COMMENTS BY THE EUROPEAN CENTER FOR NOT-FOR-PROFIT LAW TO THE DRAFT LAW OF THE REPUBLIC OF ARMENIA ON PUBLIC ORGANIZATIONS April 6, 2015

European Center for Not-for-Profit Law (ECNL)[1] is pleased to have an opportunity to provide its extended comments to the draft Law of the Republic of Armenia on Public Organizations, the translated version received on March 24, 2015 (hereinafter: "*Draft Law*"). ECNL reviewed the current regulation for CSOs in Armenia, as well as participated in public discussions of the Draft Law conducted in Yerevan in March 2015. In January 2015, ECNL submitted its initial comments on two specific issues, the public appeal and the reporting of public organizations.

The comments are based on European and international standards in regulation of freedom of association, comparative examples and good practices. The comments are divided into **two main parts**:

1) General comments that highlight the international standards and the main, conceptual issues; and
2) Detailed comments and recommendations on how to further improve the Draft Law.

ECNL remains committed to provide further support to local stakeholders in the process of developing an enabling law for public organizations in Armenia.

I. GENERAL COMMENTS

Freedom of association is guaranteed by European and international documents, most importantly by the European Convention on Human Rights (Article 11, hereinafter: "*ECHR*") and the International Covenant on Civil and Political Rights (Article 22, hereinafter: "*ICCPR*"). These documents recognize that **everyone** has the right to freedom of association with others. The state has a positive obligation to guarantee and protect freedom of association, including through adopting framework legislation for CSOs. **Any interference with freedom of association must: 1) be prescribed by law; 2) serve a legitimate aim; and 3) be necessary in a democratic society.** The list of the grounds for legitimate derogations is exhaustive. Restrictions can be applied: in the interest of national security, public safety, prevention of disorder or crime, protection of health or morals and protection of the rights and freedoms of others. Freedom of association encompasses, *inter alia,* the following principles[2]:

1) ***Right to form, join and participate in a CSO***- freedom of association involves the right of individuals to interact and organize among themselves to collectively express, promote, pursue and defend common interests. Everyone shall have the right to establish and join an association,

[1] 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.

[2] Defending Civil Society Report co-authored by ICNL, World Movement for Democrary Secretariat at the National Endowment for Democracy (NED). Second Edition. June 2012. Available at: http://www.defendingcivilsociety.org/dl/reports/DCS_Report_Second_Edition_English.pdf

including natural persons (citizens, foreign citizens and stateless persons) and legal persons (both non-profit and for-profit) – both separately and jointly.

2) ***Broadly permissible purposes-*** International law recognizes the right of individuals, through CSOs, to pursue a broad range of objectives. Permissible purposes generally embraces all 'legal' or 'lawful' purposes.
3) ***Right to associate without legal entity status***- freedom of association includes the right to associate informally, as a group lacking legal personality. The state is equally obliged to protect the right to association for informal groups without registration. Registration should not be mandatory.
4) ***Right to obtain legal entity status***- organizations should be able to obtain legal entity status in order to meet their mission goals most effectively and enjoy the advantages that legal personality may provide. The registration procedure should be simple and swift to facilitate the process.
5) ***Right to operate freely from unwarranted state interference***- Once formed, CSOs shall have the right to operate in an enabling environment, free from unwarranted state intrusion or interference in their affairs. Freedom of association embraces the freedom of the founders and/or members to regulate the organization's internal governance and run their own affairs. As independent, autonomous entities, NGOs should have broad discretion in regulating their internal structure and operating procedures. The state has an obligation to respect the private, independent nature of NGOs, and refrain from interfering with their internal operations. Also, civil society representatives, individually or through their organizations, enjoy the right to privacy.
6) ***Right to seek and secure resources-*** CSOs should have the right to seek and secure funding from legal sources, including individuals and businesses, as well as local, national and foreign governments. Restriction on access to certain resources is a limitation to the ability of CSOs to operate.

In light of the prescribed international good standards for regulation of freedom of association, **we would like to welcome the following positive aspects and developments of the Draft Law:**

- The Draft Law establishes the framework for registration, operation and lifecycle of public organizations;
- The Draft Law prescribes independence of public organizations in determining their organizational structure, activities, objectives and forms;
- The Draft Law grants access of public organizations to a wide scope of financing resources without limitations;
- We especially welcome that the Draft Law would allow public organizations to carry out economic activities directly; and
- The Draft Law for the first time prescribes measures in support of volunteering and aims to give guarantees to host organizations and volunteers.

