



EUROPEAN MASTER'S DEGREE
IN HUMAN RIGHTS AND DEMOC-
RATISATION

Foreign Agents or Human Rights Defenders?

The Protection of Non-Governmental Organisations in Russia

vis-à-vis Council of Europe model

Case study of 2012 'Law of Russian Federation on Foreign Agents'

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Abstract

This thesis examines the compatibility of the Russian framework for protection of non-governmental organisations (NGOs) in law and practice with the model approved by the Council of Europe. While NGOs are recognised as legal personalities and subjects to international law by the Strasbourg system and as key elements of a pluralist democracy, the Russian system does not protect them in the same manner. The author of this thesis argues that the main reason why Russia does not recognise NGOs as ‘equal partners’ is because they may be perceived as a ‘danger’ to its sovereignty and state-centred approach to international law. The thesis focuses on the ‘Law on Foreign Agents’ adopted in 2012 that regulates mainly Russian human rights NGOs. As a result of a legal analysis, the author finds that the individual rights to freedom of assembly and association and expression are not respected in Russia. The issue of protection of NGOs represents yet another landmark in the Russia-Council of Europe human rights partnership which has been since its beginning a ‘battle’ of sovereignty versus interference in the state affairs. Therefore, there still remains a question whether the Western model of individual rights is applicable to the Russian context with its socio-cultural and political specificities.

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AI	Amnesty International
CAT	Committee Against Torture
CM	Committee of Ministers (Council of Europe)
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EHRAC	European Human Rights Advocacy Centre
EIDHR	European Instrument of Democracy and Human Rights
EU	European Union
HRC Memorial	Human Rights Centre Memorial
HRW	Human Rights Watch
ICNL	International Centre for Not-for-Profit Law
INGO	International Non-Governmental Organisation
IRL RAS	Institute of the Russian Language of the Russian Academy of Sciences
IYHRM	International Youth Human Rights Movement
KGB	Komitet gosudarstvennoy bezopasnosti
MHG	Moscow Helsinki Group
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary Assembly of the Council of Europe
RCAO	Russian Code of Administrative Offences
SRJI	(Stichting) Russian Justice Initiative
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USSR	Union of Soviet Socialist Republics

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1. Introduction

Russia joined the Council of Europe in 1996 and two years later ratified the European Convention on Human Rights (ECHR) committing therefore to comply with the human rights standards enshrined in it, as enforced by the practice of the European Court of Human Rights (ECtHR); and as the 1993 Constitution of Russian Federation likewise requires.

At the moment of accession Russia was alerted to pay particular attention to *inter alia* “support for, and the strengthening of, non-governmental organisations in the field of human rights and to the establishment of a civil society.”¹

This thesis is dedicated to the question whether the Russian protection of non-governmental organisations (NGOs²) in law and practice is compatible with the Council of Europe’s legal and normative framework.

We will explore the protection of NGOs on two levels: first being based on individual rights necessary to form and make NGOs function. Those are mainly the freedom of assembly and association and freedom of expression (‘NGO rights’) as enshrined in all major international conventions, declarations and other documents³ including the 1948 Universal Declaration of Human Rights (UDHR).⁴ The second level

¹ PACE, *On Russia’s Request for Membership of the Council of Europe*, Opinion 193, 25 January 1996, para. 9, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta96/EOP193.htm> (consulted on 7 May 2013).

² The term in Russia is *nekommercheskaja organizacija* (non-commercial organization). For the purposes of this thesis we will use the term NGO for any non-profit/non-commercial/non-governmental organization following the general usage.

³ E.g. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); including its General Comment 25 (Article 25) of the Human Rights Committee (participation in public affairs and the right to vote); OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe’s Commission for Democracy through Law (Venice Commission), 2010 Guidelines on Freedom of Peaceful Assembly, second edition (2010), available at <http://www.osce.org/odihr/73405?download=true> (consulted on 17 May 2013).

⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), Art. 19 and Art 20 available at <http://www.un.org/en/documents/udhr/> (consulted on 7 June 2013).

is represented by specific legislation (including soft law) and norms directly regulating the functioning of NGOs in both systems.

An active civil society and NGOs' presence in it is generally cherished by the West⁵ as an inherent part of pluralist democracy and as a 'bottom-up' element contributing, for example, to the transition to democracy in some countries.⁶ NGOs focusing on human rights issues are especially endangered in their function of human rights defenders, and are therefore protected by the United Nations' (UN) Special Rapporteur on the situation of human rights defenders, amongst others.

The term 'NGO' (both international and national) was first mentioned in the 1945 UN Charter in Article 71, according them consultative status with the Economic and Social Council (ECOSOC). The 1200 voluntary organizations present at the San Francisco Conference⁷ in the same year made an essential contribution to the writing of the UN Charter, as well as to the drafting of the 1948 UDHR.

Even prior the UDHR, NGOs were influencing its forerunners, such as the 1864 Geneva Conventions; the 1906 Multilateral Labour Conventions; and the 1926 International Slavery Convention. It is not surprising that the recognition of NGOs occurred in the course of the post-Second-World-War period in which law evolved from strictly state-centred to individual-centred. Some states have understood the doctrine of individual-centred approach of international law as a challenge to their state sovereignty and seen it to be interfering with their internal affairs.⁸

The Council of Europe accords NGOs the status of a legal personality and recognises them as subjects to international law. NGOs (as individuals or group of

⁵ Alger, 2002, p. 97.

⁶ As well as by 'non-West' countries, such as Burma or Czechoslovakia before the Velvet Revolution in 1989. For 'classic' examples see *e.g.* Suu Kyi, 2010; and Havel, 2009.

⁷ For an interesting debate about the involvement of Soviet Union in the drafting of the UN Charter and UDHR see *e.g.* Chapter 6 "San Francisco and Human Rights, 1945" in Clark, 2007.

Clark focuses on the debate about the San Francisco conference and the role of NGOs in it and poses the question whether they were representing US interests or their own non-state agenda applicable to all countries? He further examines also the role of Soviet Union (as one of four sponsors of the Charter) and the reasons behind the decision to firstly oppose US and the proposition to include larger human rights agenda in the Charter at the Dumbarton-Oaks Conference and later accept it at the San Francisco Conference (while for example UK remain sceptical), moreover advocating for involvement of NGOs with social issues focus.

⁸ Cassesse, 2005, pp. 3-21.

individuals) also have the right under Article 34 of the ECHR to sue their country of origin at the ECtHR in Strasbourg. Russia hesitates to recognise NGOs in this way. The 1993 Constitution of Russian Federation does provide the protection of individual rights to freedom of assembly and freedom of expression, but it does not specifically mention NGOs. The latest political developments in Russia and the legal measures adopted during 2012 regarding civil rights show that Russia's current government does not recognise NGOs (especially those focusing on human rights issues) as 'equal partners'. This is expressed especially in the 2012 Law on Foreign Agents (obliging all Russian NGOs 'involved in a political activity' or receiving foreign funding to register as 'foreign agents' and if they fail to do so they face both administrative and criminal sanction).

As Putin proclaimed "[foreign agents NGOs]...are allegedly our national NGOs but in substance working for foreign money playing the music ordered by a foreign state..."⁹ Sergey Lavrov, the Minister of Foreign Affairs of Russian federation (reacting on the expulsion of the agency USAID from Russia) stated: "With use of distribution of grants [there were] attempts to influence the political process, including elections on different levels."¹⁰

Can we therefore claim that human rights NGOs are targeted by the Law on Foreign Agents because they may represent a threat to Russia's sovereignty? Can Russian (human rights) NGOs represent a challenge to Russia's sovereignty?

It is indeed clear that while the framework adopted by the Council of Europe for the protection of NGOs represents an ideal model, every individual member state develops its own framework based on its specific socio-cultural, historical or political aspects. What does the Law on Foreign Agents show about the Russian particularities and about 'Russia-style' rule of law?

⁹ Quoted in Buyse, Antoine, 'Two High Profile Russian Cases Coming to Strasbourg', in *ECHR Blog*, 8 February 2013, available at <http://echrblog.blogspot.cz/2013/02/two-high-profile-russian-cases-coming.html> (consulted on 21 June 2013).

¹⁰ Case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application): *Zhaloba 'Golos' i drugie NKO protiv Rossii* (novaja zhaloba), 6 February 2013, para. 15.46, available at <http://www.memo.ru/uploads/files/950.pdf> (consulted on 27 April 2013).

The ‘NGOs rights’ are protected by the 1993 Russian Constitution and the specific legislation adopted in the period from 1991 (collapse of the USSR) until last year was more or less allowing Russian NGOs to function. We will argue that the 2012 Law on Foreign Agents represents a landmark in Russia-Council of Europe relations because it is the first time since 1991 that a law is using the ‘Soviet rhetoric’ (for example the term ‘foreign agent’) to restrict the functioning of Russian NGOs focusing mainly on human rights issues. There is therefore a clear imbalance between the Council of Europe recognising some Russian NGOs as human rights defenders both in theory and practice and Russia labelling the same NGOs as ‘foreign agents.’

