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## “Foreign Agents,” Sovereignty, and Political Pluralism: How the Russian Foreign Agents Law is Shaping Civil Society

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**“FOREIGN AGENTS,” SOVEREIGNTY,  
AND POLITICAL PLURALISM: HOW THE  
RUSSIAN FOREIGN AGENTS LAW IS  
SHAPING CIVIL SOCIETY**

*Alexandra V. Orlova\**

ABSTRACT

*During the 1990s, many Russian non-governmental organizations (“NGOs”) secured foreign funding and participated in transnational advocacy networks. However, in the early 2000s, Russian authorities attempted to regain control over foreign-funded NGOs’ activities, presenting these NGOs as national security threats. The 2012 Russian Foreign Agents Law and the resulting 2018 challenge before the European Court of Human Rights reflect contemporary Russian political rhetoric that views Western governments and their agents, including NGOs, as threats to Russian sovereignty and national security. However, legal challenges also de-politicize the issues by forcing all parties into the framework of legal argument, reflecting the decline of political pluralism in Russia. Revitalizing Russia’s civil and political landscapes requires a thorough redefinition of national security, one that includes NGOs participating in transnational advocacy networks as partners in providing security.*

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INTRODUCTION

During the 1990s, many Russian non-governmental organizations (“NGOs”) successfully secured foreign funding and participated in transnational advocacy networks.<sup>1</sup> However, in the early 2000s, Russian authorities expressed concern over foreign-funded

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<sup>1</sup> Miriam Matejova, Stefan Parker, & Peter Dauvergne, *The Politics of Repressing Environmentalists as Agents of Foreign Influence*, 72 AUSTRALIAN J. INT’L AFF. 149 (2018). Transnational advocacy networks are characterized by the participation of a variety of actors, such as “individuals, civic groups, international organizations and international nongovernmental organizations (INGOs),” etc., that interact with each other around issues of common concern. Alexandra-Maria Bocșe, “Understanding Transnational Advocacy Networks: How the Political Opportunity Structure Impacts Their Emergence,” *Proceedings of the Conference “EU Strategy for the Danube Region. Conference on regional cooperation” organized by The Institute for the Danube Region and Central Europe*, Vienna, 15 December 2011, at 121 (citing David Held, *Democracy, the Nation-State and the Global System*, 20 ECON. & SOC’Y 138, 138–72 (1991)). Transnational advocacy networks include members “situated across state borders and at least one actor in the network is a non-state agent. . . .” Alexandra-Maria Bocșe, “Understanding Transnational Advocacy Networks: How the Political Opportunity Structure Impacts Their Emergence,” *Proceedings of the Conference “EU Strategy for the Danube Region. Conference on regional cooperation” organized by The Institute for the Danube Region and Central Europe*, Vienna, 15 December 2011, at 121 (citing Thomas Risse-Kappen, *Bringing Transnational Relations Back in: Introduction, in BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES, AND INTERNATIONAL INSTITUTIONS* 3–33 (Thomas Risse-Kappen ed., Cambridge Univ. Press 1995)).

NGOs and “expressed a clear desire to regain control over the activities of non-profit groups.”<sup>2</sup> The Foreign Agents Law,<sup>3</sup> enacted in 2012 and continually amended until 2016, reflects contemporary Russian political rhetoric that views Western governments and their agents, including NGOs, as attempting to undermine Russia’s ruling regime and threatening national security.<sup>4</sup> The Foreign Agents Law requires domestic NGOs receiving foreign funding and participating in political activities on the territory of the Russian Federation “to register and advertise their status as ‘foreign agents.’”<sup>5</sup> Many Russian NGOs participating in transnational advocacy networks that rely on foreign funding due to lack of domestically available funds have been stigmatized and, in some cases, forced to shut down as a result of the law. The chilling effect created by the provisions of the Foreign Agents Law impacts not only the relationship between NGOs and the state, but also the very nature of governance and political pluralism in Russia. It also arguably violates constitutionally established principles of freedom of association and expression.

Part I of this article examines the reasons behind a global trend towards enhancing governmental control over NGOs that receive foreign funding and participate in transnational advocacy networks. It looks at the intensification of nationalism within nation-states that are forced to deal with geopolitical forces beyond their control, and the international pressure on nation-states as a result of NGOs working in cooperation with global partners. This part also discusses the role of constitutional courts in shaping and reshaping the very concept of national sovereignty and the impact of their reasoning on foreign-

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<sup>2</sup> Françoise Daucé, *The Duality of Coercion in Russia: Cracking Down on “Foreign Agents,”* 23 DEMOKRATIZATSIYA: J. POST-SOVIET DEMOCRATIZATION 57, 61 (2015).

<sup>3</sup> See generally Federal’nyi Zakon RF o Vnesenii Izmenenii v Otdel’nye Zakonodatel’nye Akty Rossiskoi Federatsii v Chasti Regulirovaniya Deyatel’nosti Nekommercheskikh Organizatsii, Vipolnialiushikh Funktsii Innostrannovo Agenta [Fed. Law of the Russian Fed’n on Amendments to Certain Legislative Acts of the Russian Fed’n Regarding the Regulation of Activities of Non-commercial Org.s Performing the Function of Foreign Agents], ROSSIISKAIA GAZETA [ROS. GAZ.] Jul 20, 2012, No. 121 [hereinafter “FOREIGN AGENTS LAW”].

<sup>4</sup> Thomas M. Callahan, *Cauldron of Unwisdom: The Legislative Offensive on Insidious Foreign Influence in the Third Term of President Vladimir V. Putin, and ICCPR Recourse for Affected Civil Advocates*, 38 FORDHAM INT’L L. J. 1219, 1221–22 (2015).

<sup>5</sup> *Id.* at 1222 (quoting FOREIGN AGENTS LAW).

funded NGOs. Part II outlines the overall legislative scheme created by the 2012 Foreign Agents Law as well as amendments to the law. This part also looks at some of the major criticisms of the law, emphasizing the terms “foreign agent” and “political activity” as well as the breadth of the foreign funding requirement.<sup>6</sup> Due to the Russian government’s assertion that the Russian Foreign Agents Law is modeled on the United States Foreign Agents Registration Act (“FARA”),<sup>7</sup> this part examines both the 2014 decision by the Russian Constitutional Court upholding the constitutionality of the regime established by the Foreign Agents Law and the 1987 U.S. Supreme Court decision in *Meese v. Keene* dealing with the constitutionality of certain provisions of FARA.<sup>8</sup> Part III explores the key differences between FARA and the Russian Foreign Agents Law, including the overall purpose behind these pieces of legislation. This part also highlights the similarities and differences between the majority and dissenting opinions in the Russian and U.S. constitutional cases discussed in Part II. Part IV of the article considers the impact of the Russian Foreign Agents law on the development of Russian civil society as well as on political governance. The article concludes that legal challenges de-politicize these issues, reflecting the decline of political pluralism in Russia. Finally, the article suggests the necessity of a thorough rethinking of the notion of national security that includes NGOs participating in transnational advocacy networks as partners in providing security.

## I. NGOS AS TRANSLATORS OF GLOBAL STANDARDS

States around the world have been enacting various legislative measures aimed at enhancing their control over NGOs that receive funding from abroad and participate in transnational advocacy

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<sup>6</sup> Federal’nyi Zakon RF o Vnesenii Izmenenii v Otdel’nye Zakonodatel’nye Akty Rossiskoi Federatsii v Chasti Regulirovaniya Deyatel’nosti Nekommercheskikh Organizatsii, Vipolnialiushikh Funktsii Innostrannovo Agenta [Fed. Law of the Russian Fed’n on Amendments to Certain Legislative Acts of the Russian Fed’n Regarding the Regulation of Activities of Non-commercial Org.s Performing the Function of Foreign Agents], ROSSIISKAIA GAZETA [ROS. GAZ.] Jul 20, 2012, No. 121.

<sup>7</sup> 22 U.S.C. ch.11, subch. II § 611 et. seq.

<sup>8</sup> See generally *Meese v. Keene*, 481 U.S. 465 (1987).

networks.<sup>9</sup> Governments frequently frame these measures as attempts to encourage transparency in national political debates and to increase national security, but the activities of NGOs receiving foreign funding have been portrayed in many instances as unpatriotic, undermining state sovereignty and opposing domestic interests.<sup>10</sup> This threatening portrayal of foreign-funded NGOs in part reflects the “intensification of nationalism within nation-states” dealing with increasing demands for acceptance of international norms, and the struggle of nations to “impose order upon geopolitical forces beyond their locus of control.”<sup>11</sup> This global trend towards delegitimizing NGOs with foreign funding is partially driven by two factors: (1) the pressure that NGOs participating in transnational advocacy networks place on their domestic governments and (2) the construction of national identities in the face of globalism through discourses of inclusion and exclusion that reinforce and emphasize distinctions between “insiders and outsiders.”<sup>12</sup> On a number of occasions, NGOs with global partners have utilized international exposure and the resulting international pressure to generate domestic momentum for reform.<sup>13</sup> This NGO strategy of “[t]hrowing a boomerang” to find international partners has influenced “local social and political dynamics, altering the relationship between domestic NGOs and the state, sometimes shifting the domestic balance of power.”<sup>14</sup>

However, the impact of transnational advocacy networks extends beyond pressuring local governments regarding issue-specific causes. It is within these transnational networks that global standards and practices are often developed and shaped. Domestic NGOs

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<sup>9</sup> See generally Miriam Matejova, Stefan Parker, & Peter Dauvergne, *The Politics of Repressing Environmentalists as Agents of Foreign Influence*, 72 AUSTRALIAN J. INT’L AFF. 145 (2018).

<sup>10</sup> See LINCOLN A. MITCHELL, *THE DEMOCRACY PROMOTION PARADOX* 98 (Brookings Inst. Press 2016).