We also would like to suggest the following issues for further discussion:

1) The Draft Law allows public organization to operate with limited membership which violates the principle of non-discrimination and limits the right to join an organization;

2) The Draft Law restricts public organizations to include in their charters the lawful objectives that are reserved to other legal entities, such as religious organizations, trade unions, political parties or other public organizations;
3) Political parties, religious organizations, trade unions may not be founders of public organizations, limiting their right to associate;
4) The Draft Law includes detailed regulation on the charter, founding meeting, management bodies, their rights and obligations that may unnecessarily restrict organizations to freely determine their internal governance;
5) The Draft Law requires the organizations to publish the minutes of the Meeting on the website of the organization (if such exists) and provide documents on its activities to the Ministry of Justice that may violate their right to privacy;
6) Organizations would be subject of compulsory liquidation, in case they fail to meet requirements of the Draft Law within 1 year after its entry into force.

In the following section we elaborate on these and some other issues based on the European standards and best regulatory practices.

II. SPECIFIC COMMENTS AND RECOMMENDATIONS

JOINT MEMBERSHIP OF NATURAL AND LEGAL PERSONS

Issue: According to Article 2(1) of the Draft Law, an organization may be either an association of natural persons or the association of legal entities. This regulation excludes the possibility to set up an organization which has both natural person and legal person members.

Discussion: According to Article 2(1) of the Draft Law, "*The organization is an association of citizens of the Republic of Armenia, foreign citizens and those without a citizenship (hereinafter referred to as individuals) and (or) public association of legal entities, which has a status of non-profit organization.*" While this might be a matter of translation, this Article seems to differentiate between associations of natural persons and associations of legal entities and therefore restrict the possibility to have both types of members within the same organization. On the other hand, Article 10 (3) requires that at least two persons: physical person and/or legal entity be the founders of the organizations. Therefore, this provision allows organizations to have both natural and legal person members.

According to Article 2 of the First Annual Report of the Expert Council on NGO Law, "*NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based.*"[3]

Recommendation: We recommend the legislator to align Article 2(1) with Article 10(3) of the Draft Law and rephrase it in a way that it allows the association of individuals and legal persons within one organization, too.

[3] First Annual Report of the Expert Council on NGO Law at Council of Europe on Conditions of Establishment of Non-Governmental Organizations, available at: http://www.coe.int/t/ngo/Source/Expert_Council_NGO_Law_report_2008_en.pdf

LIMITED MEMBERSHIP

Issue: Article 2(2) of the Draft Law allows public organization to operate with limited membership which violates the principle of non-discrimination and limits the right to join an organization.

Discussion: According to Article 2(2) of the Draft Law, "*The Organization may be based on membership, without limitation or with limited membership, if the number of members is limited according to its charter."* The charter of the organization shall stipulate the requirements and the procedure for becoming a member, as per Article 13(1) 8).

As a general rule, there can be **two types of noncommercial organizations, member-based and non-membership type**. The founders should be free to choose the type based on the nature of the organization. For membership organizations, there is typically a minimum threshold for the number of founding members (2 or 3 being considered best practice) but no maximum limit or ceiling. For a non-membership organization, there is no regulation relating to membership – rather, the question may relate to minimum assets. Due to the different nature of membership and non-membership organizations, their internal governance structure is regulated differently, too.

In case the non-membership organization has high entry requirements, the regulator may provide an alternative non-membership form. Based on comparative practices, other non-membership legal forms can be non-profit companies, institutions, centers and others. As an example, Czech Republic introduced the legal form of funds which are foundations without initial asset requirement. In many countries, including Hungary and Germany, it is possible to establish a nonprofit company. Institute is a non-membership legal form in Slovenia.

According to international standards, organizations are free to determine the criteria for membership but it should not be discriminatory. Article 28 of the OSCE/ODIHR Joint Guidelines on Freedom of Association adopted by the Venice Commission at its 101th Plenary Session[4] (hereinafter: "*OSCE/ODIHR Joint Guidelines on Freedom of Association*) provides that "***Associations shall be free to determine their rules for membership, subject only to the principle of non-discrimination***". According to Article 22 of the Council of Europe Recommendation on the legal status of non-governmental organisations in Europe[5] (hereinafter: "*Council of Europe Recommendation*"), "*The ability of any person, be it natural or legal, national or non-national, to join membership-based NGOs should not be unduly restricted by law and, **subject to the prohibition on unjustified discrimination**, should be determined primarily by the statutes of the NGOs concerned*." The Second Annual Report of the Expert Council on NGO law further elaborates on this point in Point 82: *"… admission to and expulsion from a membership-based NGO is generally a matter for the organisation itself. However, the rules governing membership in its Statute - which would need to conform either explicitly or implicitly with the prohibition in Paragraphs 22 and 23 of Recommendation CM/Rec(2007)14 on unjustified discrimination and a right for members to be protected against arbitrary exclusion - must always be observed…"*[6].