We will argue that the example of the NGOs protection in Russia, especially the example of the specific case of the recently adopted and implemented Law on Foreign Agents raises a difficult question - whether a Western model of individual-centred human rights system is applicable to the Russian context.

We will first look at the Council of Europe’s theoretical concept of civil society and its legal and normative framework for the protection of NGOs; next we will study Russia’s system of NGOs protection, focusing mainly on current legislation regulating NGOs, and looking as well into the history of NGOs in Russia and their current contribution to human rights protection. Finally we will present a case study of the Law on Foreign Agents, taking a look at its impact on Russian NGOs and analysing whether it is compatible with the human rights standards as enshrined in the ECHR and as enforced in practice by the ECtHR (analysing its case-law). Both systems will be compared in the conclusion.

1.2. Methodology

Given the main topic of the present thesis, a variety of sources were used: legal sources (both from the Council of Europe and Russia as well as from other countries, such as US and Ethiopia), and academic sources (mainly from legal scholars but also from scholars focusing on other disciplines such as political sciences, and history). One of the main challenges encountered while researching for this thesis was the lack of relevant material by Russian (legal) scholars (both in Russian and in English) on the topic of NGOs and their legal protection in Russia. There is some literature cited

bellow, but one might wonder what the reasons for this possible ‘gap’ are. As Mälksoo argued, the legal literature on the topic of ‘non-state actors’ does not yet seem to be very vast in Russia because “the discussion on non-state actors is but a deduction from a more general philosophical debate about the relationship between state sovereignty and rights of the individual.”¹¹ Another reason may be more pragmatic - since it was adopted only recently it is indeed too recent for Russian scholars to react on it. This thesis tries to contribute to fill this gap.

Parts of this thesis are descriptive such as the outline of activities of Russian largest human rights NGOs or the description of latest political developments. The author of this thesis considers as necessary to include them in order to make a reader who is not familiar with the Russian complex context acquainted with it.

In order to collect data from the ‘field,’ the author of this thesis carried out research in Russia in St. Petersburg and Moscow from 6 until 29 April 2013. The main purpose of the field research was to examine the Russian system in practice. In order to understand fully the context of Russia’s socio-cultural and political peculiarities it was necessary to focus on complex issues first as exercised in practice such as the rule of law, the system of Courts, the executions of judgements and other relevant issues. It was therefore of great importance to be able to participate at a Criminal Court hearing in order to explore fully the ‘legal atmosphere’ in Russia. The author of this thesis contacted mainly Russian human rights NGOs prior to her ‘field trip’ and was able to contact others while in Russia. The purpose of meeting them was to explore how they function in practice, what activities they deliver, and especially to determine how they contribute to the human rights protection in Russia, particularly *vis-à-vis* the Strasbourg system. A special interest was put in examining the challenges they are currently facing because of the impact of the Law on Foreign Agents. It was indeed interesting for the author to be able to witness, for example, an inspection carried by the Ministry of Justice (ordered under the Law on Foreign Agents) while conducting an interview. The focus of the field research was also to understand the NGOs protection as it was before the adoption of the Law on Foreign Agents.

¹¹ Mälksoo, 2011, p. 129.

The research was done mainly by conducting qualitative interviews with various respondents, mainly representatives of Russian human rights NGOs, as well as lawyers, scholars, independent barristers and other ‘general’ actors (such as doctors, artists and ‘young activists’). It is indeed quite obvious that due to the time and location constraints; and other reasons (since the Law on Foreign Agents just started to be implemented in March the majority of Russian human rights NGOs were undergoing inspections by Ministry of Justice and were not available for interviews) it was indeed impossible to embrace all Russian human rights NGOs. The selection of respondents was based simply on their availability and willingness to respond to questions. Evaluating the findings from the interviews, it is regrettable now that more information from the ‘other’ side was not collected, such as interviews with government representatives in charge of implementation of the Law on Foreign Agents). The reason for this omission was mainly practical, due to time limitations, but also by general difficulty to access such sources or their willingness to respond to questions.

Regarding the research for the specific issue of this thesis, the Law on Foreign Agents and its impact on Russian NGOs, it is necessary to mention a very important aspect - timing of this thesis. Since the Law on Foreign Agents entered into force only in November 2012 and has started to be implemented only since March 2013, it is indeed too short period to study the total impact of it yet.

Chapter 1

2. The legal and normative framework adopted by the Council of Europe for NGOs

NGOs were first recognized by the Council of Europe in its 1951 Resolution, in a vague notion of “international non-governmental organisations which deal with matters that are within the competence of the Council of Europe.”¹² This was a first step in establishing arrangements for their consultative status and officially by the adoption of 1986 European Convention recognising the international NGOs contribution to “the achievement of the aims and principles of the UN Charter and the Statute of the Council of Europe.”¹³ The NGOs are recognised as legal personality and they have the same rights as individuals or group of individuals to file an individual application:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”¹⁴

This provision is of utmost importance since it gives NGOs the same statute as individuals and represents the individual-centred approach to international law. The Council of Europe recognizes NGOs as essential elements for the functioning of democratic societies, especially for promoting public awareness and the participatory involvement of citizens in the ‘*res publica*.’ The main principles regarding NGOs promoted by the Council of Europe are *inter alia*: NGO shall be free to seek funding

¹² Council of Europe, *Resolution adopted by the Committee of Ministers at its 8th Session*, May 1951 Annex I. to the Statute of the Council of Europe, ETS 1, 5 May 1949, available at <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm> (consulted on 21 May 2013).

¹³ European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, (adopted on 24 April 1986) ETS 124, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/124.htm> (consulted on 13 May 2013);

According to the Council of Europe’s Treaty Office (Status as of: 30/5/2013), the ETS No. 124 is signed and ratified only by Austria, Belgium, Cyprus, France, Greece, Netherlands, Portugal, Slovenia, Switzerland, The Former Yugoslav Republic of Macedonia, and United Kingdom. Russia did not sign or ratify it.

¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, (adopted 4 November 1950) ETS 5 (ECHR), available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (consulted on 3 May 2013).

abroad; be independent from directions by public authorities; be free to undertake research, education and advocacy on issues of public debate even if the position taken is not in accord with government policy or requires a change in the law; NGOs shall also be provided judicial protection as any other legal entity and be entitled to challenge decisions affecting them in an independent court which has the capacity to review all aspects of their legality, to suppress them where appropriate and to provide any consequential relief that might be required.¹⁵

The Council of Europe has established a special body for NGOs called ‘Conference of INGOs’ and distinguishes them as “the voice of European citizens, providing direct representation for them at the Council of Europe.” The INGOs are therefore recognised as a fourth pillar of the “*quadrilogue*, representing cooperation between governments, parliaments, local and regional authorities, as well as civil society organisations.”¹⁶ Currently, some 400 INGOs have been granted participatory status. (“The Council of Europe may establish working relations with INGOs by granting them participatory status.”)¹⁷ NGOs have played an important role in the drafting of various conventions and charters, including the Convention on the Legal Status of Migrant Workers, the Convention for the Prevention of Torture, and the European Cultural Convention.

The right to freedom of assembly and association and of expression are laid out in Articles 11 and 10 of the ECHR.¹⁸ As stated for example in 2007 Committee of Ministers’ (CM) Recommendation “NGOs should enjoy the right to freedom of expression and all other universally and regionally guaranteed rights and freedoms applicable to

¹⁵ Council of Europe, *Fundamental Principles on the Status of Non-governmental Organisations in Europe and explanatory memorandum*, 13 November 2002, available at <http://www.coe.int/t/dghl/standardsetting/cdcj/ONG/Fundamental%20Principles%20E.pdf> (consulted on 3 May 2013).

¹⁶ Council of Europe, ‘Civil Society’, at <http://hub.coe.int/what-we-do/democracy/civil-society> (consulted on 27 June 2013).

¹⁷ CM, *Participatory status for international non-governmental organisations with the Council of Europe*, Resolution Res 8, 19 November 2003, Art. 1, available at <https://wcd.coe.int/ViewDoc.jsp?id=88953&Site=CM> (consulted on 5 May 2013).

¹⁸ We are mentioning them in this order since based on the ECtHR case-law, Article 11 is considered as ‘main’ provision for NGOs, in completion with Article 10.

them.”¹⁹ Both the rights under Articles 11 and 10 are considered fundamental rights, the freedoms given in first paragraphs being subject only to the restrictions laid out in the second paragraphs. The state is therefore allowed (as expressed in the second paragraphs of the Articles 10 and 11) to interfere with both rights only if it is justifiable (prescribed by law, in pursuit of a legitimate aim and necessary in a democratic society). In theory the state shall be left only a limited space for manoeuvre in fulfilling ECHR obligations – so-called margin of appreciation (similar to the principle of subsidiarity established by the European Union law).

