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INITIAL COMMENTS BY THE EUROPEAN CENTER FOR NOT-FOR PROFIT LAW TO DRAFT LAW ON PUBLIC ORGANIZATIONS OF ARMENIA
January 30, 2015

The European Center for Not-for-Profit Law (ECNL) is a leading European resource and research center in the field of civil society law based in Budapest. Its mission is to promote an enabling legal and fiscal environment for civil society in Europe and beyond. ECNL has demonstrated deep commitment to empower civil society organizations and ensure their sustainability. ECNL experts have provided support that directly and positively influenced more than 50 laws affecting civil society organizations across Central and Eastern Europe and the CIS.

ECNL is pleased to have an opportunity to provide its initial feedback to 2 specific provisions of the Armenian draft Law on Public Organizations, translated version received in December 2014 (hereinafter: "*Draft Law*"). The comments provided in the present document are based on comparative examples of international regulation and good practices.

RIGHT OF PUBLIC ORGANIZATIONS TO APPEAL TO COURT:

Issue: We recognize and commend the legislator's intention to re-emphasize the right of public organizations to represent and defend their own rights and lawful interests (Article 16.1(1)). The draft also includes a pioneering provision, which will allow certain organizations to represent the rights and lawful interest of their participants (members), beneficiaries and volunteers (Article 16.1 (7). However, the fact that the representation of own interest and public interest is not separated in section 1 point 7 and section 2 of Article 16 of the Draft Law results in difficulties in interpretation and, as a result, possible limitation of the right.

Discussion: According to Article 16. 1(7), "*…..the Organization is entitled to represent and defend its rights and lawful interests, its participants (members), beneficiaries or volunteers in other organizations, court, the state and local self-governance bodies*". According to section 2 of Article 16, "*The right to apply to court, provided by point 7 of section 1 of Article 16, may be exercised by the organization by bringing lawsuit to the court:*

1) *For protection environmental, historical and cultural values in the fields of protection of public rights and legal interests, and*
2) *Against the state and local government bodies' actions, acts and omissions contradicting the Republic of Armenia legislation laws.*
   The Organization may bring a lawsuit if,
   1) *The object of lawsuit meets the charter goals and objectives,*
   2) *Participated in the procedure of adoption of the act or performance of the action, as well as applied for elimination of inaction and the fact is confirmed by procedural documents evidencing the participation and application,*

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Within at least two years preceding the moment of filing the lawsuit they conducted activities in the fields that are mentioned in point 1, section 2 of this article."

The Organizations may have an interest to turn to court for two purposes:

1) To protect the rights and own interests of the organization;
2) To protect public interests related to issues in which they are not directly affected in order to eliminate injustice, represent the rights of vulnerable people or reach some other, publicly beneficial result.

We welcome and find it a great achievement that the Draft Law includes the possibility to protect public interest via defending the rights and interests of their beneficiaries. However, Article 16. 1(7) of the Draft Law seems to merge the two issues - protection of own interest "to represent and defend its rights and lawful interests" and public interest "its participants (members), beneficiaries or volunteers in other organizations, court, the state and local self-governance bodies." - and in this way may limit the right of the organization to represent and defend its own rights and interests, too.

Possibility to protect the rights and own interests of the organization

According to the OSCE/OIDHR *Joint Guidelines on Freedom of Association* adopted by the Venice Commission at its 101th Plenary Session[1], one of the guiding principles for legislation pertaining to freedom of association is the right to an effective remedy for the violation of the rights.

> "*116. Associations, their founders and members* ***should have the right to an effective remedy concerning all decisions affecting their fundamental rights, in particular those concerning their rights to freedom of association, expression of opinion and assembly.*** *This means providing them with the right to appeal or to have reviewed by an independent and impartial court the decisions or inaction by the authorities, as well as any other requirements laid down in legislation, with respect to their registration, charter requirements, activities, prohibition and dissolution or penalties. If a violation is found to have occurred, proper and effective redress should be made available in a timely manner. The procedure for appeal and review should be clear and affordable, and remedies should include compensation for moral or pecuniary loss.*
>
> *117. All associations should have equal standing before impartial tribunals and,* ***in case of an alleged violation of any of their rights, have full protection of the right to a fair and public hearing.*** *This is a fundamental aspect of protecting associations from undue control by the executive or administrative authorities.*

[1] Adopted at the 101st Plenary Session on 12-13 December 2014. Available at: http://www.osce.org/odihr/132371

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118. The founders, members and representatives of associations should likewise enjoy the right to a fair trial in any proceedings commenced by or against them. Therefore, in matters concerning restrictions placed on an association, the right to receive a fair hearing by an independent and impartial tribunal established by law is an essential requirement to be secured by legislation."