<sup>11</sup> Anna Popkova, *Global Partners or International Spies? A Comparative Analysis of the Russian Media’s Coverage of the Law on ‘Foreign Agents,’* 10 INT’L J. COMM. 3062, 3063 (2016) (quoting Ryan J. Thomas & Mary Grace Antony, *Competing Constructions of British National Identity: British Newspaper Comment on the 2012 Olympics Opening Ceremony*, 37 MEDIA CULTURE & SOC’Y 493, 494 (2015)).

<sup>12</sup> Popkova, *supra* note 11, at 3063–64.

<sup>13</sup> See Matejova, Parker, & Dauvergne, *supra* note 9, at 147.

<sup>14</sup> *Id.*

frequently serve as “sites of implementation,” actively engaging in the “transferring, adopting and adjusting of global standards to local practices. . . .”<sup>15</sup>

Furthermore, it can be argued that the role of NGOs in transnational advocacy networks is not limited to serving as simple conduits of externally-developed standards, but rather involves domestic NGOs actively contributing to shaping these global standards. For example, a grant awarded by an international organization to a domestic NGO makes the donor and the NGOs co-designers who mutually influence and transform each other’s practices and ideas.<sup>16</sup> In other words, “[t]hrough grants, donors introduce policies and standards related to democracy, stakeholder governance, civil rights, and environmental protection that may be new to the domestic political sphere. These policies are not necessarily supported by national governments.”<sup>17</sup>

States under pressure due to the direction of attention towards a specific violation, or more generally due to constant highlighting of systemic issues, frequently do not react favorably to such efforts by NGOs.<sup>18</sup> Nation-states may view NGOs that focus on issues including human rights law, environmental law, and international criminal law as enabling challengers to states’ exercise of power and monopoly on violence, thus challenging the very notion of state sovereignty.<sup>19</sup> Therefore, because NGO-generated and supported transnational pressure may result in domestic policy changes—or at least changes in rhetoric to satisfy the international community—threatened states start to view such foreign-funded NGOs as “seditious” and even as threats to national security.<sup>20</sup> While states are frequently eager to portray international legal norms, human rights principles, and NGOs working

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<sup>15</sup> Maria Tysiachniouk, Svetlana Tulaeva, & Laura A. Henry, *Civil Society under the Law: On Foreign Agents’: NGO Strategies and Network Transformation*, 70 EUROPE-ASIA STUD. 615, 632 (2018).

<sup>16</sup> *See id.* at 618.

<sup>17</sup> *Id.* at 619.

<sup>18</sup> Matejova, Parker, & Dauvergne, *supra* note 9, at 147.

<sup>19</sup> Jutta Brunnée & Stephen J. Toope, *The Sovereignty of International Law?*, 67 UNIV. TORONTO L.J. 496, 507, 510 (2017).

<sup>20</sup> Matejova, Parker, & Dauvergne, *supra* note 9, at 147.

to advance them as undermining national sovereignty, the actual relationship between international law—including human rights law—and state sovereignty is more nuanced. International law must ultimately operate in part inside the nation-state.<sup>21</sup> This operation inside the nation-state and its foundation in national institutions and practices “lends it a distinctive power and legitimacy.”<sup>22</sup> Thus, the interplay of international norms and domestic sovereignty concerns is not one between purely oppositional forces, for states contribute to the shaping and legitimizing of international principles and practices. Furthermore, because some governments may be unable to satisfy many of their citizens’ needs, affected citizens may seek help from various NGOs. Thus, NGOs often become a vital link between citizens and their governments.<sup>23</sup> National security—that is, security from outside threats as well as domestic economic, ecological, and social security—can be a joint effort of both governmental and non-governmental organizations,<sup>24</sup> but NGOs may have the advantage in enabling citizens to communicate with their governments more effectively. By working to address a multitude of social problems, NGOs become a way—indeed, sometimes the only way—for popular complaints to reach public officials.<sup>25</sup> However, this connection with the public, combined with participation in transnational advocacy networks and receipt of foreign funds, may foster suspicion among governmental organizations against NGOs.<sup>26</sup> The combination of foreign funding, connectivity to global norms, and ability to shape

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<sup>21</sup> Irina Ceric, *The Sovereign Charter: Security, Territory and the Boundaries of Constitutional Rights*, 44 OTTAWA L. REV. 353, 373 (2012–13) (quoting SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 65 (Columbia Univ. Press 1996)).

<sup>22</sup> *Id.*

<sup>23</sup> Denis V. Iroshnikov, “Vzaimodeistvie Organiv Gosudarstvennoi Vlasti s Obschestvennymi Ob’edineniyami v Tselyah Obespechaniya Natsionalnoi Bezopasnosti Rossiiskoi Federatsii,” *Uridicheskaya Nauka* (2012) 3 at 18.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> Pavel Petrovich Fantrov, *Nekommercheskie Organizatsii I Sistema Natsional’noi Bezopasnosti v Rossii: Rol’ Nepravitel’stvennykh Ob’edinenii, Imeuschib Status Inostrannogo Agenta*, 18:303 UGROZY I BEZOPASNOST 59, 59 (2015).

<sup>26</sup> *Id.* at 58.

public opinion underpins the discourse of NGOs as threats to national security and undermining state sovereignty.<sup>27</sup>

Despite the complex and intertwined nature of the relationship between state sovereignty, national security, international norms, and NGOs participating in transnational advocacy networks, the work of increasingly prominent domestic NGOs around the world is being presented by domestic governments as challenging state sovereignty and catering to foreign interests, especially when it comes to human rights.<sup>28</sup> Domestic legislative measures seemingly aimed at increasing transparency and ensuring national security by effectively reducing NGOs' access to foreign funding create fractures in domestic civil society<sup>29</sup> and de-politicize NGOs by reducing their contact with foreign partners and participation in transnational advocacy frameworks.<sup>30</sup> In addition to creating legal barriers between domestic NGOs and other actors in a transnational network, governmental "regulatory offensive[s]"<sup>31</sup> contribute to the growth of informal practices (such as operating without registration or ending formal legal status entirely) between domestic NGOs, their international and domestic partners, and state officials, placing NGOs' work into a "grey area" of uncertainty.<sup>32</sup> While informality may aid in avoiding administrative penalties, NGOs operating informally cannot be as effective in their interactions with state agencies, and are thus unable to participate in governance effectively, further contributing to the de-politicization of NGOs and the reduction of their policy footprint.<sup>33</sup>

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<sup>27</sup> *Id.* at 63.

<sup>28</sup> See Matejova, Parker, & Dauvergne, *supra* note 9, at 148.

<sup>29</sup> Being designated as a "foreign agent" may result in other members of civil society (such as NGOs that do not accept foreign funding) being reluctant to engage with foreign funded NGOs, despite common causes pursued by both foreign funded and domestically funded NGOs, creating fractures in domestic civil society. Tysiachniouk, Tulaeva, & Henry, *supra* note 15, at 625.

<sup>30</sup> Matejova, Parker, & Dauvergne, *supra* note 9, at 155.

<sup>31</sup> *Id.* at 148 (quoting Kendra E. Dupuy, James Ron, & Aseem Prakash, *Who Survived? Ethiopia's Regulatory Crackdown on Foreign-Funded NGOs*, 22 REV. INT'L POL. ECON. 419, 420, 423 (2015)).

<sup>32</sup> Tysiachniouk, Tulaeva, & Henry, *supra* note 15, at 630.

<sup>33</sup> NGOs choosing informality as a strategy and operating without official legal registration can no longer participate in public hearings, offer expertise to

Domestic governments are deliberately attempting to “reconstitute[] the human rights field as a national security threat.”<sup>34</sup> As a result, NGOs, especially those concerned with human rights, are increasingly scrutinized on national security grounds.<sup>35</sup> The work of NGOs, especially when this work is connected with challenging the existing social contract between the state and its citizens, is gradually framed as an existential threat.<sup>36</sup> The issues are discussed “‘either as a special kind of politics or as above politics,’ which paves the way for exceptional intervention that may violate normal legal and social rules.”<sup>37</sup> Once this reframing is adopted and legitimized in the eyes of the public, the actual “threat” posed by the work of NGOs with foreign funding and links to transnational advocacy networks becomes irrelevant.<sup>38</sup> Issues of national identity and national values then become closely linked with discourses of needing to oppose foreign threats or influences, creating a “state of psychological siege,” with NGOs caught in the midst of this political standoff.<sup>39</sup> Perpetuating the rhetoric of needing to respond to foreign threats and “keeping the population in ‘survival mode’” becomes essential to the survival of the domestic regime itself.<sup>40</sup>

Due to the complexity of the relationship between governmental and non-governmental organizations, constitutional courts play an increasingly significant role in negotiating these “contested legal spaces. . . .”<sup>41</sup> In a way, constitutional courts have

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government officials or work on public councils. Tysiachniouk, Tulaeva, & Henry, *supra* note 15, at 629, 634.

<sup>34</sup> Neve Gordon, *Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs*, 48 LAW & SOC’Y REV. 311, 312 (2014). “In Canada, China, India, Israel . . . [and] Russia . . . governments are cracking down on foreign-funded NGOs” that operate within their jurisdictions. Lawrence Solomon, *Lawrence Solomon: The Worldwide Crackdown on NGOs*, FINANCIAL POST (May 18, 2015, 4:14 PM), <https://business.financialpost.com/opinion/lawrence-solomon-the-worldwide-crackdown-on-ngos>.

<sup>35</sup> Gordon as *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 317 (quoting BARRY BUZAN & LENE HANSEN, *THE EVOLUTION OF INTERNATIONAL SECURITY STUDIES* (Cambridge Univ. Press 2009)).

<sup>38</sup> Jardar Ostbo, *Securitizing ‘Spiritual-Moral Values’ in Russia*, 33 POST-SOVIET AFF. 200, 202 (2017).

<sup>39</sup> *Id.* at 212.