2.1. Principles of democratic society

The Council of Europe considers active civil society (and the NGOs’ presence in it) as one of six elements of a functional democracy (together with free, and fair elections; party pluralism; separation of powers; checks and balances system; media pluralism; and local and regional democracy), and as a “vital component of European society.”²⁰ The principle of pluralism, as expressed for example in the 2004 *Gorzelik and Others v. Poland* case is directly connected with the concept of democracy, and the freedom of association and only „convincing and compelling reasons can justify restrictions on that freedom.”²¹

The principle of tolerance and open-mindedness was applied, for example, in the 1981 *Young, James and Webster v. the United Kingdom* case, when the ECtHR ruled that “democracy does not simply mean that the views of the majority must always prevail.”²² The ECtHR ruled that Article 11 had been violated because UK legislation allowing dismissal of employees of British Rail (based on their refusal to join a trade union) was breaching the freedom to choose whether to belong to a given trade union or not. The same principle was applied in the 1999 *Chassagnou and Others v. France*

¹⁹ CM, *To member states on the legal status of non-governmental organisations in Europe*, Recommendation, CM/Rec 14, 10 October 2007, para. 5, available at <https://wcd.coe.int/ViewDoc.jsp?id=1194609> (consulted on 21 May 2013).

²⁰ *Ibidem.*, Preamble.

²¹ *Gorzelik and Others v. Poland* (17 February 2004) No. 44158/98, para. 95.

²² *Young, James and Webster v. the United Kingdom* (13 August 1981) No. 7601/76, 7806/77.

case²³ where applicants who opposed hunting on ethical grounds were forced to join a municipal hunters' association. In regards to Russia's cases, in the 2010 *Alekseyev v. Russia* case²⁴ ECtHR found violation of Article 11 based on a repeated unjustified ban on gay-pride marches in Moscow.

The principle of open debate of political ideas under Article 11 is expressed, for example, in the 2011 *United Macedonian Organisation Ilinden and Others v Bulgaria* case ("...the essence of democracy is its capacity to resolve problems through open debate"),²⁵ or under Article 10 in the 1998 *United Communist Party of Turkey and Others v Turkey* case.²⁶ In the latter case the ECtHR considered the possibility to resolve country's problems through dialogue as one of principal characteristics of democracy.

The principle of 'watchdogs' necessary in a democratic society under Article 10 is expressed for example in the 1994 *Jersild v. Denmark* case.²⁷ The principle of watchdogs applied directly to NGOs was expressed in the 2004 *Vides Aizsardzības Klubs v. Latvia* case where a violation of Article 10 was found since the applicant, an environmental NGO, was not allowed to publish an advocacy report about the conservation of coastal dunes containing allegations against the local government. The ECtHR ruled that since the NGO specialised in the relevant area exercised its role of 'watchdog', it shall be protected as essential in a democratic society and the public authorities shall not interfere with its activities. In this case the ECtHR recognised that functions of NGOs shall be considered as similar to the press. "In order to effectively accomplish its tasks, an NGO must be able to disclose facts in the public interest, to comment on them and thus to contribute to the transparency of the actions of public authorities."²⁸

²³ (29 April 1999) No. 25088/94, 28331/95, 28443/95.

²⁴ (21 October 2010), No. 4916/07, 25924/08, 14599/09.

²⁵ *United Macedonian Organisation Ilinden and Others v Bulgaria* (18 October 2011) No. 34960/04, para. 33 (b).

²⁶ (30 January 1998) No. 19392/92, para. 57.

²⁷ (23 September 1994) No. 15890/89, para. 31.

²⁸ *Vides Aizsardzības Klubs v. Latvia* case (27 May 2004) No. 57829/00, para. 42.

2.2. *Inherently pro-democratic civil society*

While the concept of inherently pro-democratic society is not shared by all scholars, some criticizing it for being a “romanticised western model which emerged from Western political discourse”²⁹ or as Berman has said just false;³⁰ the majority of Western scholars³¹ agree on the inherently pro-democratic function of civil society and this is reflected as well in the policy of the Council of Europe. This concept is mainly based on Tocqueville’s theory of ‘associationalism’ – a phenomenon founded on volunteerism, community spirit and independent associational life. The ‘associationalism’ serves as protection against the domination of society by the state. Tocqueville defines three main functions of a civil society: 1) a standing resistance to government; 2) a substitute for government; and 3) release and relief from private life.³² The function of civil society as standing resistance to governments was crucial for the resistance movements against totalitarian regimes in Eastern Europe and in Latin America in the 1970s and 1980s. Can the protection of NGOs be used as a litmus test for ‘measuring’ the level of democracy in a concrete country? Can we simply state that when NGOs functioning is being restricted or even or standing at risk of suppression, it can be considered as a warning for the status of democracy? In our case, therefore, the question would be: if, according to the norms adopted by the Council of Europe, Russia restricts the freedoms of its NGOs, does this mean that Russian democracy (as defined by the Strasbourg model) is in danger? This opinion is shared by many international NGOs (INGOs) (such as the Human Rights Watch (HRW), Amnesty International (AI) and UN agencies (such as special Rapporteurs for freedom of assembly and of expression) as well as some Western governments. The situation is nevertheless much more complicated. Let us therefore now examine the system of protection of NGOs in Russia in theory so we can later get back to this question and ‘measure’ the compliance of level of democracy in both systems.

²⁹ Chris Hann quoted in Ljubownikow, 2013, p.153.

³⁰ Berman, 1997, p. 402.

³¹ Cohen and Arato (1994); Howard (1993); Lewis (2002); Putnam (1994); Taylor (2006).

³² Woodward, 2010, pp. 71-75.

Chapter 2

3. Protection of NGOs in Russia

Having outlined the main axes of the Council of Europe's model of civil society and functioning of (human rights) NGOs in it, let us firstly analyse shortly here the origins of the Russia-Council of Europe partnership. Only after this short overview will we examine the Russia's system.

3.1. Origins of the Council of Europe-Russia human rights relation

The process of European reconciliation or building of the Greater Europe that would be based on universal human rights principles and standards was one of the main aims of the Council of Europe since the very beginning. This was demonstrated by the Council of Europe accepting Germany as its member (first as associate in 1950 and later as full member in 1951), re-admitting Greece five years after exclusion following the colonel's coup in 1974, and admitting post-Salazar Portugal in 1976, and post-Franco Spain in 1975. When 1989, the "year zero in the history of modern Europe"³³ came the majority of the member states of Council of Europe were ready to expand to the east and to start accepting countries newly emerged from the ex-Union of Soviet Socialist Republics (USSR) based on the respect for protection of human rights as law in action (not only their proclamation as law in books). This core concept of the Council of Europe since its beginning was designed to go beyond the pure military, economic or diplomatic concepts of security as represented for example by the North Atlantic Treaty Organization (NATO), European Union (EU), or the Organization for Security and Cooperation in Europe (OSCE). The process of enlargement was rapid: in one decade, the number of the Council of Europe's members grew from twenty-three in 1989 to forty in 1999, yet certain acts of the process of accession provoked many controversies, as in the case of Russia.

³³ Huber, 1999, p. 2.

What might have been the reasons for Russia and for Council of Europe (a part of its official motives as expressed *inter alia* in its Statute³⁴) becoming partners in the protection of human rights?

As the Russian foreign minister Andrei Kozyrev³⁵ at the time argued in his newly constructed 1991 foreign policy, the main aim of post-Soviet Russia was to liberate itself from the Tsarist and Soviet periods' legacies and to become part of the club of Western democracies.³⁶ It can probably be assumed, along with Pamela A. Jordan's pragmatic theory, that Russia's motives to access the Council of Europe were mainly in order to strengthen "trade ties with Europe, ensure an institutional connection with its former Soviet bloc partners, and gain acceptance as a nascent democracy."³⁷ In order to understand the background of the debate about whether to accept Russia or not, let us explore here shortly Russian³⁸ and other state members' delegates arguments³⁹ as expressed during the 1996 Parliamentary Assembly of the Council of Europe (PACE) ordinary session,⁴⁰ where the final decision to accept Russia as a new member of the Council of Europe was made. The main reason behind the accession was the argument of "safety of Europe being at stake;"⁴¹ and the exclusive role of Council of Europe as the only Pan-European human rights safeguard organisation;⁴² as well as the promotion

³⁴ Statute of the Council of Europe, (adopted on 5 May 1949) ETS 1, available at <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm> (consulted on 21 May 2013).

³⁵ Appointed by the President of Russia at the time Boris Yeltsin who did represent the same approach.

³⁶ Donaldson, 2009, p. 271.

³⁷ Jordan, 2003, p. 285.

³⁸ Since Russia was granted a special guest status with PACE on 14 January 1992 it was allowed to be present on selected assemblies, such as this one concerning the Russian application for accession.

³⁹ It would be beyond the scope of this thesis to acknowledge all the argument presented since the purpose here is to provide a sample of main axes presented by various state delegates regarding Russia's membership in the Council of Europe.

⁴⁰ PACE, *Debates of the Parliamentary Assembly of the Council of Europe on Russia's application for accession (25 January 1996)*, 4 September 2012, available at <http://www.cvce.eu/viewer/-/content/2fab4bc2-2783-4d3b-b33f-17541e532adc/en> (consulted on 7 May 2013).

