of right to association. In this article of the Constitution freedom of association is protected to a larger extend and does not make it necessary to have any restricting legal procedures for enjoyment of freedom of association. Having a procedure in the Law that is not provided by the Constitution and furthermore to have a lot of restricting norms in those procedures contradicts essence of freedom protected by the Constitution. By law regulation of freedom of association may be subordinated to certain procedures, however, those procedures must have not restricting norms but norms that will facilitate its realization and regulating norms.

1. Law on NGOs and Foundations must be worked out with a wide public participation (with active participation and consensus of the NGO sector, political parties, media representatives and independent experts), norms of the existing Law that restrict and narrow freedoms and that link their enjoyment to very difficult procedures must be refused and it must be turned into a Law which is targeted only at regulating freedoms.

2. As the Constitution does not have any norm that envisages permission of a relevant state body for enjoyment of freedom of association, procedures for registration for those people who want to enjoy freedom of association and establish an NGO must be simplified, registration must be made on a basis of notification like it exists for the media outlets. Any legal and physical persons or a group of persons must be able to unite without getting an initial permission and after submitting a notification to a relevant state body, in some time (at most 1 week) must be able to start free activity. The relevant state body with exception of cases when a legal person with the same name is registered and cases when one of the restrictions for freedom of association stipulated in the Constitution are chosen as a purpose within 1 week must register that organization and must present a copy of the certificate to the founders. In any case, the organization must start the legal activity in 1 week.

3. Norms on NGO registration as provided in the Law of the State Registration of the Legal Persons and State Registry must be completely renewed, the state registration must be implemented in a simplified form based on notifications. (like for commercial legal persons).

4. Along with a Law on NGOs and Foundations, Model Statutes for NGOs and Foundations must be approved and in these Statutes a single management form for both the union and foundation must be determined and all the NGOs must adapt their management system to this form. In such a way, the claim on incompliance of the Statutes to the legislation will be eliminated. In addition, by indicating in the Model Statutes legitimate grounds for demanding restriction of NGOs' freedom of association as in accordance with the Constitution and European Convention for Human Rights and Freedoms, frames of the activities of the NGOs must be determined and those frames must be the activity frames determined and accepted for everyone in advance. The Model Statutes must give freedom to choose directions of NGO

activities in accordance with the law. So, activity of NGOs in accordance with the law will be provided and gaps in the Statutes will not be put forward without grounds.

5. Termination of the NGO activity can be only by a court decision:

- Reasons for grounds to terminate must be described in the Law clearly, precisely and in detail, must allow for the prohibitions to be clearly seen from the very beginning and must not contain indefinite expressions and norms that give freedom of interpretation of the grounds;
- Purpose and result of the legal reasons for termination must be for protection of one or a number of the legitimate public interests, namely national security, territorial integrity, public order and security, prevention of disturbances and crime, protection of health and morals, other persons' rights and freedoms as enlisted in Articles 3.5 and 3.6 of the Constitutional Law on Regulation of Public Rights and Freedoms of the Republic of Azerbaijan as well as in paragraph 2 of Article 11 of the European Convention for the Protection of Human Rights and Fundamental freedoms;
- Termination must take place when it is directed at protection of the most essential values which are necessary for existence of the democratic society and be applied as the last resort in the democratic society when the other possible and efficient means for the protection of the legitimate public interests that could restrict freedom of association to a lesser degree are exhausted.
- Termination of the NGO activity by stopping freedom of association or application of the other sanctions must be proportional to the freedom of association, namely the benefits from protection of the legitimate public interests must be prevailing over a damage that restriction (by taking into account sanctions to be applied) will have on freedom of association.

6. Artificial reasons that do not have legitimate legal values and form a basis for terminating the activity of the NGOs must be removed from the Law. Receipt of a written warning by the NGO or punishment in an administrative way must not be a sole basis for NGOs' abolishment. An NGO that made an administrative legal violation is brought to an administrative responsibility and receives a proportionate punishment for the violation. In accordance with each of the violations, a certain sanction is envisaged. In such a case, combining a violation for which earlier a sanction was applied and giving a more severe decision and determining a ground for abolishment of the NGO in a court order is an approach that eliminates freedom of association completely and is far from the essence of legal regulation. (E.g. Provision on termination of the NGO activity in a court order provided by Article 31.4 of the Law on the Non-Governmental Organizations (public unions and foundations) that states "In case if the non-governmental organization was given more than 2 written warnings during 1 year or was given instructions on elimination of the violations, the non-governmental organization may be abolished by a court decision" is a very non-adequate regulation and has to be removed from the law. Not notifying about change of the address in time leads to the same legal result...)