The currently operative Armenian Law on Public Organizations, adopted on December 4, 2001 already regulates the right to represent and defend the rights and lawful interests of the organization and its members in Article 15.

Possibility to protect public interest

NGOs can serve as a bridge between citizens and public authorities which helps to articulate opinions of the concerned citizens more constructively. Moreover, some of them have a mission to represent the public interest or the interest of third parties in front of the courts. As an example, environment protection NGOs initiate court cases to protect the environment from unlawful construction. Anti-corruption and watchdog organizations may turn to court in order to force state authorities to disseminate information of public interest. Therefore, NGOs have an important role to protect public interests, including the right of representation and litigation in courts.

The most developed body of international law is related to environmental issues. The **Aarhus Convention**[2] adopted by the United Nations Economic Commission for Europe in 1998 obliges the signatory parties to guarantee the right of access to justice in environmental matters, acknowledging in this regard that citizens may need assistance in order to exercise their rights. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in the Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention. Armenia ratified the Convention on August 1, 2001.

Article 2 point 5. *"**The public concerned" means** the public affected or likely to be affected by, or having an interest in, the environmental decision-making; **for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.***

Article 3. point 9. *Within the scope of the relevant provisions of this Convention, the public shall have access to justice in environmental matters without discrimination as to citizenship, nationality or*

[2] Convention on access to information, public participation in decision-making and access to justice in environmental matters. Available at: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

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domicile and, in the case of a legal person, ***without discrimination as to where it has its registered seat or an effective centre of its activities.***

Article 9 point 2. ***Each Party shall****, within the framework of its national legislation,* ***ensure that members of the public concerned***
(a) Having a sufficient interest or, alternatively,
(b) ***Maintaining impairment of a right,*** *where the administrative procedural law of a Party requires this as a precondition,* ***have access to a review procedure*** *before a court of law and/or another independent and impartial body established by law,* ***to challenge the substantive and procedural legality of any decision, act or omission*** *subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.*

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the ***objective of giving the public concerned wide access to justice within the scope of this Convention****. To this end,* ***the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above.*** *Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.*

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, ***members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.***

Based on the above provisions, NGOs promoting environment protection and meeting any requirements under national law shall be deemed to have an interest in the environmental decision-making and considered as "public concerned". This creates the legal basis for the environmental NGOs to challenge acts and omissions in order to protect public interest.

The national laws regulating administrative procedures in various fields may determine who can be considered as a "client" or "concerned party" and, therefore, have the right to initiate a legal action, make statements, request information and appeal on specific issues. Usually, the right or legitimate interest of the concerned party is affected by the specific issue– e.g., it is the owner, user or neighbor of the subject real estate. In addition, the law may specifically determine that NGOs are deemed as concerned parties in certain issues, too.

As an example, in **Bulgaria** human rights NGOs have the right to file lawsuits without being directly affected, based on the Law for Protection against Discrimination. There is similar possibility related to consumers and the right of consumer associations to do it. Currently, there is a draft Law on legal capacity in which local NGOs try to introduce a similar provision for people with disabilities.

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According to the **Hungarian Law** on the general rules on administrative procedure and service, legal regulations may ensure the right of being a client and make legal statements in an administrative procedure for NGOs whose activities are directed to protect fundamental rights and enforce some kind of public interest.[3] One example for such law is the Law on the general rules on environment protection[4] that provides the legal status of being a client for NGOs in environment protection administrative procedures. This mean that NGOs are entitled to look into procedural documents, make statements and observations, participate at official acts and appeal against the decision.

The **Polish** Act of 30 August 2002 on proceedings before administrative courts also allows NGOs to represent the cases of others in front of the court if the matter concerns the scope of their statutory activity. The NGO may appeal the decision that rejects admission to the court case.[5]

In **France,** NGOs have broad competence to bring lawsuit to administrative courts, given that most of the administrative acts have the characteristics of public interest. The right to bring a lawsuit of general interest is not regulated in the laws, it is accorded to NGOs based on the court practice.