⁴¹ *Ibidem.*, p. 6:

„Mr De Lipkowski (France): Will we feel any safer if we shut the door on Russia?...If we slam the door, what hold will we have on Russia to stop it going this worst of all ways and to promote greater democracy? None.” (emphasis added).

⁴² *Ibidem.*, pp. 2-6:

“De Lipkowski (France): The Council of Europe is in danger of turning into a branch office or a human rights museum...If Russia is rejected here, it has another card up its sleeve. It will turn to the OSCE, and play an active part in European security there. One of the things it will try to do there

of its core democratic principles;⁴³ among them the of the principle to open its doors to any country willing to comply with its principles⁴⁴ or in other words not to apply double standards to applicants.⁴⁵

The main argument against the accession, on the other hand, was based on the human rights situation in Russia, which was considered non-compatible with the human rights standards as enshrined in the ECHR, required to be met by any new Council of Europe member.⁴⁶

As far as Russia is concerned, most of the arguments in favour of the accession emphasised the Russian engagement in the direction of full implementation of the rule of law, multi-party democracy, and protection of individual human rights⁴⁷ which Russia had started since the collapse of the USSR in late 1991, having as major landmark the adoption of the 1993 Constitution of the Russian Federation. As Chairman of the Russian delegation Lukin argued that “[Russia] has embarked on the path to the rule of law and has guaranteed freedoms that Russians have never had before.”⁴⁸

Eventually, a common decision was reached,⁴⁹ based on the agreement that rejecting Russia would represent a higher risk to the European security than accepting it and that the main concern should be about individual human rights protection in Russia,

is set up a mini security council for Europe, where it will be sure of a permanent seat.” (emphasis added).

“Masseret (France): [rejecting Russia] would make it turn away from Europe and our Organisation and look for answers outside this democratic framework.” (emphasis added).

⁴³ Huber, 1999, p. 58.

⁴⁴ PACE, *op.cit.* note 40, p. 7:

“Caputo (Italy):...against the closing the door in Russia's face having opened it to virtually all the other countries on the continent.” (emphasis added).

⁴⁵ *Ibidem.*, p. 8:

“Marmazov (Ukraine) reminded that the Council of Europe accepted Ukraine (as its 37th Member State on 9 November 1995) even though it was not at the time of accession, fully compliant with all aspects of human rights.”

⁴⁶ *Ibidem.*, p. 3:

“Gricius (Lithuania) Unfortunately, the latest events in Chechnya and the way in which the critical situation has been handled over the last several weeks causes strong doubts about Russia's readiness to adhere to the ECHR.”

⁴⁷ Bowering, 2009, pp. 257-278.

⁴⁸ PACE, *op.cit.* note 40, p. 17.

⁴⁹ Bowering, 1997, p. 4:

“214 of the 263 members of the PACE took part in the vote: 164 voted for the resolution, 35 against and 15 abstentions. Significantly, at the request of more than 10 members, the voting was by roll-call.”

not geo-political interests.⁵⁰ Nevertheless Russia was accepted as a new member on a conditional basis and the Council of Europe established additional measures for Russia to fulfil within a clear time frame, as *inter alia* to sign and ratify the ECHR at the moment of accession; to ratify the ECHR and its Protocols Nos. 1, 2, 4, 7 and 11 within one year after accession; to recognise the right of an individual to apply to the ECtHR and also its compulsory jurisdiction; to sign within one year and ratify within three years from the time of accession Protocol No. 6 to the ECHR on the abolition of the death penalty; and to put into place a moratorium on executions with effect from the day of accession.⁵¹

Russian State Duma approved membership of the Council of Europe by 204 votes against 18.⁵² This was a signal ‘on paper’ towards the West that Russia is ready to accept⁵³ the Council of Europe’s concept of democracy based on individual freedom, political liberty and the rule of law as laid out in Articles 3 and 4 of its Statute. Was Russia nevertheless ready to (at least partially) re-evaluate its state-sovereignty paradigm - “the higher plenipotentiary power of the state over society”⁵⁴ as well in practice?

In the light of this question it is indeed interesting to acknowledge what another Russian delegate, Vladimir Zhirinovskiy,⁵⁵ stated in much ‘less academic tone’:

“European history was, above all, a drama of human freedom and from this point of view Russian history was European history. European culture was about the freedom and the development of the individual personality. Russian culture contained great men who had shone in European terms. The task was to bring Russian culture closer to Europe without losing its identity. Like a bouquet, each flower should show its own beauty yet contribute to the harmonious whole.”⁵⁶

⁵⁰ PACE, *op.cit.* note 40, p. 4:

“UK representative, Lord Finsberg stated: ‘I believe firmly that whatever the dangers may be in inviting Russia to join us, if that process permits one Russian citizen in Astrakhan to bring his case to the European Court of Human Rights in Strasbourg, it will be worthwhile’.”

⁵¹ PACE, *op.cit.* note 1, para. 7.

⁵² Bowring, 1997, p. 631.

⁵³ In a sense of ‘to give admittance or approval’ not necessarily in a sense of ‘adopt’.

⁵⁴ Antonov, 2012 (b), p. 96.

⁵⁵ Zhirinovskiy is still a member of State Duma and during the periods from 1996 till 2004 and from 2005 till 2008 was a PACE member (one of the 18 members Russian delegation), representing his party Liberal Democratic Party of Russia.

PACE, ‘Vladimir Zhirinovskiy’, at http://assembly.coe.int/ASP/AssemblyList/AL_MemberDetails.asp?MemberID=3726 (consulted on 16 May 2013);

Solov’ev, 2006, pp. 52-72.

⁵⁶ PACE, *op.cit.* note 40, p. 17.

Zhirinovsky's speech was probably more indicative of the future Russian approach to international human rights law than the rest of the more diplomatic speeches; and showed that Russia would not give-up its sovereignty by simply becoming a member of another international mechanism.

3.2. *Russia's doctrine of sovereignty*

The prevalence of the state-centred approach to international law was almost absolute in Russia during the Soviet period when for instance even the direct applicability of the UN human-rights treaties was rejected.⁵⁷ The politics of the USSR had considered that the principles of state sovereignty and non-interference in internal affairs were the two foundations of international law.⁵⁸ It is mostly agreed both by Russian and non-Russian scholars that the change in this paradigm (at least in theory) came with the 1993 Constitution based on the idea and supreme character of individual human rights⁵⁹ that “has stood the test of time; and its democratic aspirations are beyond question”⁶⁰ and represented a clear change from the traditional state-centred (Grotian) approach to towards an individual-centred (Kantian) attitude.⁶¹

The current situation (including the newly adopted legislation regulating Russian NGOs) proves that the sovereign paradigm is still predominant in today's Russia. As Morozov puts it, the “slogan of ‘sovereign democracy’ still forms the ideological horizon of contemporary Russia.”⁶² As Antonov⁶³ argues, the notion of an absolute sovereign authority (“the ‘out-dated’ concept of sovereignty”) that cannot be restricted or challenged by other powers (unless it chooses so) is still prevalent in the contemporary Russian legal doctrine, and has an impact on the enforcement of law in

⁵⁷ Mälksoo, 2012, p. 360.

⁵⁸ Bowring, 2009, p. 267.

⁵⁹ Starzhenetskii, 2012, p. 352.

⁶⁰ Bowring, 2009, p. 258.

⁶¹ Mälksoo, 2011, pp. 126-138.

⁶² Morozov, 2008, p. 152.

⁶³ Interview with Mikhail Antonov, Profesor at the National Research University Higher School of Economics (St. Petersburg) and Director of the Centre for Studies in Legal Argumentation; Associate Professor of Law, St. Petersburg, Russia, 20 April 2013:

“Russian prevailing ideology is the state-sovereignty. The idea that the state must control. Thus, one of the problems is the quantity of regulation.”

Russia.⁶⁴ The issue of sovereignty in international law was developed as a doctrine after the Peace Treaty of Westphalia (1648) together with the horizontal and positivist model of international law representing a system of rules between sovereign states.⁶⁵ There are currently many Russian scholars, especially those employed in state universities, who interpret for example the ECHR in different way, such as professor Chernichenko who argues that “the Convention does not envisage the right of individuals to go to the Court but obliges the states participating in the Convention to give them such a right”⁶⁶ and he consequently refuses to recognise the legal status of individuals (or NGOs or any other non-state actors) as subject to international law arguing that state sovereignty cannot be divided or limited. Professor Moiseev argues the same stating that the absolute sovereignty “remains fully available as a legal capacity and right on the theoretical level”.⁶⁷ A similar approach of “individual is there for the state”⁶⁸ is expressed in the 2008 Foreign Policy Concept of the Russian Federation (Russian Foreign Policy) as well.⁶⁹

The latest developments in Russia show that the prevalence of sovereignty will not be changed any time soon. Putin as newly re-elected President of Russia in his inaugural speech on 7 May 2012 did not mention at all the relations with the West, instead he stressed his “determination in developing our vast expanses from the Baltic to the Pacific, and on our ability to become a leader and centre of gravity for the whole of Eurasia.” Putin as well underlined the specificities of Russia’s socio-cultural heritage (“multi-ethnic people’s cultural and spiritual traditions, our centuries of history”) and concluded his speech by stating that “the values that have always been the moral backbone of our life, and if each of us lives according to their conscience, with love for

⁶⁴ Antonov, 2012 (a), p.3.