[4] Adopted at the 101st Plenary Session on 12-13 December 2014. Available at: http://www.osce.org/odihr/132371
[5] Council of Europe Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, available at: https://wcd.coe.int/ViewDoc.jsp?id=1194609
[6] Second Annual Report of the Expert Council on NGO on the Internal Governance of Non-Governmental Organisations, available at: http://www.coe.int/t/ngo/Source/Expert_Council_NGO_Law_report_2009_en.pdf

The limitation of the number of members, however, would be discriminatory for persons who meet the qualitative requirements set for the members in the charter, but would like to join the organization only after the maximum number has been already reached.

Recommendation: We recommend the legislator to remove reference to limited membership in Article 2(2) of the Draft Law and consider possibility to establishing a non-membership legal form with no or minimum founding capital/assets.

OBJECTIVES OF THE ORGANIZATION

Issue: Article 3(2) of the Draft Law prohibits organizations to define objectives that are reserved to certain legal entities, including religious organizations, trade unions, political parties or other public organizations. Such provision may be interpreted broadly and further restrictions could be introduced by other legal instruments that violate the right of organizations to freely determine their objectives.

Discussion: According to Article 3(2) of the Draft Law, "*It is prohibited for the charter of the Organization to define objectives, which are reserved to political parties, religious organizations, trade unions, or other public organizations.*"

As described earlier, ECHR **guarantees the right of NGOs to engage in any kind of activities otherwise allowed to individuals**, and it provides a limited list of legitimate interests that may justify restrictions on fundamental freedoms of individuals or activities of organizations.[7] Public organizations should be able to define as its objective any noncommercial objective, which pursues a legitimate goal.

International law specifically protects the political activities of NGOs. According to the Study prepared by the Expert Council on NGO Law Regulating Political Activities of Non-Governmental Organization:

"B. 21. *The European Court of Human Rights addressed the capacity of citizens and NGOs to engage in public policy and political activities in several cases. The Court stated that allowing participation in public life and policy is in keeping with one of the principal features of democracy — that is, to create the possibility for members of a society to resolve social and political problems through dialogue, without recourse to violence, "even when they are irksome".[8] A State has some margin of appreciation in setting out conditions for the establishment and oversight of political parties and other associations participating in elections, however, other than that* ***the ECHR provides broad protection to NGOs "political" activities****. More importantly,* ***the Court also stated that the fact that an NGO's objectives might be seen as "political" should not necessitate it seeking the status of a political party where this is separately provided for under a country's law.***

B.22. In the case of Zhechev v. Bulgaria, where an association with objectives deemed "political" was precluded from acquiring legal personality other than as a political party, ***the Court noted that the mere fact that an organisation demands political changes or that its activities are otherwise deemed***

[7] See Expert Council on NGO Law 'Conditions of Establishment of Non-Governmental Organisations', pars. 33-45, available at: http://www.coe.int/t/ngo/Source/Expert_Council_NGO_Law_report_2008_en.pdf

[8] United Communist Part of Turkey and Others v. Turkey, no 19392/92, 30 January 1998, paras 57-58

"political" does not per se justify interference with its freedom of association, including a request that the organisation be registered as a political party, in order to participate in political life."[9]
Also, according to Article 13 of the Council of Europe Recommendation, **"***NGOs should be free to support a particular candidate or party in an election or a referendum provided that they are transparent in declaring their motivation. Any such support should also be subject to legislation on the funding of elections and political parties*."

In general, the reason to establish a certain legal form is connected to its benefit – for political parties, the possibility to run in elections, receive state funding for political campaigns etc.; for religious organizations, to carry out religious services, preach; for trade unions, to participate in negotiations with the employers.

Article 3(2) of the Draft Law does not provide any guidance on what are the objectives that are reserved to these entities. Religious organizations, trade unions and political parties are regulated by separate laws in Armenia, however, there are no clearly defined objectives in these laws either. Hence to define what should or should not be the objectives for public organizations is difficult and subject to interpretation.

Specifically, according to Article 3(1) of the Law of the Republic of Armenia on Political parties, "*The party is a public union formed on the basis of individual membership of citizens of the Republic of Armenia, the aim of the activity of which is to participate in the political life of the society and the state."* In addition, Article 21 of the Draft Law regulates the exclusive right of the parties, specifically "*the party is the sole public union, which is entitled to nominate candidates in the elections of the deputies to the National Assembly, elections of the President of the Republic and heads and council members of local self-governing bodies."*

Article 2(4) of the Law of the Republic of Armenia on Freedom of Consciousness and Religious Organizations defines that "*A Religious organization is an association of citizens established for professing a common faith as well as for fulfilling other religious needs*."

Due to this, even if Article 3(2) was included with the best intention and in good faith, it may be subject to broad interpretation and effectively limit the lawful objectives for activities of public organizations. For example, one may claim that public organizations may not have an objective to "participate in the political life of the society and the state" as per the definition of the aim reserved for political parties described in Article 3(1) of the Law on Political Parties. This would limit public organizations to engage in public policy processes and advocate for legal changes affecting civil society.