<sup>40</sup> *Id.* at 213.

<sup>41</sup> Ceric, *supra* note 21, at 368.

become intimately involved in constructing “the juridical framework of national sovereignty.”<sup>42</sup> In states hostile to NGOs’ involvement in transnational advocacy networks, constitutional courts frequently use powerful tools like “proportionality” to determine whether state measures are both (1) “necessary” in a democratic society and (2) proportional to the aims of transparency and national security.<sup>43</sup> In other words, while the courts acknowledge that proportionality is key when striking a balance between human rights and national security,<sup>44</sup> the way that various stages of proportionality analysis are presented makes it clear that both national governments and constitutional courts often view national security as a necessary precondition for the state to guarantee human rights protections.<sup>45</sup> It is pointed out that a balance between human rights and national security is jurisdictional as well as time-specific, and that there are no “universal standards” when it comes to striking such a balance.<sup>46</sup> Thus, limiting a right is not necessarily the same as violating a right.<sup>47</sup> While a government’s attempts to assert greater control over NGOs that receive foreign funding may reduce or even eliminate services provided by NGOs, concerns of sovereignty and narrowly defined national security take precedence.<sup>48</sup> Throughout this process, constitutional courts become complicit in delegitimizing NGOs.<sup>49</sup> Thus, constitutional courts may not only reduce democratic pluralism but may also decrease human rights protections and citizens’ contributions to political governance.

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<sup>42</sup> *Id.*

<sup>43</sup> Gregoire C.N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. L. & JURIS. 179, 198 (2010).

<sup>44</sup> Sergei U. Chapchikov, *Problemy Formirovaniya Konstitutsionnoi Doktriny Natsional'noi Bezopasnosti Rossiiskoi Federatsii* 1 PROBELY V ROSSIISKOM ZAKONODATEL'STVE 17 (2012).

<sup>45</sup> A.V. Tulikov, *Obespechenie Informatsionnoi Bezopasnosti kak Garantiya Prav Cheloveka*, 2 PRAVO. ZHURNAL VYSSCHEI SHKOLY EKONOMIKI, 57 (2015).

<sup>46</sup> V.A. Nomokonov, *Prava Cheloveka I Natsional'naya Bezopasnost*, 2:4 CRIMINOLOGICHESKII ZHURNAL OGUEP, 5-6 (2008).

<sup>47</sup> *Id.* at 8.

<sup>48</sup> Fantrov, *supra* note 25, at 63.

<sup>49</sup> Ceric, *supra* note 21, at 370 states that constitutional jurisprudence has the capacity to “catalyse[] direct acts of sovereignty by the state.”

## II. RUSSIAN CRACKDOWN ON FOREIGN-FUNDED NGOS

Beginning in the early 2000s, the Russian government became progressively concerned over the activities of foreign-funded NGOs, claiming that these NGOs were harming Russian national security interests and that their campaigns were “initiated by foreign intelligence agencies” aiming to overthrow the current Russian regime.<sup>50</sup> Suspicions only increased after the 2011–12 public protests regarding the violation of voting procedures during the Russian presidential election.<sup>51</sup> The authorities viewed these massive protests as sponsored by the West and designed to effect regime change.<sup>52</sup> Thus, these “Western influence[s]” and those who supported them became associated with “undermin[ing] the country from within.”<sup>53</sup>

Legislation aimed at suppressing the work of NGOs receiving foreign funding has to be contextualized within a broader policy of the Russian government directed at the “nationalization of elites”<sup>54</sup> and reasserting its sovereignty and importance on the global stage, particularly as relations with the West continued to deteriorate. The Russian government’s attempts to discredit foreign-funded NGOs accords with the Russian government’s conception of Russian national identity as antagonistic to Western values<sup>55</sup> and instead grounded in

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<sup>50</sup> See generally Sergei Vasilevich Ustinkin et al., *Otsenka Vozdeistviya Nepravilnostvennykh Organizatsii na Izbiratelnyi Protsess v Rossii*, 7 VLAST 28, 28–29 (2016).

<sup>51</sup> Popkova, *supra* note 11, at 3067.

<sup>52</sup> Pavel Romanov & Elena Iarskaia-Smirnova, ‘Foreign Agents’ in the Field of Social Policy Research: The Demise of Civil Liberties and Academic Freedom in Contemporary Russia, 25 J. EUR. SOC. POL’Y 359, 362 (2015).

<sup>53</sup> *Id.*

<sup>54</sup> “[N]ationalization of elites” is a policy of the Putin administration designed to reduce the odds of public servants and politicians having interests in foreign jurisdictions. Lester M. Salamon, Vladimir M. Benevolenski, & Lev I. Jakobson, *Penetrating the Dual Realities of Government – Nonprofit Relations in Russia*, 26 VOLUNTAS 2178, 2206–07, 2210 (2015). An example of this policy is a law banning government officials from owning financial assets abroad. *Id.* at 2206. The “nationalization” extends beyond government officials and includes prominent members of civil society. See *id.* at 2206–07. Russian federal “Foreign Agents” law is part of this policy. *Id.* at 2210.

<sup>55</sup> Popkova, *supra* note 11, at 3065.

traditional Russian values.<sup>56</sup> Thus, critically examining the government's framing of its legislative measures is key to understanding what these measures are truly aiming to accomplish.

On July 20, 2012, the Russian government passed a federal law "On Foreign Agents" that significantly constrained the financial, communication, and administrative operations of NGOs receiving foreign funding and participating in transnational advocacy networks.<sup>57</sup> Under the 2012 law, NGOs must register with the Justice Ministry as "foreign agents"<sup>58</sup> if they receive funding from foreign sources (government or private) and engage, "including in the interests of foreign principals," in "political activity" taking place on the territory of the Russian Federation.<sup>59</sup> The Foreign Agents Law defines "political activity" very broadly to cover almost all aspects of advocacy and human rights work:

[a] non-commercial organization<sup>60</sup> is considered to carry out political activity on the territory of the Russian Federation if, regardless of its statutory goals and purposes stated in its founding documents, it participates (including through financing) in organizing and implementing political actions aimed at influencing decision-making by state bodies intended for the change of state policy pursued by them, as well as in

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<sup>56</sup> Alexandra V. Orlova, *Privatizing Homosexuality: Russia's Reassertion of Moral Sovereignty over Gay Rights*, 11 HUM. RTS. & INT'L LEGAL DISCOURSE 122, 176 (2017).

<sup>57</sup> Federal'nyi Zakon RF o Vnesenii Izmenenii v Otdel'nye Zakonodatel'nye Akty Rossiskoi Federatsii v Chasti Regulirovaniya Deyatel'nosti Nekommercheskikh Organizatsii, Vipolnnyaiushikh Funktsii Inostrannovo Agenta [Fed. Law of the Russian Fed'n on Amendments to Certain Legislative Acts of the Russian Fed'n Regarding the Regulation of Activities of Non-commercial Org.s Performing the Function of Foreign Agents], ROSSIISKAIA GAZETA [ROS. GAZ.] Jul 20, 2012, No. 121.

<sup>58</sup> *Id.* Art. 1(1).

<sup>59</sup> *Id.* Art. 2(2).

<sup>60</sup> NGOs are included in the term "non-commercial organization," *see* Federal'nyi Zakon RF o Nekommercheskikh Organizatsiyah [Fed. Law of the Russian Fed'n on Non-Profit Organizations of the Russian Fed'n], ROSSIISKAIA GAZETA [ROS. GAZ.] Jan 12, 1996, as amended on Feb., 11, 2013, No. 7, Art.3, 4 and 6.

the shaping of public opinion for the aforementioned purposes.<sup>61</sup>

The Foreign Agents Law places additional administrative burdens on NGOs that have been designated as foreign agents, such as mandating separate accounts for funds from local and foreign sources, submitting biannual activity reports, quarterly reports on spending, and annual audits.<sup>62</sup> The Foreign Agents Law also prescribed a number of criteria for conducting additional unscheduled audits of “foreign agent” NGOs.<sup>63</sup>

Initially, the Foreign Agents Law required all NGOs that met the criteria prescribed in the law to register with the Ministry of Justice and to label all of their materials as produced by “foreign agents,”<sup>64</sup> with administrative penalties for failure to comply.<sup>65</sup> When most Russian NGOs refused to voluntarily register as “foreign agents” with the Justice Ministry, the Russian parliament amended the Foreign Agents Law to authorize the Justice Ministry to register NGOs as “foreign agents” without their consent.<sup>66</sup> On November 24, 2014, additional amendments to the Foreign Agents Law prohibited political parties from concluding contracts with NGOs designated as “foreign agents,” and NGOs registered as “foreign agents” were also prohibited from “participating in other ways in the electoral and referendum campaigns.”<sup>67</sup> Moreover, in May 2016, further amendments expanded

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<sup>61</sup> *Izmenenii Iulya 20, 2012* (Amendments dated Jul 20, 2012), Art. 2(2).

<sup>62</sup> *Id.* Art. 2(5).

<sup>63</sup> *Id.* Art. 2(5).

<sup>64</sup> *Id.* Art. 2(4).

<sup>65</sup> *Id.* Art. 3(2).

<sup>66</sup> Federal’nyi Zakon RF o Vnesenii Izmenenii v Stat’iu 32 Federal’nogo Zakona “O Nekommercheskikh Organizatsiyakh” [Federal Law of the Russian Federation on Amendments to Article 32 of Federal Law on Non-commercial Organizations’], SISTEMA GARANT [SYSTEM GARANT] Jun 4, 2014, No. 147, Art. 1.

