



Report on the Situation of the Lawyers in Azerbaijan

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This report is written to highlight the critical situation of the legal profession in Azerbaijan. Since independence, Azerbaijan has taken steps towards advancing the legal profession and the rule of law. It adopted a new Constitution in 1995, which provides for political and individual rights and mandates the separation of powers and the independence of the judiciary. It is a participating state of the OSCE, obliged to fulfill its commitment to the rule of law and human rights standards established in several documents including the Copenhagen, Moscow and Budapest Documents of 1990, 1991 and 1994 respectively. In January 2001, Azerbaijan acceded to the Council of Europe (CoE). As a member of the CoE, Azerbaijan is obligated to bring its legislation into conformity with European standards. It is also a party to the European Convention of Human Rights, violations of which can be brought before the European Court of Human Rights in Strasbourg after all domestic remedies have been exhausted. Although there has been reform to the law governing the criminal defense bar on paper, implementation of the law has maintained the status quo; a closed, tightly controlled criminal defense bar.

The international legal community has voiced its concern over this situation repeatedly. As far back as 1999, the International League of Human Rights addressed the closed criminal bar as a major curtailment to defending victims of human rights abuse stating, “Preventing independent lawyers from defending dissidents charged with criminal offenses will undermine the broader struggle for human rights and criminal justice.”¹ The Organization for Security and Co-operation in Europe - Office for Democratic Institutions and Human Rights (OSCE ODIHR) has made the opening of the criminal defense bar a priority for Azerbaijan. On June 23 and 24, 2004, the U.S. Embassy, American Bar Association Central Europe and Eurasian Law Initiative (ABA CEELI) and OSCE hosted a “Conference on the Formation of the New Bar of Advocates” in which recommendations were made towards creating a new and all-inclusive bar association pursuant to the Law on Advocates.² The OSCE Office in Baku expressed its concerns in a November 11, 2004 press release regarding the establishment of the new Collegium of Advocates.³ Most recently, the OSCE deliberated on the problem in its Trial Monitoring Report.⁴ The Baku office of the ABA CEELI has provided interviews to television stations and press statements also expressing its concern and criticism of the process.⁵ The Law Society posted an appeal to the President of

¹ International League of Human Rights, “Restrictions on the Independent Legal Profession in Azerbaijan”, September 1999, Section I(C); available at <http://www.ilhr.org/ilhr/reports/legal/restrict.html>.

² Participants included: Presidential Administration, Ministry of Justice, Milli Majlis, U.S. Embassy, ABA CEELI, OSCE, “Conference Recommendations – Formation of the New Bar of Advocates”, in OSCE ODIHR and OSCE Office in Baku, *Report from the Trial Monitoring Project in Azerbaijan 2003-2004*, Annex 6, Warsaw and Baku, February 4, 2005.

³ OSCE Office in Baku, Press Release of November 11, 2004.

⁴ OSCE ODIHR and OSCE Office in Baku, “Report from the Trial Monitoring Project in Azerbaijan 2003-2004”, *Right to choose a lawyer*, pg. 13 (in the Azerbaijani version pg. 14) and *Conclusions and Recommendations*, pg. 38 (41), *supra*.

The report is available at http://www.osce.org/documents/odihr/2005/02/4233_en.pdf

⁵ ABA CEELI, Press Release of February 2, 2005.

Azerbaijan on its website.⁶ In addition, Council of Europe has expressed its concern in the Monitoring Groups 5th Progress Report.⁷

Limiting Members of the New Collegium of Advocates

In August 2004, amendments to the Law on Advocates were signed by President Aliyev and came into effect. The spirit and intent of the law is to expand the number of advocates available to defend individuals in criminal matters. With one advocate for every 22,887 people, the ration of advocate to person in Azerbaijan is among the lowest in the NIS.⁸

The transitional provisions of the 2004 Law on Advocates provides that “licensed lawyers” shall be part of the membership of the new Collegium: “[t]here shall be acknowledged the right of persons, who at the date of entering of these Transitional Provisions into force are the members of the existing Collegium of Advocates and those who have special permission (license) for rendering paid legal services, to establish [the] new Collegium of Advocates without passing [a] professional examination . . .” The understanding of the international legal community is that the language of the law opens up the initial membership of the new Collegium to the community of over 200 licensed lawyers. This would almost double the number of advocates in the country and show a real commitment to defending human rights.