Recommendation: We recommend the legislator to remove Article 3(2) of the Draft Law and prohibit only unlawful objectives in line with Article 11(2) of ECHR.

PROPERTY OF THE ORGANIZATION

Issue: Article 7(4) of the Draft Law lists the possible sources of income for the organizations. Some of the listed sources seem to overlap while others are unclear. There is no specific reference to foreign sources of income, which constitute a significant source of funding for public organizations.

[9] Zhechev v Bulgaria, no 57045/00, 21 June 2007, Pars. 55-56 of the judgment.

Discussion: The diversification of resources is very important for the sustainability of CSOs so we welcome that the Draft Law provides a detailed and open list of various sources. Also we find it an important development that public organizations will be allowed to carry out economic activities without establishing a separate entity for such purposes.

While this might be a matter of translation, some points listed under Article 7(4) seem to overlap, including "donations, including grants" and "contributions". Also, it may worth to clarify what "Investments of the members of the Organization" means. As far as we understood, this may stand for the financial and in-kind contribution of the members of the organization.

Finally, the list does not include specific reference to foreign resources though we understand that the list remains open and any sources of income may be domestic and external, too. Nevertheless, foreign sources play important role in the life of public organizations so similarly to the current law, the Draft Law could also make a reference to this.

Recommendation: We would recommend to clarify some of the points mentioned above and add a sentence that the various sources of income may be domestic and external.

ESTABLISHING AN ORGANIZATION

Issue: Based on Article 10(4) of the Draft Law, political parties, religious organizations and trade unions cannot found an organization and the restriction may be extended to other legal entities, too.

Discussion: According to Article 10(4) of the Draft Law, "*Political parties, religious organizations, trade unions, as well as legal entities, which are prohibited to establish an organization or to become its member, may not be founders of an organization."* As far as we understood, this provision may be due to the legal culture that aims to distinguish between the role of various legal forms. Nevertheless, it constitutes a limitation on freedom of association that shall be granted to everyone, physical persons and legal entities alike.

For example, it is a common practice in many countries that religious organizations establish separate organizations to carry out some social, educational or humanitarian activities. Such possibility would be prohibited in Armenia due to this regulation. Also, the limitation on trade unions and political parties fall short of satisfying the legitimate aims requirement of Article 11 of ECHR. It is also worrisome that the regulation provides broad discretion to introduce limitations for other legal entities to their right to form an organization through other laws.

Recommendation: We recommend the legislator to remove Article 10(4) of the Draft Law.

CHARTER OF THE ORGANIZATION

Issue: Article 13 of the Draft Law provides an overly detailed list of information that shall be stipulated in the founding document and therefore limits the possibility of the organizations to freely determine the content of their founding documents. Also, Article 13(4) requires that any minor amendment to the Charter shall be registered by the state, which creates an additional burden.

Discussion: According to Article 19 of the Council of Europe Recommendation, "*the statutes of an NGO with legal personality should generally specify:*

a. its name;
b. its objectives;
c. its powers;
d. the highest governing body;
e. the frequency of meetings of this body;
f. the procedure by which such meetings are to be convened;
g. the way in which this body is to approve financial and other reports;
h. the procedure for changing the statutes and dissolving the organisation or merging it with another NGO."

Article 13 of the Draft Law prescribes for the charter to include 19 items of obligatory information. This unnecessarily limits the discretion of the organization to freely determine the content of the charter. The current law already requires quite a detailed information in the charter of the organization. Compared to this, additional information would be required by the Draft Law, such as the peculiarities of the rights and obligations if the underage members (point 10); the procedure and cases of using the services by members (point 11); the procedure of disposition and management of the property (point 13); and the description of the symbols and its image, if such exist (Article 13(3)).

The Law on public organization should be a **framework law that provides the main standards of operation and leave broad discretion for the organizations to regulate their internal governance.** Such detailed requirements for the founding document seem to be unnecessary and create burden for the organization. If the organizations wish so, such issues may be regulated in the by-law of the organization.

In addition, the charter shall be registered by the state every time the public organization amends any of its provision. Especially considering the detailed content of the charter, it would cause significant administrative burden for both public organizations and the Ministry of Justice. According to Article 43 of the Council of Europe Recommendation, "*NGOs should not require approval by a public authority for a subsequent change in their statutes, unless this affects their name or objectives. The grant of such approval should be governed by the same process as that for the acquisition of legal personality but such a change should not entail the NGO concerned being required to establish itself as a new entity. There can be a requirement to notify the relevant authority of other amendments to their statutes before these can come into effect*."