⁶⁵ Lindblom, 2005, p. 136.

⁶⁶ Quoted in Mälksoo, 2011, pp. 131-2: “...sovereignty and ‘subjecthood’ are absolute, almost natural, rights under international law.”

⁶⁷ Quoted in Mälksoo, 2011, p. 132.

⁶⁸ Quoted by Mälksoo, 2011, p. 127.

⁶⁹ The Ministry of Foreign Affairs of the Russian Federation, ‘Concept of the Foreign Policy of the Russian Federation’, adopted on 12 February 2013, available at http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/76389fec168189ed44257b2e0039b16d!OpenDocument (consulted on 13 May 2013).

and faith in their country, their families and loved ones, and care for their children's happiness and their parents' welfare.”⁷⁰

Putin rhetoric is of course nothing new to Russian political milieu. One of his admirers in his late years Alexander Solzhenitsyn already proclaimed in his Harvard speech in 1978 that the West (mainly US) where “the individual courage was ‘declined’ and human beings are ‘weak’” should not be applied to Russia.⁷¹ In a 2007 interview with Spiegel Solzhenitsyn explained that the main reason why the West does not understand Russia and vice versa is psychological “i.e. the clash of illusory hopes against reality,” when the perception of West as a ‘knight of democracy’ has been replaced (especially after NATO bombings of Serbia) with the “disappointed belief that pragmatism, often cynical and selfish, lies at the core of Western policies. For many Russians it was a grave disillusion, a crushing of ideals.”⁷²

Russia did eventually become a member of the Council of Europe and by ratifying the ECHR in 1998, she also become subject to control of the Council of Europe's monitoring and enforcement mechanisms, such as the CM, the PACE, or the Commission for Democracy through Law (Venice Commission).

In the last PACE monitoring report, Russia is being criticized for, *inter alia*, shortcomings in the protection of NGOs and civil society actors and the government is urged to “[...] refrain from attempts to discredit some of the most respected domestic and

⁷⁰ ‘Vladimir Putin inaugurated as President of Russia’, 7 May 2012, reproduced at <http://eng.kremlin.ru/transcripts/3749> (consulted on 13 June 2013).

⁷¹ “‘A World Split Apart’ Speech by Alexander Solzhenitsyn at Harvard Class Day Afternoon Exercises’, 8 June 1978, reproduced at <http://www.columbia.edu/cu/augustine/arch/solzhenitsyn/harvard1978.html> (consulted on 13 June 2013).

Solzhenitsyn was expelled from Russia in 1974 and returned from exile in 1994 and became a strong supporter of Putin especially during his last years.

⁷² Neef, Christian and Shepp, Matthias, ‘Spiegel Interview with Alexander Solzhenitsyn: “I Am Not Afraid of Death”’, in *Spiegel*, 23 July 2007, available at <http://www.spiegel.de/international/world/spiegel-interview-with-alexander-solzhenitsyn-i-am-not-afraid-of-death-a-496003.html> (consulted on 21 June 2013):

“Putin inherited a ransacked and bewildered country, with a poor and demoralized people. And he started to do what was possible -- a slow and gradual restoration. These efforts were not noticed, nor appreciated, immediately. In any case, one is hard pressed to find examples in history when steps by one country to restore its strength were met favourably by other governments.”

international NGOs by publicly accusing them, without foundation, of acting on foreign instructions and representing foreign interests.”⁷³

3.3. *Russian legal instruments regulating NGOs*

What is therefore the system of protection of NGOs in Russia?

The 1993 Constitution of the Russian Federation was drafted analogically to the ECHR during the process of Russia’s accession to the Council of Europe which has started already in 1992.⁷⁴ The main reason why the Constitution represents such an important landmark is that it differs in essence from the “strictly dualist Soviet approach, characterized by the idea that international law consists only of explicit commitments by the state, and that ultimately state sovereignty always takes precedence.”⁷⁵ Article 1 of the ECHR (Obligation to respect human rights) is reflected under Articles 2 and 18 of the Constitution, the prevalence of international law over the domestic law is laid out in Article 15(4) to be interpreted in conjunction with Article 46(3), which states that when international guarantees are not complied with by Russian authorities within the Russian legal system, victims have the right to bring the violation to the attention of an international tribunal.⁷⁶ Therefore, Article 46(3) indirectly requires that international human rights principles are respected at the national level in the first instance.⁷⁷ The individual ‘NGO’ rights are protected by the provisions of Articles 30 and 31 (right to freedom of assembly and association), and Article 29 (right to freedom of expression), but the expression NGO is not mentioned anywhere explicitly in the Constitution.

⁷³ PACE, *The honouring of obligations and commitments by the Russian Federation*, Doc. 13018, 14 September 2012, para. 23.7., available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18998&Language=EN> (consulted on 3 May 2013),

⁷⁴ Burkov, 2012, pp. 409-411.

⁷⁵ Mälksoo, 2012 (a), p. 839.

⁷⁶ The 1993 Constitution of the Russian Federation: *Konstitutsii Rossiiskoi Federatsii ot 12 dekabrya 1993 goda, Rossiiskaia gazeta* (25 December 1993), Art. 46, para. 3, reproduced (as amended) at <http://www.rg.ru/2009/01/21/konstitucia-dok.html>; English translation available at <http://www.legislationline.org/documents/section/constitutions/country/7> (consulted on 21 April 2013).

⁷⁷ Burkov, 2012, p. 412.

Regarding specific legislation, Russia recognizes a large number of organizational forms of NGOs in a complex regulatory framework:⁷⁸ the Civil Code defines NGOs as “legal entities”⁷⁹ and reiterates thus the individual right to form an association or union.⁸⁰ The 1995 Federal Law “On Public Associations”⁸¹ regulates “the social relations arising in connection with the realization by individuals of the right to association, with the creation, functioning, reorganization and/or liquidation of public associations”⁸² and defines NGOs as belonging to the category of public associations recognised as legal entity;⁸³ and assures fundamental guarantees for their functioning.⁸⁴ The 1995 Federal Law “On Charitable Organizations” defines NGOs as “non-government (non-state and non-municipal) non-profit organizations, set up to realize the goals by way of performing the charitable activity in the interest of society as a whole or of the individual categories of persons.”⁸⁵

⁷⁸ ICNL, ‘NCO Law Monitor: Russia’ (Last updated 8 May 2013), at <http://www.icnl.org/research/monitor/russia.html> (consulted on 13 May 2013).

ICNL mentions the following legal provisions: *inter alia* the 1996 Criminal Code N 63-FZ as amended; 2001 Code of Administrative Penalties N 195-FZ, as amended; the 2000 Tax Code of the Russian Federation, Part II, Federal Law No. 118-FZ, as amended; 1999 Federal Law No. 95-FZ “On Gratuitous Assistance”, as amended (Law on Gratuitous Assistance).

⁷⁹ Civil Code of the Russian Federation: *Grazhdanskij kodeks Rossijskoj Federacii* ot 26 janvarja 1996 goda N 14-FZ Chast' vtoraja, *Rossiiskaia gazeta* (22 May 2008), Art. 50, para. 3, available at <http://www.rg.ru/2008/05/22/gk-2-dok.html>; English translation available at <http://www.russian-civil-code.com/> (consulted on 13 May 2013):

“The legal entities that are non-profit organizations, may be set up in the form of the consumer cooperatives, of the public or religious organizations (associations), financed by the owner of the institutions, of the charity and other funds, and also in the other law-stipulated forms.” (Emphasis added).

⁸⁰ *Ibidem.*, Art 50, para. 4.

⁸¹ Federal Law of the Russian Federation No. 82-FZ of 19 May 1995 “On Public Associations”: *Federal'nyj zakon Rossijskoj Federacii* ot 19 maja 1995 N 82-FZ, *Rossiiskaia gazeta* (25 May 1995); under *Sobranie zakonodatel'stva RF*, 22.05.1995, N 21, ct. 1930, as amended in 2012 available at <http://www.consultant.ru/popular/obob/>; English translation (as amended in 2004) available at <http://www.legislationline.org/documents/id/4374> (consulted on 3 May 2013).

⁸² *Ibidem.*, Art. 1.

⁸³ *Ibidem.*, Art. 2.

⁸⁴ *Ibidem.*, Art. 27.

⁸⁵ Federal Law of the Russian Federation No. 135-FZ of 11 August 1995 “On Charitable Activities and Charitable Organizations”: *Federal'nyj zakon* ot 11 avgusta 1995 g. N 135-FZ “O blagotvoritel'noj dejatel'nosti i blagotvoritel'nyh organizacijah” (s izmenenijami i dopolnenijami), Art. 6, para. 1, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=108360>; as amended, *Rossiiskaia gazeta* (27 December 2010), available at <http://www.rg.ru/2010/12/27/blagotv-dok.html>; English translation available at <http://www.legislationline.org/documents/id/4373> (consulted on 7 May 2013).