The Ministry of Justice and the Organizational Committee for the new Collegium of Advocates, however, interpreted the law’s provision on licensed lawyers in a very narrow and restrictive manner. They included only those individuals whose licenses had not expired but were active on the date the law was passed. Thus, any lawyer with a license issued prior to August 4, 2001 was not considered to have a “valid” license and, therefore, not entitled to automatic membership in the Collegium. Under the Ministry of Justice’s and the Organizational Committee’s interpretation, only 62 lawyers held a “valid” license conferring the right to automatic membership. That right, however, was even further qualified by the Organizational Committee. The 62 licensed lawyers were required to apply for admission - a qualification not embodied in the law. Of the 62 licensed lawyers, only 36 “qualified” and, therefore, were invited to the constitutive meeting of the new Collegium and admitted as members. The interpretation of the law is clearly contrary to the spirit behind the law. Furthermore, it takes advantage of a series of legal regulations and administrative processes that deny lawyers the right to practice criminal law.

A “license” referred to in the 2004 Law on Advocates became essentially meaningless after December 1998, pursuant to an announcement by the Ministry of Justice stating the licensing process did not confer the right to practice criminal defense law. The effect of the announcement was to bar licensed lawyers who were not

⁶ See <http://www.lawsociety.org.uk>

⁷ Council of Europe, CM(2004) 215 prov. 8 December 2004.

⁸ There are approximately 350 members of the “old” Collegium. The population of Azerbaijan is approximately 8 million.

Collegium members from representing criminal defendants, thereby preserving the Collegium's monopoly on criminal defense services. The Minister's interpretation was codified in the 1999 Law on Advocates, which required membership in the Collegium in order to practice criminal law. In September 2002, the law was completely abolished to the effect that licenses were not required and did not need to be renewed.⁹

Given this legal and administrative background of licensed lawyers, the interpretation of the Ministry of Justice and the Organizational Committee for the new Collegium is disingenuous. The interpretation is designed with one purpose in mind - to limit the inclusion and participation of licensed lawyers, which is contrary to the spirit and language of the law. The law was intended to open the criminal defense bar and establish an independent bar. The exclusion of the majority of licensed lawyers has allowed the Collegium to maintain its monopoly on the criminal defense bar.

The Constitutive Meeting of the New Collegium

In addition to restricting membership, the way the constitutive meeting was conducted ensured the position of the old leadership. The Organizational Committee only gave five days notice for the constitutive meeting, which itself could result in limited participation.¹⁰ Moreover, the procedural issues detailed below demonstrate a lack of commitment to an independent Collegium.

1. Rush Amendments

The 2004 law provided for secret balloting in voting for the new Presidium, a method that promotes independent voting without fear of reprisal. On Tuesday, October 26, 2004, a rush amendment to the law was introduced in Milli Majlis, which did away with the requirement of secret balloting. The amendment passed and came into effect on October 29, 2004, the same day the Organizational Committee called the constitutive meeting. This amendment was a fundamental change to the law that was reviewed by Council of Europe and contrary to the principle of independent voting without duress or influence. Further, it indicates bad faith on the part of the Ministry of Justice and the Organizational Committee to force a rush amendment, after a year of negotiations to pass the law.

2. Members Only?

According to Mr. Azer Tagiev, Chairman of the Presidium and Chairman of the Organizational Committee for the new Collegium, 406 lawyers were invited to attend the constitutive meeting – 370 advocates and 36 licensed lawyers. 377 invited members attended. At the constitutive meeting there was no system or method for verifying the identity of the participants. It was noted by participants that there were numerous plain clothes police officers present and participating as invited members.

⁹ Presidential Decree No. 782, which removed “paid legal services” from the list of activities requiring special permission (license). September 2, 2002.

¹⁰ The Organization Committee announced on Oct. 29, 2004 that the constitutive meeting would be held on November 3, 2004.

The list of invitees or attendees has not been made public, although it has been requested by ABA CEELI. Previous requests to the Collegium and the Ministry of Justice for the names of licensed lawyers as well as Collegium members have been denied. ABA CEELI has been told that an advocate's identity is "a secret." Names of certified lawyers should never be held in secret. For a person to exercise the right to defense, clearly the names of qualified advocates must be a public matter.

3. Non-Democratic Procedures

The constitutive meeting was orchestrated in such a manner that there was no opportunity for meaningful input by the participants. Prior to and at the meeting, invited members were not given an agenda or a copy of the proposed Charter to be voted upon. There was no means of nominating candidates for the Presidium other than shouting out a name. When participants did attempt to discuss their platform they were rudely shouted down by the Chairman of the Organizational Committee. There were no microphones or podiums to address the Organizational Committee. Significantly, no nominations were taken for the accounting committee - those responsible for counting the ballots. The only candidates presented to the participants for the accounting committee were those individuals nominated by the Chairman of the Organizational Committee.