Finally, Article 13(7) of the Draft Law requires organizations to bring their charter in conformity with any legal amendments within 3 months of the legal act entering into force, unless stipulated otherwise. If adopted, even a minor, technical legal amendment necessitate the amendment of the organization's charter and its state registration. This would cause significant administrative and financial burden to the organizations unnecessarily. Also, it cannot be expected from the organizations to constantly monitor the legal changes and react to it within such a short period of time. According to best practices, state registration is only required if the information of the state registry changes.

Recommendation: We recommend the legislator to provide more discretion to the public organizations to determine the content of their charter and reduce the compulsory content prescribed by law in line

with the Council of Europe Recommendation. In addition, we recommend to remove Article 13(7) from the Draft Law and regulate the transitional period in the relevant laws themselves, in the light of the nature and importance of the legal amendment.

STATE REGISTRATION OF THE ORGANIZATION

Issue: Article 14(2) 6 of the Draft Law requires the submission of both the excerpt from commercial register (or equivalent document) and the founding document of foreign legal person founders. Moreover, these documents need to be notarized that creates additional administrative and financial burden for the organization that have foreign founders.

Discussion: According to Article 14(2) 6 of the Draft Law, *inter alia* the following shall be submitted for the purposes of registration in case of foreign founders: "*Information on founding legal persons (decision on foundation of the legal person, name and number of state registration of the legal person), and in case of foreign legal persons, also an excerpt from commercial register of that country or an equivalent document evidencing legal status of the legal person, the founding documents (or relevant excerpts) translated into Armenian language and having notary ratification*."

Unlike domestic founders, foreign entities shall submit the notarized translation of the commercial register and the founding document (or relevant excerpts). However, the Draft Law does not provide further guidance on what relevant excerpt shall mean. As far as we understood, the reason to request the founding document is to check whether the foreign entity has the right to establish a public organization abroad. According to the current practice, it is sufficient to only submit the respective provision of the founding document. Based on this, it may be beneficial to make specific reference to this in Article 14(2) 6.

Recommendation: We would recommend the legislator to specify what "relevant excerpt" means.

THE RIGHTS OF THE MEMBERS OF THE ORGANIZATION

Issue: Article 15 of the Draft Law and especially its (2) section includes overly detailed regulations on the rights of the members that limits the possibility of the organization to freely determine its internal governance.

Discussion: According to Article 15(2) of the Draft Law, "*Members of the Organization are entitled to demand from the Organization information, receive copies of documents on the charter changes of the Organization, protocols and decisions of bodies and funds from the use of the property, during the last 3 years, as well as a copy of the opinion of the independent auditor that audited financial statements of the Organization. Within 5 business days upon receiving the request the executive body shall provide the requested information in hard or soft copies. Charges for provision of information and documents indicated in this paragraph may be made, however not exceeding the costs of their provision.*"

While we support the right of members to obtain information, the organization shall be free to determine the conditions in the charter or its bylaw. Depending on the activity of the organization, 5 working days may be too short to comply with the requests.

Recommendation: We recommend to remove Article 15 (2) of the Draft Law and at most include that the procedure for members to demand information from the Organization shall be regulated in the charter or by-law of the organization.

THE RIGHTS OF THE ORGANIZATION

Issue: Article 16 provides a closed list of rights for the organizations, without reference to their right to carry out advocacy and watchdog roles, including participation in policy making, submitting opinions and other.

Discussion: Article 16(1) of the Draft Law provides a list of rights that public organizations are entitled to exercise in accordance with their charter objectives. According to international law, public organizations shall have the **right to carry out any lawful activities.** Even if the list is considered open in practice, we would recommend to include a separate point for the right to participate in policy-making to reinforce this specific right and the possibility to engage in any other lawful activities to avoid any possible misunderstanding in the future.

Recommendation: We recommend to include the right to "Implement activities, campaign, express their points of view, participate in policy making, comment on the policies of public authorities and engage in any other civil and lawful activities and projects."

VOLUNTEERS OF THE ORGANIZATION

Issue: According to Article 17 of the Draft Law, it is prohibited to engage volunteers to fulfill economic operations of the organization.

Discussion: Economic operation of the organization is defined under Article 8 of the Draft Law. According to this, "*an Organization shall have the right to use, possess and dispose its property, the products of its activities and delivered paid services for economic (entrepreneurial) purposes, as well as to establish in statutory manner a commercial organization or participate to the latter*."

While we welcome the possibility of involving volunteers in public organizations, we think that the restriction on engaging volunteers in economic activities does not meet legitimate purpose. Would this prohibition mean that volunteers cannot help in an elderly home where the clients pay monthly fees for the service? Or would organizations working for persons with disabilities be prohibited to involve volunteers in selling the hand-made crafts prepared by the clients?

According to Article 8(4) of the Draft Law, the profit received from economic activities of the organization shall be used only to meet the goals of the organization. This provision itself provides enough security that the income from economic operations will be reinvested to the organization based on the non-distribution principle.