<sup>67</sup> Federal’nyi Zakon RF o Vnesenii Izmenenii v Otdel’nye Zakonodatel’nye Akty Rossiskoi Federatsii po Voprosu Finansovoyi Otchetnosti Politicheskikh Partii, Izbiratei’nikh Obyedinenii, Kandidatov na Vyborakh v Organy Gosudarstvennoi Vlasti I Mestnogo Samovupravleniya [Fed. Law of the Russian Fed’n on Amendments to Certain Legislative Acts of the Russian Fed’n on the Question of Fin. Reporting of Political Parties, Electoral Ass’ns, Candidates in the Elections of

the controversial definition of “political activity” to include almost all forms of public action undertaken by NGOs.<sup>68</sup> While the new amendments still reference “influencing decision-making of state bodies” and “shaping of public opinion,” they also identify areas in which participating is deemed “political activity,” including state building, national security, constitutional order, foreign policy, socio-economic and national development, development of the political system, and legislative regulation of human rights and freedoms.<sup>69</sup> Other activities now deemed to be “political” include, among other things, participation in and organization of public functions (e.g., meetings, demonstrations, pickets); organization of and participation in public debates and discussions; election monitoring; public petitions directed to state bodies and actions directed at influencing the activities of these bodies, including lobbying for legal change; and shaping of public opinion through public opinion or sociological surveys.<sup>70</sup>

The government’s choice of the term “foreign agent” to describe NGOs receiving foreign funding and engaging in “political activity” has faced criticism both domestically and internationally.<sup>71</sup> The term “foreign agent” in Russian political and popular discourses often suggests association with spies and traitors.<sup>72</sup> Thus, using the term “foreign agent” stigmatizes and ostracizes NGOs participating in transnational advocacy networks<sup>73</sup> and silences those who criticize

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State Auth.s and Local Gov’ts], SISTEMA GARANT [SYSTEM GARANT], Nov. 24, 2014, No. 355, Art. 1(2).

<sup>68</sup> Proekt Federal’nogo Zakona RF o Vnesenii Izmenenii v Stat’iu 8 Federal’nogo Zakona “Ob Obshchestvennykh Obyedzineniakh” I Stat’iu 2 Federal’nogo Zakona “O Nekommercheskikh Organizatsiakh,” [Draft the Fed. Law of the Russian Fed’n on Amendments to Article 8 of the Fed. Law on Public Ass’ns and Article 2 of the Fed. Law on Non-Commercial Org.], No. 1000884-6. Art. 2.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Matejova, Parker, & Dauvergne, *supra* note 9, at 151.

<sup>72</sup> N.A. Kupina, *Ideologema ‘Inostrannyi Agent’: Tri Dnya v Iule 2012 Goda*, 3(41) Politicheskaya Lingvistika 43, 44 (2012).

<sup>73</sup> Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organizations in Light of Council of Europe Standards, Strasbourg, CommDH (2013) 15, July 15, 2013 at ¶ 57.

governmental policies.<sup>74</sup> In other words, the connotations of the term “foreign agent” belie the law’s true aim: revealing “enemies within.”<sup>75</sup> Indeed, this label created divisions within the Russian NGO community itself between NGOs receiving foreign funds and those not receiving such funds, with the latter being reluctant to cooperate with the former.<sup>76</sup> In fact, many NGOs chose to cease operations rather than operate under the label “foreign agent.”<sup>77</sup>

Problematic naming aside, the key criteria for an NGO to be labelled as a “foreign agent” include receipt of foreign funding and participation in “political activities.”<sup>78</sup> Both of these criteria must be present,<sup>79</sup> and both of these criteria pose problems.

First, the criteria of receipt of money and other property from foreign sources is exceptionally broad and can cover almost any type of transactions with foreign funds, from payment for contracts or membership dues to a single monetary donation, receipt of office equipment, or financial award for winning a competition.<sup>80</sup> The types of foreign funds are not restricted and can include payments from individuals, organizations, or governments.<sup>81</sup> Additionally, neither the amount nor the purpose of the payments are prescribed by the law.<sup>82</sup> Thus, a small individual donation from abroad can trigger the requirements of the Foreign Agents Law if the NGO receiving such a

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<sup>74</sup> Opinion of the Commissioner for Human Rights, Legislation and Practice in the Russian Federation on Non-Commercial Organizations in Light of Council of Europe Standards: An Update, Strasbourg, CommDH (2015) 17, July 9, 2015 at ¶ 70.

<sup>75</sup> Kupina, *supra* note 72, at 46.

<sup>76</sup> Opinion of the Commissioner for Human Rights concerning Case N.9988/13 *Ekozaschita and Others v. Russia* and 48 other complaints, Strasbourg, CommDH (2017) 22, July 5, 2017 at ¶ 34.

<sup>77</sup> Kupina, *supra* note 72, at 47.

<sup>78</sup> A.A. Kashin, *Status Inostrannogo Agenta*, 21: 309 *BUHGALTER I ZAKON* 17, 17 (2012).

<sup>79</sup> *Id.*

<sup>80</sup> A.I. Vasilenko, *Prinyatie Zakona ‘Ob Inostrannykh Agentakh’ Kak Pervyi Etap na Puti k Pravovomu Regulirovaniu Lobbistskoi Deyatelnosti v Rossii*, 3:25 *VESTNIK PERMSKOGO UNIVERSITETA* 44, 46 (2014).

<sup>81</sup> Kashin, *supra* note 78, at 18.

<sup>82</sup> *Id.* at 19.

donation participates in "political activity," whether or not the money from such a donation was used to fund "political activity."<sup>83</sup>

The case of Russia's major independent pollster, the Levada Center, illustrates the problematic nature of the provisions of the Foreign Agents Law. For twenty-eight years, the Levada Center has been one of the most important and respected research institutes in Russia,<sup>84</sup> but the Levada Center was designated as a "foreign agent" by the Russian Justice Ministry in September of 2016.<sup>85</sup> This designation came two weeks ahead of the Russian parliamentary election and resulted in the Center ceasing publication of its polling results prior to the election, despite having conducted similar polling since 1991.<sup>86</sup> The Levada Center unsuccessfully argued that all of the foreign funds it received were not used for any "political activity," but were instead used to conduct market surveys.<sup>87</sup> Nevertheless, the Center's sociological activity was equated with "political activity."<sup>88</sup>

The definition of "political activity" has been criticized as overly vague, as almost any NGO activity that aims to influence public opinion or governmental decision-making processes by calling for changes to government policies has been defined as engagement in political activity.<sup>89</sup> Such an expansive definition of political activity arguably goes against one of the primary functions of NGOs as

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<sup>83</sup> *Id.* at 18.

<sup>84</sup> I 'Levadu' Poschitali, KOMMERSANT.RU (05.09.2016, 22:49) <https://www.kommersant.ru/doc/3081977> (last visited March 13, 2019).

<sup>85</sup> Daria Skibo, *Five Years of Russia's Foreign Agents Law*, OPENDEMOCRACY (Aug. 14, 2017), <https://www.opendemocracy.net/en/odr/five-years-of-russia-s-foreign-agent-law/>.

<sup>86</sup> I 'Levadu' Poschitali, *supra* note 84.

<sup>87</sup> Ekaterina Grobman, Sotsiologam Zachitali Interviu, KOMMERSANT.RU, (19.11.2016) available at [https://www.kommersant.ru/doc/3148363?from=doc%20\\_%20vrez](https://www.kommersant.ru/doc/3148363?from=doc%20_%20vrez) (last visited March 13, 2019).

<sup>88</sup> I 'Levadu' Poschitali, *supra* note 84.

<sup>89</sup> See Art. 2(2). See Tysiachniouk, Tulaeva, & Henry, *supra* note 15, at 621.

“watchdogs” that aid in the review, critique, and exchange of ideas on all matters of public interest.<sup>90</sup>

Additionally, Russian courts have classified holding roundtables and conferences to discuss government policy; publishing policy analysis documents, textbooks, or academic articles; and even handing out needles and condoms as part of HIV/AIDS prevention as participation in “political activity.”<sup>91</sup> Indeed, it seems that the only way for a foreign-funded NGO to avoid falling within the scope of the law is to either agree with government policies or cease accepting foreign funding.<sup>92</sup> For many Russian NGOs engaged in human rights work, e.g., LGBT advocacy, funding from domestic sources is simply not available due to lack of popular support for these causes.<sup>93</sup>

Other issues with the Foreign Agents Law emerged as soon as the law came into effect. Some of these issues included a lack of clarity with regards to when administrative penalties will be applied to NGOs, as well as the retroactive application of the law, where decisions regarding participation in “political activities” were made based on the past activities of an organization or simply because the NGO had previously received foreign financing.<sup>94</sup> Domestic courts were also reluctant to assess all of the factual circumstances surrounding the designation of NGOs as “foreign agents” thoroughly; instead, they tended to take information provided by the Ministry of Justice or the prosecutors at face value.<sup>95</sup> Furthermore, domestic courts frequently

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<sup>90</sup> Opinion of the Commissioner for Human Rights, Legislation and Practice in the Russian Federation on Non-Commercial Organizations in Light of Council of Europe Standards: An Update, Strasbourg, CommDH (2015) 17, July 9, 2015 at ¶ 9.

<sup>91</sup> Vasilenko, *supra* note 80 at 47; *See also* Spravka po itogam obobshcheniya sudebnoi praktiki po delam, vznikavshim iz publichnykh pravootnoshenii, svyazannym s primeneniem zakonodatelstva, reguliruyushchego deyatelnost nekommercheskikh organizatsii, vpolnyayushchih funktsii inostrannogo agenta, October 20, 2016 (N.4-VS-7535/16).

<sup>92</sup> Kashin, *supra* note 78, at 21-22.

<sup>93</sup> *See* Romanov and Iarskaia-Smirnova, *supra* note 52, at 363.

<sup>94</sup> Opinion of the Commissioner for Human Rights on the Legislation of the Russian Federation on Non-Commercial Organizations in Light of Council of Europe Standards, Strasbourg, CommDH (2013) 15, July 15, 2013 at ¶ 48.