7. Opportunities for NGO activities must not be restricted without a legitimate ground in the Law. Showing in which activities the NGOs may be engaged also indirectly serves to restrict the freedom. Selection of this method is unacceptable. (E.g.

paragraph 4 of Article 2 of the current Law lists the activities in which NGOs may be engaged; *“In accordance with the election legislation of the Republic of Azerbaijan the non-governmental organizations may monitor the Presidential Election, Parliamentary Elections and Municipal Elections conducted in the Republic of Azerbaijan and conduct exit-polls”*. From the description of this Article it is seen that that non-governmental organizations may neither monitor the Referendum nor conduct exit-polls during the Referendums that are conducted for realization of very important changes to the Constitution in Azerbaijan as it is only elections enlisted in the article, not the referendum.). As all the other activities are not shown in the law, enlisting what the NGOs can do in the law is unacceptable and that by essence is not logical and contradicts the dominating legal norms that regulate human rights and freedoms.

8. Having norms on names of the NGOs in the law, which state that selecting certain names may be unacceptable, having a requirement to have a name matching purpose are the reasons that restrict freedom and do not fit any of the legitimate grounds. It is unacceptable to have such restrictions in the law (E.g. The first sentence of Article 3.1. of the Law about Non-Governmental Organizations (Public Unions and Foundations) of the Republic of Azerbaijan *“The non-governmental organization must have a name that shows its organizational and legal form and nature of the activity”*, an imperative provision, by another change made to Article 3.1 *“In the name of the non-governmental organization names of the state bodies of the Republic of Azerbaijan as well as names of the outstanding people (without consent of their relatives or heirs) may not be used”* provision are provisions of the same kind, which do not serve a legitimate legal purpose.)

9. Normative legal acts directly or cohesively regulating NGO activities must be reviewed, their provisions hindering NGO activity must be removed and must be turned into regulating ones;

- **Norms in the “Rules on Registration of the contracts (decisions) on receipt (giving) grants” approved by a decree #27 of the President of the Republic of Azerbaijan dated 12 February 2004 require procedures that exceed the purpose. These norms should either be completely removed or should be replaced with the notification system;** (The clear example is a requirement to repeatedly certify a contract approved by a grantor and a grantee legal person by a notary).

- **if transferred to the notification system, an NGO must be able to present for information a copy of the contract about a receipt of the grant together with a letter certified by an official stamp, certification by a notary must not be needed, the term of this notification should not be 1 month but must cover the period during which the Grant is in effect;**

- **non-provision of this information must not lead to an administrative responsibility with hard financial results; punishment and violation must be balanced;** (According to Article 223.1 of the Code of the Administrative Offences for non-presentation of the copies of the contracts and decisions on receipt (giving) of the grants a fine from 1,000 to 2,500 manats will be applied. That is a very big amount. The

administrative responsibility that arises as a result of the failure of the employees of the state institutions to present a document or information required by the NGOs or citizen envisages a fine of 20-25 manats for physical persons and a fine of 80-90 manats for officials in accordance with Article 181.3.1 of the Code of Administrative Offences. Having a maximum fine equal to 90 manats for the state officials and approximately 28 times higher fine for a similar violation, namely 2,500 manats, first of all contradicts a principle of equal rights “Everyone is equal before the law and court” provided in Article 25 of the Constitution, provisions of paragraph 5 of Article 25 added after the latest changes to the Constitution in 2009 “Everyone is guaranteed equal rights in their relations with the state bodies that make decisions related to rights and duties and those who are bearers of the powers of the state authorities”. This difference must be removed and must be reduced for NGOs).