Recommendation: We recommend the legislator to remove the prohibition to engage volunteers in economic operations of the organization.

RESPONSIBILITIES OF THE ORGANIZATION

Issue: According to Article 18(1) point 5 of the Draft Law, the organization is obliged to inspect enforcement of the requirements of the law and within reasonable timeframe provide copies of decisions of its management bodies or other documents on its activities. Such provision provides broad discretion for the Ministry of Justice to determine the timeframe and request any document in relation to the operation of the organization which may violate the right to privacy.

Discussion: Article 8 of ECHR guarantees that everyone has the right to respect for his private and family life, his home and his correspondence. According to European Court decisions, this right is not limited to individuals, but extends to corporate entities.[10] According to Article 65 of the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, "*The Special Rapporteur recognizes the right of independent bodies to examine the associations' records as a mechanism to ensure transparency and accountability, but such* ***a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk***."[11]

Based on Article 18(1) 5 of the Draft Law, Ministry of Justice may request any documents of the organization within a 'reasonable' timeframe. As an example, the Ministry may look into the list of members of LGBT rights organization, self-help group of anonymous alcoholics or rehabilitating addicts that may discourage people to become members of such organizations.

Recommendation: We recommend the legislator to include that the procedure to inspect enforcement of the requirements of the law cannot be arbitrary and must respect the principle of non-discrimination and the right to privacy.

PROCEDURE OF CONVENING THE MEETING

Issue: Article 20(9) of the Draft Law requires the organizations to publish the minutes of the Meeting on their website which violates the right to privacy.

Discussion: As described above, **public organizations shall enjoy the right to privacy** and the requirement to publish the minutes violates this right. It may be especially sensitive for organizations working for vulnerable people such as drug addicts, LGBT groups, persons subject to domestic violence and others. Also, it may lead to corridor discussions or the preparation of simplified minutes in order to avoid reference to sensitive issues.

Recommendation: We recommend the legislator to remove Article 20(9) of the Draft Law.

[10] See Niemietz v. Germany, 13710/88, ECHR 80 (16 December 1992), in which the Court found no reason why the notion of "private life" should exclude activities of a professional or business nature.

[11] Report available at: http://freeassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf

AUDIT OF FINANCIAL STATEMENT OF THE ORGANIZATION

Issue: According to Article 25 of the Draft Law, if the annual turnover of an organization funded from public or community budget exceeds 10 million AMD (approx. 21,200 USD) during a reporting period, its financial statement shall be subject to mandatory audit. Such threshold may be very low vis-à-vis the high costs of conducting an audit and the possible risk state may encounter in case of abuse.

Discussion: According to Article 25 of the Draft Law, "*If annual turnover of the Organization funded from public or community budget, exceeds ten million AMD during reporting year, its financial statements submitted to state agencies in the manner set forth by the law are subject of mandatory audit to be conducted by an independent auditor selected in accordance with the charter of the Organization not later than before May 15 of following year.*" As far as we learned in discussions with the local stakeholders, the threshold would apply only to the received state funding and only this received funding from the state will be subject for audit.

We support the intention to ensure transparent state financing to public organizations. **Transparency and accountability of state financing shall apply to all types of beneficiaries, not only to public organizations.** This may be ensured, *inter alia*, through the adoption of general standards on the transparency of state financing. As an example, the Hungarian Act CLXXXI of 2007 on Transparency of Financial Support Provided from Public Funds regulates the circle of information of public interest related to the financing process; the disclosure of public information; the circle of people/organizations that cannot be applicant and receive funding (conflict of interest rules); and the procedure in case conflict of interest arises.

The **audit requirements of public organizations shall be proportionate to the requirements of other sectors (i.e., companies) and the level of risk** arising from the misuse of state funding. As far we learned from the local stakeholders, the audit fee may be quite a significant amount (3,000-5,000 USD or more) which may discourage organizations to obtain state funding. According to the OSCE/ODIHR Joint Guidelines on Freedom of Association, *"….there may be situations where audits (understood as the verification of an association's financial and accounting records and supporting documents provided by an independent professional) are required by donors.* ***At least in cases where associations receive public funding, it may be necessary to provide them with adequate funds to conduct such audits, regardless of whether the funds are from a public or private source.*** *States should assist by providing funds for such audits in cases where associations have difficulties in carrying them out."*

Based on the above, the state may provide adequate funds to conduct such audits through allowing the organizations to build the audit costs in their public/community budget. From cost efficiency point of view, however, it would be counterproductive to provide 22,000 USD state financing and spend nearly 1/5th of this amount for audit.

According to comparative examples, the requirement for external audit are determined on various grounds: based on the annual income of the organization, based on the business income of the organization, only for public benefit organizations etc. The threshold for audit is usually higher. As an example, in Hungary CSOs shall be subject to audit in case the annual income from business activity in

the average of the past two business years exceeds 300 million HUF (1,102,000 USD). In some countries associations are exempt from audit (e.,g in Czech Republic and Slovakia).