<sup>95</sup> Opinion of the Commissioner for Human Rights, Legislation and Practice in the Russian Federation on Non-Commercial Organizations in Light of Council of

conflated “political activity” pursued by leaders of NGOs in their personal capacities with the activities of the organization itself, improperly attributing the activities of the leader to the organization.<sup>96</sup>

A. Russian Constitutional Court Decision N.10-P (2014)

On April 8, 2014, the Russian Constitutional Court held that the Foreign Agents Law complies overall with the Russian Constitution.<sup>97</sup> The majority of the Russian Constitutional Court Justices acknowledged that freedom of association constitutes one of the fundamental freedoms in a democracy and ensures ideological and political pluralism.<sup>98</sup> Guaranteeing this fundamental freedom is a responsibility of the state prescribed in the Russian Constitution, Article 30(1), as well as in various international instruments signed and ratified by the Russian Federation, including Article 11 of the European Convention on Human Rights (ECHR).<sup>99</sup> Nevertheless, freedom of association may be limited, as long as those limitations are undertaken for a legitimate governmental purpose and the means chosen are proportional to such a purpose.<sup>100</sup> The role of the Constitutional Court is to strike an appropriate balance.<sup>101</sup>

The majority held that the designation of “foreign agent” as applied to qualifying NGOs does not mean that designated organizations constitute a national security threat, even if they act as agents of foreign principals.<sup>102</sup> Hence, the majority of the Court opined that any attempts to equate the meaning of the phrase “foreign agent” with outdated stereotypes prevalent in Soviet times are groundless because the phrase “foreign agent” does not carry negative

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Europe Standards: An Update, Strasbourg, CommDH (2015) 17, July 9, 2015 at ¶ 53.

<sup>96</sup> *Id.* at ¶ 58.

<sup>97</sup> Po Delu o Proverke Konstitutsionosti Polozhenii Punkta 6 Stat'yi 2 i Punkta 7 Stat'yi 32 Federal'nogo Zakona [On the Matter of Constitutionality of Art. 2(6) and Art. 32(7) of the Fed. Law], Konst. Sud RF [RF Const. Court] 2014, No. 10, ¶ 3.4.

<sup>98</sup> *Id.* at ¶ 2.

<sup>99</sup> *Id.* at ¶ 2.

<sup>100</sup> *Id.* at ¶ 2.

<sup>101</sup> *Id.* at ¶ 2.

<sup>102</sup> *Id.* at ¶ 3.1.

connotations.<sup>103</sup> The majority reasoned that due to Russia's extensive participation in the global community, the mere fact that an NGO receives foreign funds and participates in political activities cannot in and of itself constitute evidence of the disloyalty of such organizations to the Russian state.<sup>104</sup> Thus, the legislative construction of the term "foreign agent" does not presuppose a negative assessment of such organizations by the Russian state and cannot be taken as evidence of distrust or intent to discredit such organizations or their activities by the state.<sup>105</sup>

Additionally, the majority opined that in order to qualify actions of NGOs as political activity, actions "must be intended to influence decision-making by state bodies or influence state policy directly or by shaping public opinion."<sup>106</sup> In other words, an action may be political if it elicits a significant public response or attracts the attention of state bodies or civil society to the issue in question.<sup>107</sup> The majority stated that political activities may include, but are not limited to, the following: public gatherings, demonstrations, marches, picketing, political agitation in the context of elections and referenda, public speeches to state bodies, and dissemination of opinions pertaining to decisions taken by authorities.<sup>108</sup> The Court also observed that the existence of NGOs peacefully propagating ideas that are critical of governmental policies or that contradict popular opinion constitutes a "cornerstone of democratic society."<sup>109</sup>

The Court held that the regime for voluntary registration as a "foreign agent" established by the Foreign Agents Law did not prevent NGOs from seeking or receiving foreign funding or from carrying out political activities within the Russian Federation, and thus was not

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<sup>103</sup> *Id.* at ¶ 3.1.

<sup>104</sup> *Id.* at ¶ 3.1.

<sup>105</sup> *Id.* at ¶ 3.1.

<sup>106</sup> *Po Delu o Proverke Konstitutsionosti Polodzenii Punkta 6 Stat'yi 2 i Punkta 7 Stat'yi 32 Federal'nogo Zakona* [On the Matter of Constitutionality of Art. 2(6) and Art. 32(7) of the Fed. Law], *Konst. Sud RF* [RF Const. Court] 2014, No. 10, ¶ 3.3.

<sup>107</sup> *Id.* at ¶ 3.3.

<sup>108</sup> *Id.* at ¶ 3.2.

<sup>109</sup> *Id.* at ¶ 3.1.

discriminatory.<sup>110</sup> The majority reasoned that the registration regime did not result in differential treatment between NGOs that receive foreign funding and those that do not.<sup>111</sup> The registration requirements were instituted to ensure the transparency of NGOs' work and were not aimed at interfering in their activities.<sup>112</sup> Registration requirements were also meant to protect Russian sovereignty by preventing foreign-funded NGOs from influencing Russian policies in the interests of foreign principals.<sup>113</sup>

The majority stated that neither the amount nor the type of foreign financing was prescribed in order to avoid undue discretion when applying this criterion.<sup>114</sup>

The Court also held that NGOs had a right of judicial review when it came to a designation as "foreign agent," and the burden of proof remained on the authorities.<sup>115</sup> Despite challenging some mandatory minimum administrative fines as unconstitutional,<sup>116</sup> the majority concluded that provisions of the Foreign Agents Law were constitutional.<sup>117</sup>

The judgment of the Constitutional Court contains a dissenting opinion by Justice Yaroslavtsev; he concluded that provisions of the Foreign Agents Law were not constitutional.<sup>118</sup> Justice Yaroslavtsev reasoned that the idea behind the constitutionally protected right of freedom of association is to enable each and every citizen to participate in the civil and political life of the state.<sup>119</sup> Hence,

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<sup>110</sup> *Id.* at ¶ 3.2.

<sup>111</sup> *Id.* at ¶ 3.2.

<sup>112</sup> *Id.* at ¶ 3.2.

<sup>113</sup> *Id.* at ¶ 3.2.

<sup>114</sup> *Id.* at ¶ 3.3.

<sup>115</sup> Po Delu o Proverke Konstitutsionosti Polodzenii Punkta 6 Stat'yi 2 i Punkta 7 Stat'yi 32 Federal'nogo Zakona [On the Matter of Constitutionality of Art. 2(6) and Art. 32(7) of the Fed. Law], Konst. Sud RF [RF Const. Court] 2014, No. 10, ¶ 3.2.

<sup>116</sup> *Id.* at ¶ 4.2.

<sup>117</sup> *Id.* at ¶ 3.4.

<sup>118</sup> *Id.* at ¶ 1. (Osoboe Mnenie Suda V.G. Yaroslavtseva [Dissenting Opinion of Justice V.G. Yaroslavtsev]).

<sup>119</sup> *Id.* at ¶ 1.

citizens holding strong political views are able to increase their participation in political governance through participation in NGOs.<sup>120</sup> Thus, participation of NGOs in the development and realization of governmental policies constitutes a normal practice of interaction between civil society and the state.<sup>121</sup>

Moreover, freedom of association cannot be fully realized without NGOs being able to attract financing for their activities from all sources not prohibited by law.<sup>122</sup> Justice Yaroslavtsev reasoned that according to the European Court of Human Rights, pluralism constitutes one of the “hallmarks” of democracy, and plurality of opinions may be expressed by individuals joining NGOs dedicated to particular causes.<sup>123</sup> Nevertheless, Justice Yaroslavtsev stated that freedom of association is not absolute and can be limited in a democratic society to the extent necessary for specific purposes, such as health, constitutional order, morality, and national security.<sup>124</sup> However, the federal legislator<sup>125</sup> must ensure that this constitutionally protected right is limited to the minimum extent possible, without such limitations “hollowing out” the core of the constitutionally protected right and making it meaningless.<sup>126</sup>

The Foreign Agents Law created a special group of NGOs: those acting as “foreign agents.”<sup>127</sup> However, the federal legislation does not require an “agency relationship” to exist between a foreign-funded NGO and a foreign principal.<sup>128</sup> Requirements for registering

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<sup>120</sup> *Id.* at ¶ 1.

<sup>121</sup> *Id.* at ¶ 1.

<sup>122</sup> *Id.* at ¶ 1.

<sup>123</sup> *Id.* at ¶ 1.

<sup>124</sup> *Id.* at ¶ 1.

<sup>125</sup> In Russia, the Federal Assembly consists of the Duma (the lower house) and the Federation Council (the upper house) – see The State Duma. The Federal Assembly of the Russian Federation, <http://duma.gov.ru/en/news/28319/> (last visited March 25, 2019).

<sup>126</sup> Osoboe Mnenie [Dissenting Opinion], *supra* note 118, ¶ 1.

<sup>127</sup> Po Delu o Proverke Konstitutsionosti Polozhenii Punkta 6 Stat'yi 2 i Punkta 7 Stat'yi 32 Federal'nogo Zakona [On the Matter of Constitutionality of Art. 2(6) and Art. 32(7) of the Fed. Law], Konst. Sud RF [RF Const. Court] 2014, No. 10, ¶ 3.1.