Civil society is mentioned as well in the Russian “Foreign Policy” document in a very vague definition of “being involved in the foreign policy process in consistence with international practice.”⁸⁶ The general legal framework for NGOs in Russia since 1991 till last year (notwithstanding various critiques that have been expressed by *inter alia* PACE,⁸⁷ international human rights organizations⁸⁸ or some scholars⁸⁹) allowed them to function and deliver their activities, including those focused on human rights protection and promotion, not without obstacles, of course, but not with barriers that would lead to their complete inability to function. This changed in 2012 with the adoption of several Federal laws regulating the NGOs functioning such as the 2012 amendments to the Federal Law on Assemblies;⁹⁰ 2012 Federal Law banning the adoptions of Russian orphans by US nationals and suspending the activities of NGOs

⁸⁶ The Ministry of Foreign Affairs of the Russian Federation, *op.cit.* note 72, para. 102.

⁸⁷ PACE, *Honouring of obligations and commitments by the Russian Federation*, Doc. 8127, 2 June 1998, available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileId=8566&lang=en> (consulted on 7 May 2013);

PACE, *Honouring of obligations and commitments by the Russian Federation*, Resolution 1277, 23 April 2002, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/ERES1277.htm> (consulted on 7 May 2013);

PACE, *Honouring of obligations and commitments by the Russian Federation*, Resolution 1455, 22 June 2005, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1455.htm> (consulted on 7 May 2013).

⁸⁸ HRW, ‘Russia Country Summary’, January 2011, available at http://www.hrw.org/sites/default/files/related_material/Russia.pdf (consulted on 21 April 2013).

⁸⁹ Maxwell, 2006, pp. 235-264; Kreshtin, Igor, ‘New NGO Law in Russia The Implementation Matters More Than Substance’, 28 February 2006, available at <http://www.aei.org/article/foreign-and-defense-policy/regional/europe/new-ngo-law-in-russia/> (consulted on 1 June 2013).

⁹⁰ Federal Law of the Russian Federation no. 65-FZ of 8 June 2012 “On Assemblies, Meetings, Demonstrations, Marches and Picketing”: Federal’nyj zakon Rossijskoj Federacii ot 8 ijunja 2012 g. N 65-FZ g. Moskva O vnesenii izmenenij v Kodeks Rossijskoj Federacii ob administrativnyh pravonarufenijah i Federal’nyj zakon “O sobranijah, mitingah, demonstracijah, šestvijah i piketirovanijah”, *Rossiiskaia gazeta* (9 June 2012), available at <http://www.rg.ru/2012/06/09/mitingi-dok.html> (consulted on 21 May 2013). English version not yet available for public to our knowledge.

which are financed by sources in the USA;⁹¹ and most importantly the Law on Foreign Agents. Before we will analyse why and how this changed, let us here shortly explore the history of NGOs in Russia since, as we will see, it would be indeed difficult to understand some socio-cultural peculiarities of the Law on Foreign Agents without having a look at the main axes of developments of Russian civil society organisations and NGOs in the past. As Mamlyuk argues, studying especially the early Soviet period “offers a remarkably sophisticated complementary analytical frame for considering the inner tensions and incongruities of Soviet legal theory and practice”⁹² which can explain much about current Russia’s situation.

3.4. *Historical overview of NGOs in Russia*

Before the 1917 October revolution⁹³ there were groups of independent civil societies in Russia represented in the form of social, cultural and sports clubs or associations run by the Russian intelligentsia.⁹⁴ Those organisations born prior to the Bolshevik revolution were able to function during the first years of Soviet period (1917-1921), but since the revolution the regime started to close many existing associations and the intention was to subordinate them all to the Bolshevik party.⁹⁵ In December 1919 new rules of the Communist party were adopted and they toughened the levels of state control of those

⁹¹ Federal Law of the Russian Federation of 28 December 2012 no. 272-FZ “On measures the impact on the face, with a particular violation of fundamental human rights and freedoms, rights and freedoms of citizens of the Russian Federation”: Federal’nyj zakon Rossijskaja Federacii ot 28 dekabrya 2012 g. N 272-FZ “O merah vozdejstvija na lic, prichastnyh k narushenijam osnovopolagajushhih prav i svobod cheloveka, prav i svobod grazhdan Rossijskoj Federacii”, *Rossiiskaia gazeta* (29 December 2012), available at <http://www.rg.ru/2012/12/29/zakon-dok.html> (consulted on 11 May 2013), English version not yet available for public to our knowledge.

The Law provides *inter alia* for banning the adoptions of Russian orphans by US nationals and suspending the activities of NGOs which are financed by sources in the USA and engage in political activity and/or activities damaging the interests of the Russian Federation.

⁹² Mamlyuk, 2011, p. 538.

⁹³ Tumanova, 2012–13, pp. 3–6.

Tumanova bases her theory on two stages of liberal reforms in pre-revolutionary Russia: the period of late imperial Russia (1860s and the 1870s), and the revolution of 1905–7 that both created environment for emergence of civil society institution including volunteer associations that later contributed to the adaptation of the Russian state and the Russian legal system during the industrialization to the development from an estate-based (*‘soslovnoe’*) to the state based on law (*‘pravovoe gosudarstvo’*) and a civil society.

⁹⁴ Bowring, 2009, p. 261.

⁹⁵ Evans, 2006, p. 30.

associations.⁹⁶ In 1918 the churches (mainly) of the Russian Orthodox Church⁹⁷ were nationalized and basically no form of functioning was possible for any religious association⁹⁸, instead, for instance, a state-sponsored mass organization, the ‘League of the Godless,’ was created in the 1920s with the purpose to directly extend the state’s will to destroy all religious organizations.⁹⁹ As a consequence by the end of 1930s almost all independent organizations that existed prior to the revolution were non-functioning. The organizations born under the Soviet period were fully controlled and managed by the state. The only quasi-exception was the Academy of Science and other scientific or environmental institutions, which were led by senior scientists, not party functionaries. During the 1950s and 1960s informal social groups started to emerge (mainly cultural, sport and music oriented clubs, for example groups who gave assistance to disabled people) whose number increased in the 1970s and 1980s. In the late 1960s dissident groups started to emerge as a new type of actors demanding more political, national, religious, or social freedoms. Those groups were nevertheless quite small, and at first the KGB¹⁰⁰ could suppress them to the degree they needed or wanted. By the early 1960s ‘*samizdat*’ (illegal, self-published) writings began to appear, starting with focus on poetry and literature, but quickly introducing texts which were ‘testing the limits’ focusing on human rights issues. After the occupation of Czechoslovakia in 1968, the KGB started to arrest “as many dissidents as possible” and destroy the samizdat publications.¹⁰¹ The official associations (monopolizing the public discourse) were directly connected (through their leadership) to the political elite of the Soviet Union (so-called ‘*nomenclatura*’). One year after Gorbachev took power in 1985, the reconstruction of Russia known as ‘*perestroika*’ started and contributed to the partial institutionalisation

⁹⁶ For instance a special rule provided for an obligation to, in case that three or more members of the party were present in one organization, form an official party cell.

⁹⁷ Evans, 2006, p. 31: “The biggest and most influential social organisation in Russia.”

⁹⁸ Evans, 2006, pp. 31-38.

Officially banned in 1929. In 1943 (during the World War II) Stalin allowed The Russian Orthodox Church to re-establish the patriarchate and a ‘State Council for the Affairs of the Orthodox Church’ was set up and many churches were allowed to re-open; but the Church was still subordinated and fully controlled by the State.

⁹⁹ Evans, 2006, p. 37.

¹⁰⁰ “*Komitet gosudarstvennoy bezopasnosti*” [Committee for State Security].

¹⁰¹ Evans, 2006, p. 43.

of the rule of law, human rights and constitutional adjudication.¹⁰² A new phenomenon aroused – the so-called ‘non-formal’ independent organizations (not directed from the state), having various purposes: apart from the ‘typical’ groups focusing on social, cultural or gender issues, or leisure-oriented sport clubs, more and more ‘politically and human rights oriented’ groups started to emerge. Some of the human rights groups were born much earlier, such as the oldest Russian human rights organizations, the Moscow Helsinki Group,¹⁰³ which had been created already in 1976. Most of the largest Russian human rights NGOs were born in the 1980s as illegal (mostly dissident) organisations and established as official NGOs in the 1990s or 2000s.¹⁰⁴ In the 1990s under President Boris Yeltsin, as Ljubownikow argues, the controversial process of privatization of previously state-owned business fully occupied the state and caused mistrust towards the state amongst its citizens and the civil society organisations that were born during the ‘perestroika’ became fragmented and continued to function more in “intimate circles.”¹⁰⁵

‘Western-style’ NGOs started to emerge only after the 1991 collapse of the USSR when reaction to both new freedoms (such as freedom of expression) and new challenges coming with the new state system ranged from total apathy to activism.¹⁰⁶

According to the Council of Europe, there are currently over 200,000 NGOs in Russia both international and national.¹⁰⁷ Crotty divides Russian NGOs into different groups: Grass Roots Organisations;¹⁰⁸ “professional” policy or advocacy organisations,¹⁰⁹ where human rights NGOs belong; and government affiliates or ‘marionette’

¹⁰² Bowring, 2009, pp. 257-278.