Recommendation: We recommend the legislator to increase the threshold of compulsory audit and allow organizations to build the audit fee in their public or community budget.

REORGANIZATION AND LIQUIDATION OF THE ORGANIZATION

Issue: Based on Article 30(2) of the Draft Law, conducting activities prohibited by law or without license is considered substantial breach that entitles the competent body to request compulsory liquidation at the court.

Discussion: According to Article 44 of the Council of Europe Recommendation, "*The legal personality of NGOs can only be terminated pursuant to the voluntary act of their members – or in the case of non-membership-based NGOs, its governing body – or in the event of bankruptcy, prolonged inactivity or serious misconduct."*

According to the Draft Law, the regulations of the Civil Code apply to the reorganization and liquidation of the organizations, with the exception regulated in the Draft Law. According to Article 30 (1) of the Draft Law, the competent body may initiate the liquidation of the organization in case it "has committed gross violations of law" and Article 30 (2) describes what gross violation means. Based on this, conducting even one activity prohibited by law or without license may result in the liquidation of the organization.

In addition, "*the failure to eliminate the violation applying the strictest sanction in accordance with the Code of Administrative Offences of Republic of Armenia*" shall also constitute gross violation, however, it is unclear to what kind of violation it shall apply- gross violation of the law or others, too.

According to the OSCE/OIDHR *Joint Guidelines on Freedom of Association*:

"*252. In general, **any penalty or sanction** amounting to the effective dissolution or prohibition of an association **must be proportionate to the misconduct of the association** and may never be used as a tool to reproach or stifle its establishment and operations.*

*253. **Associations should not be prohibited or dissolved owing to minor infringements**, including cases where the association's chosen name is not in line with legislation, or of other infringements that may be easily rectified. In addition, associations should be provided with adequate warning about the alleged violation and be given ample opportunity to correct infringements and minor infractions, particularly if they are of an administrative nature.*

*256. It is also essential that **any decision leading to the suspension, prohibition or dissolution of an association be communicated in a timely manner** and be subject to review by an independent and impartial tribunal.*

*257. **Legislation should clearly state what happens to the assets and property of associations where their termination is involuntary**. Where involuntary termination is based on the noncompliance of the association's objectives or activities with international standards or with legislation that is consistent*

with such standards, the legislation may provide that the funds or assets concerned should pass to the state. In other cases, providing for an automatic transfer may be considered disproportionate.

258. Where the termination is voluntary, it should be initiated by the association itself, for example, in accordance with its founding instrument or by decisions of its members. ***The association's freedom to determine who should succeed to its assets is only subject to the prohibition on distributing profits that it may have made among its founders and members. Regarding the transfer of assets obtained with the assistance of tax exemptions or other public benefits, it may be legitimate to have them transferred to associations with similar objectives.***"

In order to assure a vigorous and independent civil sector, the law should provide for intermediate sanctions (e.g., pecuniary fine) for various types of violations. Termination of legal existence and dissolution of an organization should be the measure of last resort. It should be possible for the state to take such action only for the most serious and blatant violations, and then except in cases involving the most urgent threat of irreparable harm, only after the civic organization has been given an opportunity to correct its behavior.[12]

On the other hand, chapter 7 of the Draft Law fails to regulate the principles for the utilization of the remaining assets of the organization in order to comply with non-distribution constraint. According to best practices, it should go to another public organization, usually with a similar purpose, pursuant to the terms of the charter or a resolution of the Meeting. In the absence of such direction, the competent court could determine the organization. In addition, the right of organization to appeal against the decision is also not mentioned in the Draft Law.

Recommendation: We recommend the legislator to consider Article 30(2) 1) substantial breach only in case it happens more than one time. In addition, we recommend to regulate the principles of utilizing the remaining assets that, from one hand, provides safety for non-distribution and on the other hand, allows the organizations to determine the beneficiary public organization.

FINAL AND TRANSITIONAL PROVISIONS

Issue: According to Article 16 (2) of the Draft Law, organizations shall be liquidated in case they fail to meet requirements of the Draft Law within 1 year. However, it is unclear from the Draft Law what requirements shall the organizations comply with the lack of which would entail such a severe consequence. Based on comments from the public authorities, this would *de facto* result in the re-registration of all public organizations in Armenia. This does not comply with good international standards.

Discussion: According to Article 16 (2) of the Draft Law, "*Organizations failing to meet requirements of this Law within one year of entering into force of this Law shall be subject to mandatory liquidation by the Authorized body*". Since the Draft Law introduces expanded requirements to the charter, formally, it would necessitate changes to statutory documents for majority of public organizations.