<sup>128</sup> *Id.* at ¶ 3.1.

as a “foreign agent” include receipt of funding from foreign sources and engaging in “political activity,” “including in the interests of foreign principals,” on the territory of the Russian Federation.<sup>129</sup> Hence, it is apparent from the wording of the legislation that acting in the interests of foreign principals is not mandatory.<sup>130</sup>

Furthermore, Justice Yaroslavtsev reasoned that certain terms contained in the Foreign Agents Law, such as “political actions” and “shaping of public opinion,” are vague.<sup>131</sup> Both NGOs and law enforcement officials must determine whether the NGO is shaping public opinion on a case by case basis.<sup>132</sup> Additionally, the Foreign Agents Law does not specify with any level of certainty which activities can be classified as “political.”<sup>133</sup> Thus, instead of greater transparency, the Foreign Agents Law has achieved the reverse effect.<sup>134</sup>

The Foreign Agents Law creates inequality between various NGOs depending on their financing, with neither foreign financing nor participation in “political activities” being prohibited.<sup>135</sup> Justice Yaroslavtsev opined that the term “foreign agent” carries with it a negative connotation designed to elicit a negative public reaction to those qualifying NGOs.<sup>136</sup> Equality and political pluralism are constitutionally guaranteed in the Russian Federation, so foreign-funded NGOs should be able to participate in political activities on the same terms as NGOs not receiving such financing, regardless of their opinions about governmental policies.<sup>137</sup> Freedom of association presupposes not only the creation of such associations, but also their functions, including participation in activities that are directed at peacefully advancing ideas that will not be positively received by either

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<sup>129</sup> *Id.* at ¶ 3.1.

<sup>130</sup> *Id.* at ¶ 3.1.

<sup>131</sup> *Id.* at ¶ 4.

<sup>132</sup> *Id.* at ¶ 4.

<sup>133</sup> *Id.* at ¶ 4.

<sup>134</sup> *Id.* at ¶ 4.

<sup>135</sup> *Id.* at ¶ 3.1.

<sup>136</sup> *Id.* at ¶ 5.

<sup>137</sup> Po Delu o Proverke Konstitutsionosti Polodzenii Punkta 6 Stat'yi 2 i Punkta 7 Stat'yi 32 Federal'nogo Zakona [On the Matter of Constitutionality of Art. 2(6) and Art. 32(7) of the Fed. Law], Konst. Sud RF [RF Const. Court] 2014, No. 10, ¶ 6.

the government or the majority of the population.<sup>138</sup> Such tolerance and pluralism is the cornerstone of democracy.<sup>139</sup> Provisions of the Foreign Agents Law violate a number of constitutional principles, such as political and ideological pluralism, freedom of association, equality before the law, and protection of personal dignity.<sup>140</sup>

Case analysis reveals that the majority opinion of the Russian Constitutional Court arguably fails to address many of the criticisms that were levelled at various provisions of the Russian Foreign Agents Law, particularly the vagueness of the term “political activity,” the pejorative designation of “foreign agent,” and the inclusion of all types and amounts of foreign financing.<sup>141</sup> The majority cited the need to ensure transparency as the key reason for creating a regime for NGOs to register as “foreign agents.”<sup>142</sup> However, the majority failed to explain the necessity for creating this new onerous registration regime when legislative provisions aimed at ensuring transparency in NGO activities and financing already exist under Russian law.<sup>143</sup> Clearly, rather than ensuring greater transparency, the government’s aim in creating a registry of “foreign agents” was to assert greater control over foreign-funded NGOs participating in transnational advocacy networks, as well as to create barriers inhibiting their effective operation.<sup>144</sup> Although the majority rightly pointed out that neither participation in political activities nor receiving foreign financing has

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<sup>138</sup> *Id.* at ¶ 6.

<sup>139</sup> *Id.* at ¶ 6.

<sup>140</sup> *Id.* at ¶ 6.

<sup>141</sup> Viktor K. Mihailov, *Kriticheskii Vzgl'yad na Pozitsiu Konstitutionnogo Suda po Usloviyam Priznaniya Nekommercheskoi Organizatsii Inostrannym Agentom*, 1 PRAVO I SOVREMENNYE GOSUDARSTVA 17, 24-26 (2015).

<sup>142</sup> *Id.* at 20.

<sup>143</sup> See generally Federal’nyi Zakon RF o Nekommercheskikh Organizatsiyah [Fed. Law of the Russian Fed’n on Non-commercial Org.s] Jan. 12, 1996, No. 7, Art. 32; See also Federal’nyi Zakon RF o Obshchestvennih Obyedzineniyah [Fed. Law of the Russian Fed’n on Civil Soc’y Org.s], May 19, 1995, No. 82, Art. 42, 44 (giving the government control and oversight over all activities and finances of NGOs); See also Federal’nyi Zakon RF o Protivodeistvii Legalizatsii (Otmivaniiu) Dohodov, Poluchennykh Prestupnim Putiom, i Finansirovaniu Terorizma [Fed. Law of the Russian Fed’n On Combatting Money Laundering and Financing of Terrorism], Aug. 7, 2001, No.115, Art. 6 (establishing strict measures to ensure transparency of foreign sources of financing).

<sup>144</sup> Mihailov, *supra* note 141, at 22.

been prohibited by the Foreign Agents Law, the majority failed to address the serious impediments that the Foreign Agents Law imposes on NGOs.<sup>145</sup> Justice Yaroslavtsev's dissent rightly challenges the key conclusions of the majority by pointing out the vagueness of various terms contained in the Foreign Agents Law and contesting the proclaimed neutrality of the designation of "foreign agent."<sup>146</sup>

B. U.S. Supreme Court Ruling in *Meese v. Keene* (1987)

In defending the Russian Foreign Agents Law, Russian government officials repeatedly reference international precedents, with a particular emphasis on the Foreign Agents Registration Act (FARA) which supposedly contains provisions similar to the Russian law.<sup>147</sup> A closer examination of both FARA and the U.S. Supreme Court decision in *Meese v. Keene* dealing with the constitutionality of "political propaganda" provisions in FARA<sup>148</sup> and the resulting amendments reveals that "fine details" frequently get "lost in translation when comparing judicial systems" across different jurisdictions, and "can be used strategically to advance specific national political goals."<sup>149</sup> On April 28, 1987, the U.S. Supreme Court in *Meese v. Keene* considered the constitutionality of the term "political propaganda," which was contained in FARA.<sup>150</sup> FARA used this particular term to identify materials subject to its requirements, and defined the term as a "communication or expression"<sup>151</sup> that is intended to

prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government or a foreign country or a foreign political

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<sup>145</sup> *Id.* at 26.

<sup>146</sup> *Id.* at 27.

<sup>147</sup> Vasilenko, *supra* note 80, at 47. *See* Kupina, *supra* note 72, at 45.

<sup>148</sup> *Meese v. Keene*, 481 U.S. 465, 465 (1987).

<sup>149</sup> Popkova, *supra* note 11, at 3071.

<sup>150</sup> *Meese*, 481 U.S. at 465.

<sup>151</sup> *Id.* at 471–72 (quoting Section 611(j) of FARA).

party or with reference to the foreign policies of the United States. . . .<sup>152</sup>

Appellee Keene, who was a member of the California State Senate, wanted to show three Canadian films about acid rain and nuclear war that the United States Department of Justice had identified as “political propaganda” under FARA.<sup>153</sup> However, the appellee did not want to be publicly regarded as a disseminator of political propaganda, as dictated by the mandatory disclosure requirements that demand that those viewing the films be informed that the films are identified as “political propaganda.”<sup>154</sup> The appellee was concerned with the impact on his reputation, in light of the public reaction to materials to which the terms “political propaganda” applies.<sup>155</sup> The District Court for the Eastern District of California asserted that the label “political propaganda” has the effect of making the public believe that the material has been “officially censured” and is pejorative and unnecessary, thus constituting an unconstitutional abridgment of free speech.<sup>156</sup> The District Court concluded that the term “propaganda” was a “semantically slanted word of reprobation. . . .”<sup>157</sup> Thus, labelling expressive materials as “political propaganda” rendered them unavailable to citizens who wanted to “use them as a means of personal expression.”<sup>158</sup> The District Court further concluded that there was “no compelling state interest to justify the use of such a pejorative label. . . .”<sup>159</sup> Thus, continuing to label expressive materials “political propaganda” was an “invalid . . . abridgment of speech.”<sup>160</sup>

Despite the judgment of the District Court, the U.S. Supreme Court held that FARA’s use of the term “political propaganda” was constitutional.<sup>161</sup> The Supreme Court commenced its reasoning by

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<sup>152</sup> *Id.* at 471–72 (quoting Section 611(j) of FARA).

<sup>153</sup> *Meese*, 481 U.S. at 467.

<sup>154</sup> *Id.* at 467.

<sup>155</sup> *Id.* at 468.

<sup>156</sup> *Id.* at 465.

<sup>157</sup> *Id.* at 469.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

referencing the overall regulatory scheme of FARA.<sup>162</sup> The Court stated that the main purpose of the regulatory scheme was

to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.<sup>163</sup>

In other words, FARA is directed at protecting national security and ensuring transparency among those who act for or on behalf of foreign interests. Thus, FARA “requires all agents of foreign principals to file detailed registration statements. . . .”<sup>164</sup> Such registration requirements apply “equally to agents of friendly, neutral, and unfriendly governments,”<sup>165</sup> who in turn must label all materials that have been classified as “political propaganda,” for the reason that “they contain political material intended to influence the foreign policies of the United States. . . .”<sup>166</sup>

The Supreme Court noted that FARA defined the term “political propaganda” as including not only slanted and “misleading advocacy,” but also advocacy materials that are accurate and deserve the “highest respect.”<sup>167</sup> Thus, the statutory definition encompasses both neutral and pejorative meanings.<sup>168</sup> Among other things, the Court then pointed out that FARA neither prohibits access to materials labelled “political propaganda,” nor the distribution of such materials.<sup>169</sup> The District Court erroneously and paternalistically assumed that public reaction to the label “political propaganda” would be overwhelmingly negative, so the District Court decided that it

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (quoting 56 Stat. 248–49).

<sup>164</sup> *Meese*, 481 U.S. at 469.

<sup>165</sup> *Id.* at 469–70.

<sup>166</sup> *Id.* at 470.

<sup>167</sup> *Id.* at 477.

<sup>168</sup> *Id.* at 477–478.