¹⁰³ Moscow Helsinki Group, ‘Charter’, at <http://www.mhg.ru/english/55488D7> (consulted on 21 June 2013).

¹⁰⁴ Such as for example HRC Memorial in 1991, Golos in 2000, Citizens’ Watch in 1992, Committee Civic Assistance in 1990, or The Committee Against Torture in 2000.

¹⁰⁵ Ljubownikow, 2013, pp. 153-166.

¹⁰⁶ Evans, Henry & Sundstrom, 2006, pp. 3-29.

¹⁰⁷ PACE, *op.cit.* note 76, para. 295.

¹⁰⁸ Crotty, 2009, pp. 91-93.

GROs are defined as focusing either locally or thematically on various specific issues (such as veterans’ affairs, or ecology) and delivering mainly campaigning activity, mostly of apolitical, academic nature (round tables, publications, and consultations). GROs do not strive for mobilising the wider Russian population.

¹⁰⁹ *Ibidem*.

POs are defined as having broad national or international focus which are funded almost exclusively from foreign funding (and being actively involved in conferences and trainings in various INGO

organisations.¹¹⁰ How many of those 200,000 can be therefore considered as human rights NGOs? According to the data provided in the 2013 case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application)¹¹¹ the number is around 1000.¹¹² There are many reports covering the activities of Russian (human rights) NGOs from 1991 till nowadays.¹¹³ Holland argues that since the mid-1980s and the collapse of Soviet Union, Russian (human rights) NGOs have had a catalytic role in monitoring, advocating, promoting and directly contributing to the protection of individual human rights.¹¹⁴ How can we prove this?

3.5. *Importance of human rights NGOs in contemporary Russia*

It would be beyond the scope of this thesis to enlist here data from various statistics or UN reports regarding funded projects by respective institutions such as EU, the Council of Europe or the majority of Western states, we will therefore try to ‘measure’ their importance in two ways: *a)* via a simple exercise analysing a sample of the ECtHR case-law regarding Article 2 of the ECHR (Right to Life) and Russia; and *b)* by examining the activities of NGOs in the field of human rights and ‘measuring’ the importance of these activities by their ability to contribute to human rights promotion and protection

groups and networks). POs are implementing activities such as pollution prevention; or human rights advocacy projects.

¹¹⁰ *Ibidem*.

MOs are defined as either allied to, or directly part of a regulatory or state body. Their main purpose of the MOs is quite straight-forward - to support the state in its activities.

¹¹¹ The English version of the new application of the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* is not yet officially available, but was provided for the purposes of this thesis by Furkat Tishaev author of the application and lawyer who will represent the case at the ECtHR. According to Tishaev, the application was accepted to the ECtHR, it is not yet available in the official HUDOC database.

The case is presented by HRC Memorial/EHRAC and represents opinion of all eleven represented NGOs: Ecodefence, Golos, Citizens Watch, Civic Assistance Committee, the Committee against Torture, Mashr, International Memorial, Moscow Helsinki Group, Public Verdict, Memorial Human Rights Group and the Movement for Human Rights.

EHRAC at Middlesex University London, ‘Leading Russian Human Rights NGOs launch challenge at European Court to “Foreign Agent” Law’, 6 February 2013, available at <http://www.mdx.ac.uk/aboutus/news-events/news/russia-foreign-agent-law.aspx> (consulted on 1 July 2013).

¹¹² The case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10.

¹¹³ HRW, ‘Russia’, at <http://www.hrw.org/europecentral-asia/russia> (consulted on 13 June 2013); European Commission, ‘European Instrument of Democracy and Human Rights (EIDHR)’, at http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm (consulted on 7 June 2013).

¹¹⁴ Holland, 2004, p. 334.

in Russia. There may be many other ways to ‘measure’ the importance of NGOs in Russia, such as studying how they are recognized by international and national human rights institutions. Yet, the scope of this thesis is not to produce statistical data, but to provide some illustrative findings in order to prove or disprove something which is often taken for granted, that is the inherent ‘goodness of (Russian) human rights NGOs’.

3.5.1. Analysis of ECtHR case-law

Let us first proceed with the exercise analysing the ECtHR case-law regarding Russia. The scope of this exercise is to prove that not only rights to freedom of assembly and association (Article 11) or the right to freedom of expression (Article 10) of the ECHR, the ‘NGOs’ rights, might be impacted by the Law on Foreign Agents but as well ‘other’ human rights as set out by ECHR, that is why the choice here is of Article 2 – simply based on the numerical order. The logic we apply here is simple: if we can find that Russian human rights NGOs are providing legal assistance to individuals whose human rights have been allegedly violated by Russia (representing the alleged victims) at the ECtHR, we can at least prove that they play an important role in the human rights protection in Russia in general, and regarding the fulfilment of Council of Europe’s obligations in particular.

Analysing the ECtHR corpus concerning cases against Russia and Article 2, we first applied the filter “English language + Russia + Article 2” to the ECtHR database and obtained a corpus of 208 cases.¹¹⁵ In the first ten cases¹¹⁶ eight were represented by lawyers from or associated with various Russian human rights NGOs:¹¹⁷ Human Rights Centre (HRC) Memorial,¹¹⁸ Karinna Moskalenko,¹¹⁹ NGO (Stichting) Russian Justice

¹¹⁵ ECtHR, ‘HUDOC database (Russia + English language + Article 2)’, at <http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#%7B%22documentcollectionid%22%3A%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%7D> (consulted on 13 May 2013).

¹¹⁶A sample of the first ten cases might not indeed represent the common trend but it will nevertheless serve the purpose we need.

¹¹⁷ In some cases it was a collaboration of an international human right NGO with a Russian human Rights NGO such as the case of HRC Memorial and EHRAC (UK), or the SRJI which has its branch in Russia and does count as a Russian NGO as well.

¹¹⁸ HRC Memorial, 'About', at <http://www.memo.ru/eng/memhrc/index.shtml> (consulted on 21 June 2013).

Initiative (SRJI),¹²⁰ in partnership with the Russian NGO Astreya,¹²¹ and the European Roma Rights Centre.¹²² From the corpus of 208 cases 75 were represented by the HRC Memorial (36%), 107 cases by the SRJI (51.4%), and 6 cases by Moskalenko (2.8%). The three together therefore are 188 cases representing 90.3%. Since there are surely as well other NGOs representing the Russian alleged victims, we might assume that almost all cases regarding Article 2 and Russia were brought to the ECtHR by Russian human rights NGOs.

Our exercise focused on the Article 2 and Russia. Under the right to life regarding Russia belong many ‘Chechen’ and hate crimes cases that are often issues on which

Cases out of the ten first appeared after filtering (Russia+English+Art.2) in the HUDOC database represented by HRC Memorial:

Askhabova v. Russia (18 April 2013) No. 54765/09;

Avkhadova and others v. Russia (14 March 2013) No. 47215/07.

¹¹⁹ Media Legal Defence Initiative, ‘Karinna Moskalenko’, at <http://www.mediadefence.org/people/board/karinna-moskalenko> (consulted on 11 June 2013).

Ms. Moskalenko represented *inter alia* Mikhail Khodorkovskiy, Garry Kasparov, as well as Konstantin Markin and other less ‘VIP’ clients at the ECtHR. She has worked as the director of the Russian human rights NGO called The Centre of International Protection (which is since 1999 a Russian affiliate of the International Commission of Jurists (ICJ) as well as a Commissioner of the ICJ and a member of the Experts Council of the Russian Federation's Ombudsman Office, the Moscow Helsinki Group, the Moscow City Bar Association and the Russian Lawyers' Committee in Defence of Human Rights.

Cases out of the ten first appeared after filtering (Russia+English+Art.2) in the HUDOC database represented by Karinna Moskalenko:

Alpatu Israilova v. Russia (14 March 2013) No. 15438/05;

Finogenov and others v. Russia (20 December 2011) No. 18299/03.

¹²⁰ Russian Justice Initiative (SRJI), ‘About’, at <http://www.srji.org/en/about/> (consulted on 11 June 2013).

SRJI is an initiative focusing on the human rights abuses committed in the North Caucasus and it seeks justice to its victims through both domestic and international legal mechanisms. SRJI works with various Russian human rights NGOs as its partner, such as Pravovaia Initsiativa (Ingushetia), or Astreya whose role is *inter alia* provide free legal counselling to alleged victims of human rights violations and their families. SRJI specializes in cases of arbitrary detention, torture, enforced disappearances and extrajudicial executions (mainly so-called Chechen cases) and bring them to the ECtHR.

¹²¹ Cases out of the ten first appeared after filtering (Russia+English+Art.2) in the HUDOC database represented by SRJI/Astraya:

Aslakhanova and others v. Russia (18 December 2012) No. 2944/06;

Vakhayeva v. Russia (10 July 2012) No. 27368/07;

Ilayeva and others v. Russia (10 July 2012) No. 27504/07.