4. Voting

Despite the rush amendment changing the method of voting from a secret ballot to an open vote, the Organizational Committee put the issue to the participants. In an open vote the participants voted in favor of secret ballots. The process, however, was disorderly and chaotic and continued past midnight. It was impossible to verify the number of ballots distributed and who actually voted. The ballots were not counted prior to distribution; ballots were not executed in a private manner; in some instances, identification was not required to obtain a ballot; and voting booths were overcrowded with people, preventing meaningful observation and allowing opportunity for voting fraud.

Response to the Constitutive Meeting

The Collegium and Presidium members made several media statements inappropriately using the mere presence of international organizations at the constitutive meeting as an endorsement for their methodology. IWPR reported Mr. Tagiev as stating, "because representatives of the OSCE in Baku and the United States Lawyers' Union [meaning ABA CEELI] attended the conference, no sort of illegality could have taken place."¹¹ Representatives of ABA CEELI, OSCE, COE, GTZ and the U.S. Embassy attended the constitutive meeting strictly as observers. The international community did not have any control in the manner or method by which the meeting was conducted. Observers witnessed a process that was procedurally flawed as described above.

¹¹ IWPR, "Azerbaijan Lawyers Up in Arms" by Samira Ahmedbeyly, CRS No. 264, December 1, 2004; see also, Zerkalo, "New Steps in Developing Advocacy in Azerbaijan" by Rafiq Gulliyev, December 5, 2004.

The international community as well as the national community condemned the process leading up to the constitutive meeting and the procedures utilized at the meeting itself. Five lawsuits have been filed at the district court level against the Ministry of Justice, the Organizational Committee and the Presidium regarding the establishment of the new Collegium. Three lawsuits have been filed directly with the Constitutional Court.

Three cases were filed in the Nasimi District Court - one involving 18 licensed lawyers; one involving 4 licensed lawyers; and one involving one licensed lawyer. Two additional cases were filed in the Yasamal District Court - each case was brought by 2 licensed lawyers. Both district courts have rejected all five lawsuits. The two Yasamal District Court cases and the two Nasimi District Court cases involving 4 and 1 licensed lawyers are on appeal to the Supreme Court, having been rejected at the district court level and the appellate level. The Nasimi District Court case involving 18 licensed lawyers is on appeal at the appellate level. The three Constitutional Court cases have all been rejected by the Court.

In every case, the Collegium of Advocates and the Ministry of Justice as defendants have refused to make an appearance in the court. Given the very nature of these institutions, they should present their defenses in a court of law.

The basis for rejection and refusal of the courts to hear the cases - that the courts cannot rule on the legality/illegality of the constitutive meeting because it is not stipulated in the Law on Advocates - is a blatant violation of Article 6 of the European Convention of Human Rights governing access to courts.

Bar Exam Preparation

The international legal community has further concerns that the process leading up to the written bar exam was a closed and non-transparent process.

1. Non-Transparent Process

When offered assistance by the international legal community, the Collegium took the position that it could not delegate or co-share the responsibility because the 2004 law states the Presidium is the only authorized body to prepare the bar exam. As a result, the Presidium alone compiled and vetted the exam questions. Solicitation of questions came from a small select group of professionals including advocates, law professors, judges, law enforcement bodies, and members of the Qualifications Committee. The Qualifications Committee's role was limited to implementing the bar exam per the rules established by the Presidium. The Presidium made the final decision on the questions to be used in the exam. Exam preparation materials were not made public prior to the exam for studying purposes. And, all complaints regarding the exam are to be addressed by the Presidium, the same body in charge of creating the rules for the bar exam.

The cumulative effect of this process is a closed, non-transparent system. The decision not to publish test preparation materials in advance, in a country where public access to laws is limited, at best, resulted in an unreasonably high number of applicants failing the exam. The decision not to vet the questions to a larger legal community resulted in questions unrelated to the law appearing on the exam. For example, one exam question asked: *Which of the North African countries have access both to Mediterranean Sea and Atlantic Ocean? (a) Egypt; (b) Morocco; (c) Tunisia; (d) Libya; (e) Algeria.* The decision not to allow an independent body to hear complaints regarding the exam allows for a process that has no accountability.

2. *Limiting Time*

The Collegium accepted applications for the bar exam from January 7, 2005, until January 30, 2005 – less than one month. As a result of this very short time-frame, at least 5 applicants were denied the right to take the exam because their foreign diplomas (from universities in the Russian Federation) could not be certified by the authorities in time to submit the application materials. It is the international community's position that these individuals should be given the right to appeal the rejection of their applications.