In **Greece,** Article 20 of the Constitution[6] guarantees the right to plead before court which is interpreted very broadly by courts. Thanks to this all NGOs claiming the unlawful practices of the state have a right to bring lawsuit to the courts.[7]

Based on the international principles and comparative country examples described above, we would have the following observations to the provisions of the Draft Law:

Article 16. 1(1) states that any organization is entitled to be a plaintiff and defendant in the court. As discussed earlier, we are certain that the intention of the legislator was to apply the criteria under section of Article 16 only for cases when NGOs protect public interest front of the court. Otherwise, the requirement that the object of the lawsuit shall meet the charter goals and objectives would be severely restrictive and very impractical. There are a number of issues related to the life of the organization which may lead to lawsuits and are absolutely unrelated to the statutory goals of the organization. For example, if the organization initiates a lawsuit for untrue information published about the organization in media, would such object considered to meet the objectives of the organization that is engaged in environment protection? Or in case the electricity company charges a very high fee for its services and the organizations wants to appeal against the administrative decision, would it be allowed based on the Draft Law?

[3] Article 15 (5) and (5a) of Law CXL of 2004
[4] Article 98-100 of Law LIII of 1995
[5] http://www.juradmin.eu/en/eurtour/i/countries/poland/poland_en.pdf
[6] http://www.hri.org/docs/syntagma/artcl25.html#A20
[7] www.psp.cz/sqw/text/orig2.sqw?idd=20953

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We commend the innovative provision on representation of public interest and litigation in courts, which is in line with good international practice. However, the second part of Article 16 (2) with following limitations will make representation of public interest extremely difficult. Moreover, some of the provisions on what type of NGO can submit a claim to the court may be further interpreted as limiting the right of participation in public affairs and decision-making only to certain public organizations. For example, to challenge unlawful acts and breached decision-making procedure by the state, the organization has to comply with the following three conditions. However, any public organization should have the right to participation in decision-making and should not be limited in this right.

With regard to this, we would have the following comments to Article 16.2 assuming that it applies to the protection of public interest only:

1. ***The right to apply to court is limited to 3 areas: protection of environmental, historical and cultural values.*** Based on comparative examples, there are other areas where NGOs play an important role - fight against discrimination, the rights of disabled people, consumer protection, access to information and others.

2. ***According to the Draft Law, organizations can file a lawsuit against actions, acts or omissions by authorities contradicting the Armenian law.*** This provision further limits the right to representation of public interest only to the organizations, which were part of the law-making or decision-making process. There are several problems with such a limitation: a) in case the process of law-making on a certain issue breached the regular legislative procedure, it may as well happen that no organizations were part of the process. Hence, they will automatically be excluded from the possibility of challenging the process in courts. b) It is not clear what is meant under "applied for elimination of inaction and the fact is confirmed by procedural documents evidencing the participation and application". Is there a clearly outlined procedure of redress for violations of law-making procedure in Armenian law? If so, can a public organization effectively complete the procedure and how long does it take? Representation of public interest in cases of environmental disaster or urban development may require immediate action, as by the time the organization gets to the court it may be late to prevent the violation.

3. ***The possibility of initiating a lawsuit is limited to organizations that within at least 2 years before filing the lawsuit conducted activities according to the charter goals and objectives.*** The possibility to bring a lawsuit to the court shall not be limited to the fact if an organization is active or not within a certain period of time. Besides, the Draft Law does not provide what would document the activities of organization.

Recommendation: We recommend the legislator to clearly separate two points under Article 16.1 on the right of the organization: (1) provision that entitles the organizations to represent

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and defend its rights and lawful interest front of other organizations, courts, the state and local self-governance bodies; and (2) provision that entitles the organizations to protect public interest. We recommend omitting limitations on the types of public organizations, which can bring a case to court in protection of public interest.

REPORT ON ORGANIZATIONS'S ACTIVITY/OPERATION

Issue: According to Article 23, all organizations have to prepare annually a detailed report on the organization's activity and operation without distinguishing between organizations based on their size or status.

Discussion: According to section 1 of Article 23, "*Each year before May 30 of the year following the reporting year the Organization is obliged to publish a report on it activities on http://www.azdarar.am - official website of public notices of the Republic of Armenia. The report shall contain the*

1) *Total amount of annual receivables (including received from the payment of fees (membership fees) of the participants (members) and from economic operation of the Organization;*
2) *Names and locations of the implemented projects;*
3) *Conclusion of the person (auditor) auditing financial statements (in case audit was conducted), if the amount of received by the Organization exceed 10 million drams;*
4) *Number of participants (members), as well as number of volunteers (as of January 1 of the reporting year);*
5) *Management bodies and names and surnames of the persons holding positions in the Organization;*
6) *Quantity of sessions of Meeting and other collegial management bodies (during previous year);*
7) *Domicile*."