According to the international best practices, **newly adopted laws or law amendments should not request all duly registered associations to re-register**. This opinion is supported by UN Special

[12] Guidelines for Laws Affecting Civic Organizations. Open Society Institute, 2004.

Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, in his report from 2012. He acknowledges the right to form and join association as an inherent part of freedom of association and raises concerns on possible violations of this right caused by re-registration. More specifically, re-registration might cause arbitrary rejection or time gaps in pursuing the activities of associations.[13]

Re-registration may **cause administrative and financial burdens for public organizations,** especially small ones. Even if the re-registration is free of charge, they have to redraft their charters that may require legal assistance. Besides public organizations, the **re-registration procedure may pose significant amount of additional work for Ministry of Justice, too.** They would have to cope with the massive paperwork, which may cause delays in accomplishment of other tasks that are vested in them.

In addition to the additional financial and administrative burden, **1 year is extremely short transitional period** based on European practices, and especially for those organizations that do not regularly monitor the legal amendments. As an example in Czech Republic, all legal entities including associations, foundations and funds have 3 years to change their founding documents and statutes to comply with the obligatory provisions of the new Civil Code. The documents shall be submitted within the prescribed three years' timeframe to the respective registration authorities. In case a legal entity fails to do so within the prescribed deadline, the registration authority calls on the organization to abide by the legal provisions and set additional reasonable time period to fulfil this duty.[14] When Bulgaria introduced public benefit status in 2000 they initially set 1 year and had to extend it twice with an extra year. In some cases, there are an affirmation in the new law that **all previously registered organizations will be recognized as registered under the new law.** The current law of Armenia also stated in its concluding provisions that the entering into force of the law does not require the obligatory re-registration of organizations. We would recommend to have similar approach in the Draft Law, too.

In addition, we would like to raise that when a new framework law is introduced, it is very important that the state authorities carry out a comprehensive awareness raising campaign to familiarize the sector with the new law and enable them to comply with the new requirements. This awareness raising shall take place in various forms in order to ensure wide reach out in the sector – through written and online media, registered mail, e-mail lists and others. Also, it is a good practice to prepare a manual that compares the current law with the new one and describes what the changes are and how public organizations can comply with the new law.

Recommendation: We recommend the legislator to affirm in the Draft Law that all previously registered public organizations will be recognized as registered under the new law. Instead of requiring re-registration (with presumption of mandatory liquidation for those not applying), we recommend to include the requirement to revise the charter in line with the Draft Law's new requirements. We recommend to extend the term to at least 2 years and ensure free of charge state registration of the amended charter. Finally, we suggest to carry out extensive awareness raising campaign through various means.

[13] Article 62 of the Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai A/HRC/20/27, Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

[14] Article 3041 of the Civil Code, available at: http://business.center.cz/business/pravo/zakony/obcansky-zakonik/cast5h2d1.aspx

RIGHT TO PUBLIC APPEAL

Issue: We recognize and commend the legislator to introduce the possibility for public organizations to present public interest front of the court. However, the requirements to 1) take some kind of previous measures to appeal the act and 2) implement activities for at least 2 years may unnecessarily limit the possibility to exercise this right.

Discussion: As mentioned earlier, ECNL already submitted initial comments on the provisions that allow public organizations to submit public appeal. We welcome that there has already been some revision to the proposed wording. Also, it is in line with European practices to regulate this right in the Code of Administrative Legal Proceedings of the Republic of Armenia.

We would recommend to consider further changes on the following:

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 and have the right to initiate public appeal. 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**.

   In some countries, the possibility to appeal to court is broadly defined. 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.[15] In **Greece,** Article 20 of the Constitution[16] 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.[17]

2. ***According to the Draft Law, organizations can file a lawsuit in case they have participated in receipt of execution of the act of appeal and has applied or taken measures to appeal the act*.** This provision limits the right to representation of public interest only to the organizations, which were part of the law-making or decision-making process and took measures against the act in some ways. 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 "has applied or taken measures to appeal the act". As far as we understood from the local stakeholders, this may include organizing a picket or other actions that can be evidenced by relevant information. However, it would be left to the courts to interpret this provision.

[15] http://www.juradmin.eu/en/eurtour/i/countries/poland/poland_en.pdf
[16] http://www.hri.org/docs/syntagma/artcl25.html#A20
[17] www.psp.cz/sqw/text/orig2.sqw?idd=20953

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 proof would document the activities of organization. Due to this limitation, issue-based organizations that are spontaneously established by experts to raise awareness on a concrete problem (e.g., building a supermarket on a Natura 2000 area) would not be allowed to initiate a public appeal.

Recommendation: We recommend the legislator to expand the scope of areas that may be subject of public appeal. Potential areas may be: fight against discrimination, the rights of disabled people, consumer protection and others. In addition, we recommend to remove the requirements to 1) take some kind of previous measures to appeal the act and 2) implement activities for at least 2 years.