<sup>169</sup> *Id.* at 478–85.

would be best to protect the public from “too much information” in order to prevent misunderstanding and misuse.<sup>170</sup> The Supreme Court proposed an alternative to the District Court’s erroneous paternalism: “to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to the end is to open the channels of communication rather than to close them. . . .”<sup>171</sup> The Supreme Court ultimately held that FARA did not impermissibly restrict free speech and was thus constitutional.<sup>172</sup>

Justice Blackmun, joined by Justices Brennan and Marshall, dissented in part, and stated that the majority formed its opinion regarding the term “political propaganda” as neutral by “limiting its examination to the statutory definition of the term and by ignoring the realities of public reaction to the designation.”<sup>173</sup> Justice Blackmun stated that even the limited definition of “political propaganda” contained in FARA could not be regarded as neutral: according to the legislative history of FARA, Congress intended to “discourage communications by foreign agents.”<sup>174</sup> The dissenting justices stated that even if Congress defined the term “political propaganda” in “completely neutral” terms, it would not necessarily amount to sufficient protection of freedom of speech.<sup>175</sup> According to the dissent, the majority was too dismissive of the “potential misunderstanding of [the statute’s] effect.”<sup>176</sup> Hence, the statute’s “practical effect” and its potential to “discourage protected speech” must be considered.<sup>177</sup>

In this particular case, the appellee did “not argue that his speech [was] deterred by” FARA’s “political propaganda” definition, but the appellee did argue that “his speech [was] deterred by” how the material that had been designated as “political propaganda” was

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<sup>170</sup> *Id.* at 481–82.

<sup>171</sup> *Id.* at 482 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

<sup>172</sup> *Meese*, 481 U.S. at 485.

<sup>173</sup> *Id.* at 485–86 (Blackmun, J., dissenting).

<sup>174</sup> *Id.* at 486.

<sup>175</sup> *Id.* at 488.

<sup>176</sup> *Id.* (quoting the majority opinion at 478; alteration in original).

<sup>177</sup> *Id.* at 488–89 (Blackmun, J., dissenting) (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986)).

perceived by the public.<sup>178</sup> The appellee submitted expert testimony that:

the designation “political propaganda” of a film or book by the government is pejorative, denigrating to the material, and stigmatizing to those disseminating it . . . to call something propaganda is to assert that it communicates hidden or deceitful ideas; that concealed interests are involved; that unfair or insidious methods [are] being employed. . . .<sup>179</sup>

This expert testimony was un rebutted, and the dissent felt that this testimony indicated that the majority erroneously concluded that “propaganda” is a “neutral classification.”<sup>180</sup> According to the dissent, “an unjustifiably narrow view of the sort of government action that can violate” free speech was adopted by the majority and the majority ignored the practical effects of materials being classified as “political propaganda.”<sup>181</sup> The practical effects of such a classification “create an indirect burden on expression.”<sup>182</sup> The dissent added that “indirect discouragements are fully capable of a coercive effect on speech. . . .”<sup>183</sup> Designation as “political propaganda” taints a material’s message, puts individuals and organizations wishing to display such materials on the defensive, and has a “deterrent and “chilling” effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association.”<sup>184</sup> While the majority classified the approach by the lower District Court as “paternalistic,” the dissenting justices concluded that the governmental classification of materials as “political propaganda” is what is paternalistic.<sup>185</sup> The dissenting justices stated that

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<sup>178</sup> *Meese*, 481 U.S. at 489 (Blackmun, J., dissenting).

<sup>179</sup> *Id.* at 490 (quoting a statement from “Leonard W. Doob, Sterling Professor Emeritus of Psychology at Yale University”).

<sup>180</sup> *Meese*, 481 U.S. at 490 (Blackmun, J., dissenting).

<sup>181</sup> *Id.* at 490–91.

<sup>182</sup> *Id.* at 490.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 492 (quoting *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963)).

<sup>185</sup> *Id.* at 493.

[g]overnment action does more than simply provide additional information. It places the power of the Federal Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation *designed* to reduce the effectiveness of the speech in the eyes of the public.<sup>186</sup>

The dissenting justices found that labelling materials as “political propaganda” constituted an unconstitutional infringement on rights guaranteed by the First Amendment of the U.S. Constitution.<sup>187</sup> Ultimately, the dissenting justices won the day, for Section 611(j) of FARA defining the term “political propaganda” was later repealed in 1995.<sup>188</sup>

### III. “LOST IN TRANSLATION”: COMPARING THE U.S. AND RUSSIAN EXPERIENCE

While Russian legislators frequently reference FARA as precedent for the Russian Foreign Agents Law, upon closer examination, unlike the Russian legislation, FARA primarily emphasizes the existence of an “agency relationship” between a domestic organization and its foreign principal.<sup>189</sup> A high standard of proof must be satisfied in order to prove that the agency relationship

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<sup>186</sup> *Meese*, 481 U.S. at 493 (Blackmun, J., dissenting).

<sup>187</sup> *Id.* at 496.

<sup>188</sup> The term “political propaganda” was specifically removed from FARA in 1995 and replaced with the more neutral term of “informational materials,” Pub. L. No. 104-65, § 9, 109 Stat. 691, 699–700 (1995), thus removing the potential negative perceptions associated with the term propaganda, as was discussed by the dissenting justices in *Meese v. Keene*, 481 U.S. 465, 485–96 (1987) (Blackmun, J., dissenting).

<sup>189</sup> Yuk K. Law, *The Foreign Agents Registration Act: A New Standard for Determining Agency*, 6 FORDHAM INT’L L. J. 365, 370 (1982) (stating that “[a]gents of foreign principals have the duty to fulfill FARA’s requirements if they engage in political activities. . . . [t]o trigger the registration requirement under FARA, an agency relationship must exist between an American representative and a foreign interest.”).

exists.<sup>190</sup> Additionally, in *Attorney General v. Irish People, Inc.*,<sup>191</sup> the U.S. Court of Appeals for the District of Columbia stated that

in determining whether any set of facts establishes that someone is acting as an agent for a foreign principal within the meaning of the Act it is important to consider the limitations on types of activity Congress intended to reach. Congress was particularly concerned that registration would not be imposed to stifle internal debate on political issues by citizens sympathetic to the views of foreigners but free from foreign direction or control. In amending the definition of agent in 1966 Congress emphasized that the Act should not require the registration “of persons who are not, in fact, agents of foreign principals but whose acts may incidentally be of benefit to foreign interests, even though such acts are part of the normal course of those persons’ own rights of free speech, petition or assembly.”<sup>192</sup>

Furthermore, the scope of the regulated activity under FARA is much narrower than the Russian Foreign Agents Law, for FARA is mostly concerned with lobbying, consultancy, and advertising.<sup>193</sup> Most

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<sup>190</sup> See *United States v. German-American Vocational League*, 153 F.2d 860 (3d Cir.), cert. denied, 329 U.S. 760 (1946). The prosecution must satisfy a high burden of proof to prove the existence of the agency relationship. See *United States v. Syed Ghulam Nabi Fai* (2011) Criminal Case No 1:11 – CR -00561-LO, Plea Agreement (the prosecution provided proof that Kashmiri American Council (KAC) was under a complete and total control of the Pakistani governmental structures that regularly provided instructions to KAC and engaged in direct planning of KAC’s activities). See also O.B. Sidorovich & G.B. Vaipan, *Zakluchenie o rezultatah sravnitelno-pravovogo analiza Federalnogo zakona at 20 iulya 2012 goda N.121-FZ “O Vnesenii Izmenenii v Otdelnye Zakonodatelnye akty Rossiiskoi Federatsii v chasti regulirovaniya deyatelnosti nekommercheskikh organizatsii, vypolnyayuschih funktsii inostrannogo agenta” I Zakona SSHA “O registratsii inostrannykh agentov” (Foreign Agents Registration Act, 22 U.S.C. 611-621) ot Avtonomnoi nekommercheskoi nepravitelstvennoi organizatsii*, INSTITUT PRAVA I PUBLICHNOI POLITIKI, Feb. 28, 2014 at ¶ 13.

<sup>191</sup> *Attorney Gen. of the United States v. Irish People, Inc.*, 796 F.2d 520 (D.C. Cir. 1986).

<sup>192</sup> *Id.* at 524 (quoting H.R. Rep. No. 1470, 89th Cong.2d Sess. 5-6 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News. 2397, 2401).

<sup>193</sup> Sidorovich & Vaipan, *supra* note 190, at ¶ 3.

actions of Russian NGOs that are captured under the Russian Foreign Agents Law would not be captured under FARA.<sup>194</sup>

Comparing the corresponding decisions of Russian and U.S. courts can also be helpful. In their respective cases, both the Russian and U.S. courts state that the terms at issue were neutral and thus did not violate the constitutional rights of those trying to deal with these designations by impeding their functions. Both courts reference governmental purposes of protecting national security and ensuring transparency. However, one key difference between the Russian Constitutional Court ruling and the U.S. Supreme Court ruling in *Meese v. Keene* is the emphasis on agency relationships in the U.S. case and the absence thereof from the Russian case.<sup>195</sup> In its current form, FARA is directed towards a very limited number of organizations that are mostly engaged in lobbying activity and are acting as agents of foreign principals.<sup>196</sup> The Russian Foreign Agents Law targets different organizations than FARA.<sup>197</sup> FARA requirements were clearly meant to apply only to those who were acting as agents of foreign principals, rather than those who sympathized and even promoted “foreign” views but were not agents of foreign principals. The judgment of the majority of the Russian Constitutional Court indicates that controlling and suppressing “foreign views” was the key aim of the Russian state.<sup>198</sup>

While the majority opinions of both Russian and U.S. Courts contain similar reasoning, the dissenting opinions are also very informative, as they challenge the notion of the “neutrality” of the designations and consider the actual impact of the use of the terms “political propaganda” or “foreign agent.”<sup>199</sup> Both dissents discuss the “tainted message” that follows these designations, and the resulting “chilling effect” of these provisions on freedoms of association and

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<sup>194</sup> *Id.* at ¶¶ 23, 25.