In addition, the Collegium announced on January 27, 2005, that the exam would be held on February 6, 2005 – only 10 days notice. An applicant could not be expected to properly prepare for the exam in such a short amount of time. The short notice coupled with the failure to provide test preparation material is certainly a contributing factor to the limited number of applicants passing the exam.

3. *Limiting Applicants*

At the end of the application time, only 359 applicants were accepted. Mr. Azer Tagiev, Chairman of the Presidium of the Collegium of Advocates, informed representatives of the international community that more than 100 potential applicants were advised that they did not have the proper credentials to apply for the exam, and therefore were informally rejected.

The majority of applicants informally rejected were advised that they lack three years of experience in the legal profession required by the 2004 law to qualify for Collegium membership. Mr. Tagiev informed international observers that the “three years of experience” can only be experience in a state institution or legally registered organization. He further stated that the Collegium does not recognize as "legal experience" practice in the civil courts by non-Collegium lawyers making an appearance via a power of attorney. The Civil Procedure Code, however, allows for representation by a power of attorney. Despite this law, Mr. Tagiev asserted that such actions are "illegal". It is the international legal community's position that this is an overly restrictive interpretation of the law, it directly conflicts with the Civil Procedure Code and is an attempt to narrow the scope and rights of civil practitioners and, thereby, expand the monopoly of the Collegium; the very opposite of the intent and spirit of the law.

Bar Exam Day

Representatives from the OSCE Office in Baku, OSCE ODIHR, Council of Europe, and ABA CEELI observed the examination process. Observers found the exam to be properly administered by the State Students Admission Commission, however, the international legal community is concerned about the process leading up to the exam. Specifically, the process for accepting applicants and determining who was ultimately allowed to take the exam as described above was overly restrictive. In addition, it was noted by observers that only 41 women took the exam and the majority of the test takers were men over the age of 40. The limited number of test takers, 347, resulted in only 144 people passing the exam. This number will be further reduced by the oral interviews. Consequently, the number of new members admitted to the Collegium is negligible.

Legislative Amendments

Finally, the international legal community is concerned about recent legislative changes that appear to broaden the scope of work reserved for Collegium members. Specific concerns relate to (1) amendments to the Law on Trade Unions, which require Unions to hire members of the Collegium for legal services; and (2) amendments to the Administrative Violations Code making it punishable by fine to provide “paid-for legal services” and use the title attorney (“vekil”) unless the individual is licensed under the Law on Advocates. These amendments appear to restrict the legal profession and give the Collegium a monopoly on the word “attorney” (“vekil”). Further restrictions on the legal profession are in direct conflict with the intent of the Law on Advocates to open the legal profession.

In addition, access to the Constitutional Court has been further restricted. An Advocate must take a specialized exam to further qualify for the right of audience before the Constitutional Court. Non-Collegium members can not even sit for the exam. Accordingly, the number of attorneys available to represent citizens before the Constitutional Court has diminished, not increased.

RECOMMENDATIONS

Considering the concerns described above, the following recommendations are presented:

1. Inclusion of All Licensed Lawyers in the Collegium

All lawyers who have at any time obtained a license to practice law pursuant to Presidential Decree No. 637, “On Confirming the List of Activities which Require Special Permission (Licenses)”, be admitted to the Collegium of Advocates without undue delay. No further requirements other than proof of license shall be necessary for

admission. All licensed lawyers shall be notified of their admittance in writing and a new constitutive meeting shall be held inclusive of all members.

2. New Constitutive Meeting

Because the constitutive meeting on November 3, 2004, failed to include all licensed lawyers, a new meeting is necessary. Members shall adopt a new Charter, elect a new Presidium and establish all other business matters relating to the Collegium as outlined in the law. The process must be fair and democratic. (If requested, the international community can make specific, detailed steps it believes would ensure a fair and democratic process.)

3. Bar Exam

A second bar exam should be held within six months. The exam should be announced at least three months prior to exam day. This should allow sufficient time for individuals to obtain the proper documentation. Test preparation material should be published at least forty-five days prior to exam day allowing individuals to properly prepare. The test questions should be properly vetted to ensure questions are relevant and test an individual's legal knowledge.

4. Independent Appeal Board

The process for appealing decisions regarding the application process to sit for the bar exam and the exam (both written and oral) itself should be established. The procedures should be made public at the same time the bar exam day is announced. An independent body, not the Presidium, should be established to handle all complaints.