Reporting is an important element of the lifecycle of NGOs that ensures that the authorities and the general public understand their mission and the results of their activities. Therefore, national legislations usually encourage NGOs to increase their transparency and provide for some kind of reporting requirement for at least certain types of NGOs. Moreover, if the state grants special privileges to certain NGOs, it may demand a higher level of accountability and set stricter reporting requirements to oversee the use of such indirect or direct state benefits. For example, in countries where distinct charitable or public benefit status exists, organizations with such a status oftentimes have to submit a narrative report about their activity in addition to the regular financial report.

The challenge in reporting requirements is usually to ensure that they are narrowly tailored to meet legitimate interests and are not unduly burdensome or intrusive. On 21 March 2013, the UN Human Rights Council adopted a *Resolution (22/6)*, in which it called upon States to ensure

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that reporting requirements "*do not inhibit functional autonomy [of associations]*". Also, the *OSCE/OIDHR Joint Guidelines on Freedom of Association* set standards regarding the reporting requirements.

> *104. The resources received by associations may legitimately be subjected to reporting and transparency requirements. However,* ***such requirements shall not be unnecessarily burdensome, and shall be proportionate to the size of the association and the scope of its activities, taking into consideration the value of its assets and income.***
>
> *225. Reporting requirements, where these exist, should not be burdensome, should be appropriate to the size of the association and the scope of its operations and should be facilitated to the extent possible through information technology tools (see the section on associations and new technologies, below).* ***Associations should not be required to submit more reports and information than other legal entities, such as businesses, and equality between different sectors should be exercised. Special reporting is permissible,*** *however, if it is required in exchange for certain benefits, provided it is within the discretion of the association to decide whether to comply with such reporting requirements or forgo them and forsake any related special benefits, where applicable.*
>
> *227. Reporting should be facilitated by the creation of, for example, online web portals where reports can be published, so long as this does not overburden the association.* ***Reporting requirements should not be regulated by more than one piece of legislation, as this can create diverging and potentially conflicting reporting requirements and, thus, diverging liability for failure to fulfil them****. Finally, associations should not, to the extent possible, be required to submit the same information to multiple state authorities; to facilitate reporting, the state authorities should seek to share reports with other departments of the state if necessary.*

The Recommendation CM/Rec (2007)14 of the Committee of Ministers to members states on the legal status of non-governmental organizations in Europe includes guidance on reporting, too.

> *62.* ***NGOs which have been granted any form of public support can be required each year to submit reports on their accounts and an overview of their activities to a designated supervising body****.*
>
> *63. NGOs which have been granted any form of public support can be required to make known the proportion of their funds used for fundraising and administration.*
>
> *64.* ***All reporting should be subject to a duty to respect the rights of donors, beneficiaries and staff, as well as the right to protect legitimate business confidentiality****.*

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There is a wide variety of organizational forms and aims pursued by civil society organizations, which can be established both for public (e.g. environmental network, educational organization, human rights organization) or mutual benefit (e.g. chess club, parents' associations). Based on the above, the European trend is to require narrative reports only from public organizations, which hold a special legal status providing them with higher level of public benefits, i.e. public funds. For example, in case the state established a special legal status for public organizations carrying out work for public good, i.e. public benefit status, then it can require a higher level of accountability from those organizations, which apply and benefit from this legal status.

We are, therefore, uncertain of the reason for requiring activity reports from all NGOs, including those that are not established for public benefit purposes. It may be especially burdensome for small organizations, such mutual benefit organization as a chess club, that do not receive any direct state support, nor have other financial resources and human capacity to produce activity reports.

While accurate accounting and proper records are appropriate for all registered organizations, we are also concerned that there is no differentiation between the treatment of large and small organizations in terms of their reporting requirements. Large organizations, with public or state funding, as well as extensive resources and activities present a significantly greater threat if mismanaged than do smaller organizations with few resources and little or no public or state support. Therefore, NGOs in several countries are exempt from reporting requirement or allowed to submit simplified report as long as their income is below a certain threshold, e.g. Ireland.

Recommendation: Based on the international standards and best practices, our preliminary recommendation is to consider the possibility of a differentiated approach to NGO reporting:

1. To identify criteria for organizations exempt from submitting reports; and
2. To provide for a simplified reporting for organizations of lesser annual income.