<sup>195</sup> *Meese*, 481 U.S. at 469.

<sup>196</sup> Sidorovich & Vaipan, *supra* note 190, at ¶ 3.

<sup>197</sup> See Osoboe Mnenie [Dissenting Opinion], *supra* note 118, ¶ 5.

<sup>198</sup> Mihailov, *supra* note 141, at 22.

<sup>199</sup> *Meese*, 481 U.S. at 485–86 (Blackmun, J., dissenting); Osoboe Mnenie [Dissenting Opinion], *supra* note 118, ¶ 5.

speech.<sup>200</sup> Both dissenting opinions emphasize that the freedoms of speech and association protect opinions and actions, regardless of whether the government or even the population supports those opinions and acts. Such is the nature of a pluralistic democratic society. Furthermore, these unpopular points of view cannot be shut down by either direct or indirect means.

#### IV. "FOREIGN AGENTS" AND CIVIL SOCIETY

Given the 2014 decision of the Russian Constitutional Court confirming the constitutionality of various provisions of the Russian Foreign Agents Law, as well as subsequent amendments that made it even harder for the Russian NGOs that receive foreign funding to participate in political activities, in March of 2018, forty-eight Russian NGOs that were classified as "foreign agents" filed a complaint in front of the European Court of Human Rights.<sup>201</sup> In their complaint to the Strasbourg Court, the NGOs emphasized the lack of a requirement of an agency relationship between Russian NGOs and foreign donors in the Russian law; the all-encompassing nature of foreign financing; the vagueness of the term "political activity;" the lack of guidance in labelling materials produced by NGOs that have been designated as "foreign agents;" and the lack of proportionality of governmental measures.<sup>202</sup> The complainants asserted that the current requirements of the Foreign Agents Law make seeking foreign financing very difficult for NGOs, even though domestic financing is frequently quite limited.<sup>203</sup> Furthermore, provisions dealing with "political activity" effectively reduce NGOs' dialogue with the government.<sup>204</sup> Overall, the NGOs argued that the real governmental

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<sup>200</sup> *Meese*, 481 U.S. at. at 488–89 (Blackmun, J., dissenting) (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986)); Osoboe Mnenie [Dissenting Opinion], *supra* note 118, ¶ 6.

<sup>201</sup> *See generally* *Ekozaschita et al. v. Russia*, App. No. 9988/13, (March 12, 2018), (Eur. Comm'n on H.R.).

<sup>202</sup> *Id.* at summary.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

aim behind this legislation was not to increase transparency, but rather to shut down dissenting views.<sup>205</sup>

The massive demonstrations protesting election falsification in the winter of 2011–12 and NGOs’ active involvement in election monitoring resulted in a “political counter-offensive from the government. . . .”<sup>206</sup> This effort culminated in the passage of the Foreign Agents Law, among other measures, in 2012. The key aims of the law are to cut off Russian NGOs from foreign funding and any sort of “political activity.”<sup>207</sup> In other words, “the NGO Law has had the effect of ‘crowding out’ the civic sphere organisations that are critical of the authorities, supplanting these groups with organisations that are neutral or loyal to the regime.”<sup>208</sup> The term “foreign agent” itself is a “throwback to espionage accusations during the Cold War”<sup>209</sup> and was deliberately chosen to discredit and stigmatize foreign-funded NGOs participating in transnational advocacy networks.<sup>210</sup> Politically active advocacy networks have been gradually replaced by politically neutral social groups as a result of the government’s efforts.<sup>211</sup> NGOs that want to continue operating in the political realm are forced to not only give up their foreign funding, but also to take account of the political risks inherent in this shift from foreign to domestic—largely government—financing.<sup>212</sup> Many realized that in order to access governmental funds, they would have to adopt a less critical stance.<sup>213</sup> This, in turn, created friction between NGOs loyal to the government and those critical of the government, leading to concerns about the “future quality of Russia’s governance” in a sociopolitical environment not openly critical of the government.<sup>214</sup> Furthermore, citizens might

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<sup>205</sup> *Id.*

<sup>206</sup> Daucé, *supra* note 2, at 63.

<sup>207</sup> *Id.* at 64.

<sup>208</sup> Leah Gilbert, *Crowding Out Civil Society: State Management of Social Organisations in Putin’s Russia*, 68 EUROPE-ASIA STUD. 1553, 1555 (2016).

<sup>209</sup> Daucé, *supra* note 2, at 64.

<sup>210</sup> *See id.*

<sup>211</sup> Gilbert, *supra* note 208, at 1571.

<sup>212</sup> *See* Daucé, *supra* note 2, at 73

<sup>213</sup> *Id.*

<sup>214</sup> Gilbert, *supra* note 208, at 1573–74.

not participate as actively in policy work if the NGOs with which they would previously partner can no longer advocate critically.<sup>215</sup>

#### CONCLUSION

While national security undoubtedly constitutes a key governmental goal, it cannot overshadow rights. In other words,

human security may be a precondition to liberty, but it should not be valued above liberty for, when so weighted, it is capable of destroying liberty. A society that exaggerates its security requirements can debase the values it cherishes. Free societies accept less security and, consequently endure some pain and suffering, in order to emphasize their humanity and civility.<sup>216</sup>

Even though rights do expand and contract in relation to changing circumstances,<sup>217</sup> arguably, they cannot be contracted to the point of making them meaningless, which is precisely what the Russian Foreign Agents Law aims to do. Once laws are enacted, they greatly influence their subjects by shaping their political choices and standardizing behavior.<sup>218</sup> The enactment of the Russian Foreign Agents Law was meant to reshape NGOs' activist practices by stigmatizing their international cooperation and participation in political activities as well as transnational advocacy networks.<sup>219</sup> The law reshaped the nature of domestic interactions and impacted interactions within transnational networks, where global partners have been forced to adapt their approaches to the restrictive legislative provisions if they choose to continue working with Russian partners.<sup>220</sup> Thus, the law itself, as well as its interpretations through judicial

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<sup>215</sup> See *id.* at 1574.

<sup>216</sup> Stanley A. Cohen, *Law in a Fearful Society: How Much Security?*, 54 U. NEW BRUNSWICK L. J. 143, 146–47 (2005).

<sup>217</sup> *Id.* at 147.

<sup>218</sup> Françoise Daucé, *The Government and Human Rights Groups in Russia? Civilized Oppression?*, 10 J. CIV. SOC'Y 239, 247 (2014).

<sup>219</sup> *Id.*

<sup>220</sup> See Tysiachniouk, Tulaeva, & Henry, *supra* note 15, at 616.

rulings, becomes a constraining mechanism nationally as well as internationally.<sup>221</sup> Challenging the law in various judicial realms, be they domestic constitutional courts or international adjudicative bodies, while useful in making the arguments of all sides transparent, also softens the “direct combat between activists and the state.”<sup>222</sup> This “juridification” of the issues, while reducing violence, also de-politicizes the nature of the interactions by forcing the parties into the frameworks of legal arguments.<sup>223</sup> Ultimately, this de-politicization reflects the decline of political pluralism in Russia.<sup>224</sup> The Foreign Agents Law is yet another element in this overall trend.

While national security and ensuring transparency are laudable goals, they are frequently misused to accomplish ulterior aims. In Russia, provisions of the Foreign Agents Law have been utilized to stifle internal debates and dissenting views, particularly when such views are critical of the state and sympathetic to so-called “Western ideas.” Individuals and organizations expressing such views have now been legislatively ostracized, marginalized, and presented as posing an existential threat to Russia itself.<sup>225</sup> The Russian Constitutional Court itself has contributed to this delegitimization. The narrative of national security has become increasingly difficult to challenge either domestically or internationally, ultimately making the change “from values of survival to values of self-expression less likely.”<sup>226</sup> Challenging the Foreign Agents Law at the level of the European Court of Human Rights is only useful to the point that the Strasbourg Court’s future ruling will be accepted and implemented by Russia.<sup>227</sup>

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<sup>221</sup> Alexandra V. Orlova, “Public Interest,” *Judicial Reasoning and Violence of the Law: Constructing Boundaries of the “Morally Acceptable,”* 9 CONTEMP. READINGS L. & SOC. JUST. 51, 72 (2017).

<sup>222</sup> Daucé, *supra* note 218, at 248.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 249.

<sup>225</sup> Alexandra V. Orlova *The Soft Power of Dissent: The Impact of Dissenting Opinions from the Russian Constitutional Court*, VANDERBILT J. TRANSNAT’L L. (2019) (forthcoming).

<sup>226</sup> Ostbo, *supra* note 38, at 212.

<sup>227</sup> Vladimir Kara-Murza, *Russia is Preparing to Back out of its Last Human Rights Commitments in Europe*, WASH. POST (Oct. 30, 2018), <https://www.washingtonpost.com/news/democracy->

This is an uncertain outcome, given Russia's recent tense relationship with the European Court of Human Rights and refusal to implement the Strasbourg Court's decisions when those decisions are deemed to contradict Russian constitutional principles.<sup>228</sup> Russia needs to engage in a wholesale rethinking of the notion of national security itself—a notion that includes social, economic, and human rights concerns. Only such a reconceptualization will allow NGOs to be viewed as partners, rather than enemies, in ensuring national security.

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post/wp/2018/10/30/russia-is-preparing-to-back-out-of-its-last-human-rights-commitments-in-europe/?noredirect=on&utm\_term=.bf5297a64fc6.

<sup>228</sup> Alexandra V. Orlova, *Sovereignty, Dissent, and the Shaping of International Consensus around Human Rights: An Examination of Russian 'Disengagement' from the European Court of Human Rights*, 35 ARIZONA J. INT'L & COMP. L. 435, 463 (2018).