- **Foundations as a form of the NGOs must be removed from among the subjects to the mandatory audit;** Although an amendment dated 14 June 2011 in a decision #55 of the Cabinet of Ministers of the Republic of Azerbaijan about approval of the stage-by-stage application of the terms of the Law of the Republic of Azerbaijan on “Internal Audit” on economy subjects of the mandatory audit removed the Non-Governmental Organizations from the list, paragraph 9 of the list still has “Foundations”. So, foundations are presented as different from NGOs. This means that the NGOs (public unions and foundations) regulated by a single law are subordinated to different regimes and that contradicts Article 25 of the Constitution. So, it is important for Foundations to be released from the mandatory audit. As if the foundations violate the mandatory audit, they may be fined up to 2,500 manats based on the Code of Administrative Offences.
- 10.** Hindering procedures required for registration of the representations and branches of the foreign legal persons in the legislation must be simplified, their equal rights with the Azerbaijani NGOs must be ensured. For registration of the branches and representations of the foreign legal persons in addition to the procedures required for local NGOs, it must suffice to present a certified copy of the document confirming activity from a legal aspect in its country and a decision of the organization on opening a representation or branch. (E.g. the provisions of Article 7.5 of the Law about Non-Governmental Organizations (public unions and foundations) of the Republic of Azerbaijan “*Deputies of the heads of the branches or representations of the non-governmental organizations whose founders are foreigners or foreign legal persons*”, Article 12.3 of the Law “*State registration of the branches and representations of the non-governmental organizations of the foreign states in the Republic of Azerbaijan may be implemented on a basis of the agreement signed with those organizations*”, complicate registration of the branches and representations of the foreign non-governmental organizations and are subject to norms that are different from those that should be applied to everyone by law. And request for the agreement is also unclear. One of the parties is a state, the other one is an NGO.
- 11. Decision # 43 of the Cabinet of Ministers of the Republic of Azerbaijan dated 16 March 2011 about approval of “The rules for conduct of negotiations for preparation and signature of the agreement related to the state registration of the branches or**

representations of the non-governmental organizations of the foreign states in the Republic of Azerbaijan" must be annulled, interference by the state at this stage must be eliminated.

- 12. It is unacceptable to restrict activities of the foreign NGOs and representations that function in Azerbaijan. The legislation should not allow such a discrimination.** (For example, a provision envisaged in paragraph 2.4 of the Law on Non-governmental organizations (public unions and foundations) *“Foreign legal persons may participate in activities related to conduct of exit-poll during the Presidential Elections of the Republic of Azerbaijan, elections to Milli Mejlis of the Republic of Azerbaijan and municipal elections only jointly with the non-governmental organizations of the Republic of Azerbaijan”* is not based on any legitimate ground).
- 13. As a non-governmental organization is not a commercial legal person requesting from it an annual financial report and issuance of an official warning for not giving this report within 30 days and the NGO annulment in case of 2 of such warnings don't serve a legitimate legal purpose. This requirement must be removed from the law.** (Decision # 201 of 25 December 2009 of the Cabinet of Ministers of the Republic of Azerbaijan on approval of "The Rule for form, content and presentation of the annual financial report of the non-governmental organization must lose its effect. Separately, 144-pages long document *“National Accounting Standards for Non-Governmental Organizations”* approved by the order # İ-05 dated 13 January 2009 of the Ministry of Finance of the Republic of Azerbaijan must be simplified and turned into a collection of norms that can be applied by everyone).
- 14. Actions that restrict freedoms of NGOs, create artificial obstacles for its legal activity; ungrounded refusal of registration, bureaucratic red tape regardless of who did those must lead to administrative and criminal responsibility.** (Respectively new provisions must be added to the Code of the Administrative Offences and Criminal Code, official persons and institutions must bear administrative responsibility for hindering activities of the NGOs, illegal restrictions of its rights, and criminal responsibility if such actions took place deliberately or by application of violence, with a purpose of cupidity).
- 15. Behaviours during the registration of NGOs that are not envisaged by the law but which are widely applied in practice (given below) must be completely eliminated, those responsible must bear administrative responsibility;**
- 16. During the NGO registration and preparation of the reports development of the Information Communication Technologies must be taken into account, in accordance with approval of the electronic signature, new norms, rules regulating presentation of the documents, including financial, social insurance, statistical reports must be adopted, procedures must be simplified.**