¹²² European Roma Rights Centre, ‘About us’, at <http://www.errc.org/about-us-overview> (consulted on 21 June 2013).

European Roma Rights Centre is a public-interest law organisation located in Budapest, Hungary having its branch in Russia.

Cases out of the ten first appeared after filtering (Russia+English+Art.2) in the HUDOC database represented by European Roma Rights Centre:

Kleyn and Aleksandrovich v. Russia (3 May 2012) No. 40657/04.

Russian human rights NGOs focus. As Kirill Koroteev stated: “Strasbourg made possible the access to domestic criminal case files where most of the information is stored. It was almost a truth commission for Chechnya.”¹²³

The representatives of Russian human rights NGOs quite logically virtually agree on the importance¹²⁴ of their activities regarding human rights protection in Russia.¹²⁵ Their arguments can be summed-up in what Elena Shakova from Russian NGO Citizen’s Watch said:

“The human rights NGOs are the ones who implement the ECHR principles in practice in Russia, from practicalities such as translating the ECtHR case-law in Russian in order to facilitate ECHR enforcement in the Russian Courts to the personal protection when representing alleged Russian victims at the ECtHR.”¹²⁶

Or by an independent barrister Evgeny Tonkov:

“The Russian NGOs play a crucial role of middle-man between Russians whose human rights have been violated by the state, especially those who cannot afford to pay a lawyer and on the other side the state. They are informing the citizens about their rights and legally represent them not only in Strasbourg but as well at Russian courts, but at Strasbourg level they have really a crucial role.”¹²⁷

¹²³ Interview with Kiril Koroteev, Senior Lawyer, HRC Memorial/European Human Rights Advocacy Centre, Moscow, 23 April 2013.

¹²⁴ ‘Civil society in Russia facing increasingly hostile environment – UN experts’, in *United Nations News Centre*, 14 May 2013, available at http://www.un.org/apps/news/story.asp?NewsID=44899#.Udc76W2d_aU (consulted on 21 June 2013).

¹²⁵ Based on the interviews effectuated during the field research by the author of this thesis in Russia.

¹²⁶ Interview with Elena Shakova, Program Manager at Citizens' Watch, St. Petersburg, Russia, 20 April 2013:

“Free legal help is only provided to accused, not victims (of for instance hate crime). NGOs, such as CW or HRC Memorial and others cover this gap and provide free legal assistance. Also free legal assistance is not provided when one wants to challenge its conditions of detention because it is not a criminal matter; it becomes a civil or administrative question.”

¹²⁷ Interview with Evgeny Tonkov, Criminal Law Barrister, St. Petersburg, Russia, 11 April 2013.

3.5.2. Activities and purposes of Russian human rights NGOs

As regards the second approach to the ‘measurement’ of the importance of Russian human rights NGOs, the analysis of their respective activities, it can be summarised that they cover both thematically and geographically large areas of Russia’s society. The coverage of their activities ranges from direct support (for instance provision of medical or social assistance to refugees and migrants or victims of torture in Russia); to provision of legal aid to individuals whose human rights have been allegedly violated (protecting their constitutional rights and representing them at both domestic Courts and at the ECtHR). The Russian human rights NGOs focus on educational activities and research; awareness raising (through conferences, media collaboration, workshops etc.); and advocacy with the aim of achieving changes in the existing legislation and state policies (especially the legislative, executive and judicial branches) of various topics such as environment; election observation and election rights; transparency of and access to justice; fight against xenophobia, discrimination and racial intolerance; refugees and displacement issues; the use of torture (and inhuman treatments) by law-enforcement bodies in Russia; enforced disappearances; supporting civil society and the democratic state of the law in order to prevent return to totalitarianism. We will provide here a short outline of the Russian largest human rights NGOs and their activities in various areas in order to illustrate this ‘abstract’ description.

3.5.2.1. Environment

Ecodefence is one of the leading NGOs in the area of environmental human rights in Russia. Ecodefence targets mainly the Kaliningrad region and is dealing with issues regarding nuclear energy, fossil natural resources and the recycling of nuclear waste; as well as providing legal aid and accompaniment to victims of nuclear accidents in Russian courts.

3.5.2.2. Election observation and election rights

Golos is based in Moscow and works in some 48 regions in Russia conducting *inter alia* independent observations of elections since 2000.¹²⁸

Moscow Helsinki Group is one of the oldest Russian NGO established in 1989 whose main purpose is to “assist human rights observation and democracy development in Russia; and to “reinforce and promote civil society in Russia, providing well-rounded support for the development of human rights and civil movement in the Russia’s regions.”¹²⁹ Moscow Helsinki Group is focusing as well on human rights education programs, involving trainings for teachers in children’s rights.

3.5.2.3. Transparency of and access to justice

Citizens’ Watch¹³⁰ focuses *inter alia* on introduction of mediatory service in the legal processes, and fight against xenophobia, discrimination and racial intolerance.

3.5.2.4. Refugees and displacement issues

Civic Assistance Committee is based in Moscow and since 1998 is the United Nations High Commissioner for Refugees (UNHCR) Russian main partner in tackling the issue of refugees and internally displaced in Russia.¹³¹

3.5.2.5. Torture and Enforced disappearances

Committee against Torture (CAT) is based in Nizhniy Novgorod and has offices in the Chechen Republic, the Republic of Mari El, the Republic of Bashkortostan and in the Orenburg region of Russia. CAT is focusing on the legislative procedures with a view to

¹²⁸ Golos, ‘About Golos’, at <http://www.golos.org/english> (consulted on 28 June 2013).

¹²⁹ The case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para 14.8.

¹³⁰ Citizen’s Watch, ‘About Us’, at <http://www.citwatch.org/en/aboutus/> (consulted on 28 June 2013).

¹³¹ Civic Assistance Committee, About, at <http://refugee.memo.ru/homesite.nsf/AboutProgram?Openpage> (consulted on 28 June 2013);

For more information about Civic Assistance Committee’s activities carried out within the frame of the programme called ‘*Migracija i Pravo*’ [Migration and Law], providing free legal advice for refugees, internally displaced persons in Russia.

develop mechanisms preventing the use of torture (and inhuman treatments) by law-enforcement bodies in Russia.¹³²

Mashr is based in Ingushetia and other regions around and focuses mainly on monitoring cases of enforced disappearances, but is as well involved in monitoring of and reporting about “other forms of abuse committed by the law-enforcement agencies in Ingushetia, such as torture, inhuman treatment, and the disproportionate use of force during special operations.”¹³³

3.5.2.6. Awareness raising and education

International Memorial expresses their purpose as “supporting the civil society and the democratic state of the law in order to prevent return to totalitarianism.”¹³⁴

Movement for Human Rights provides assistance to NGOs (or labour unions) contributing to the development of civil society working in the field of human rights, and education towards the idea of open civil society.¹³⁵

3.5.2.7. Legal assistance to human rights victims

HRC Memorial focuses *inter alia* on the legal protection of civil society activists and the provision of assistance to those who are prosecuted on political grounds. HRC Memorial is one of the leading Russian human rights NGO created in 1991, based in Moscow. It is currently carrying out seven main projects, focusing on the following issues: 1) litigation at the ECtHR (together with the UK based EHRAC) which is since 2013 part of the School of Law of the Middlesex University); 2) monitoring of human rights violations in the North Caucasus (the ‘Hot Spots’ programme); 3) monitoring of human rights violations in Central Asia; 4) the counteraction of the fabrication of criminal prosecutions in Russia; 5) the protection of civil society activists and the provision of

¹³² Committee Against Torture, ‘General information’, at <http://pytkam.net/web/index.php?go=Content&id=279> (consulted on 28 June 2013).

¹³³ Mashr, ‘Statement’, at <http://eng.mashr.org/?p=788> (consulted on 28 June 2013).

¹³⁴ International Memorial, ‘About Us’, at <http://www.memo.ru/eng/about/whowe.htm> (consulted on 28 June 2013).

¹³⁵ *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 14.11.

assistance to those who are prosecuted on political grounds; 6) legal assistance to migrants in Russia (the Migration and Law programme) and 7) harmonization of the relationship between ethnic minorities.¹³⁶

Public Verdict was established in February 2004 as a non-profit, non-partisan organization offers legal assistance to victims of human rights abuses committed by law-enforcement agents in Russia.¹³⁷

¹³⁶ HRC Memorial, *op.cit.* note 121.

¹³⁷ Public Verdict, About, at <http://eng.publicverdict.ru/topics/about_us/about_us.html> (consulted on 28 June 2013).

Chapter 3

4. The Law on Foreign Agents

The press service of the Ministry of Justice of Russian Federation stated on 24 October 2012 that “The activities of Russian NGOs receiving finances from abroad and refusing to register as ‘Foreign Agents’ will be suspended, in case of the repetitive refusal they will face criminal responsibility.”¹³⁸

The Law on Foreign Agents which is an amendment mainly to the 1995 Federal Law On Public Associations,¹³⁹ but to other legal provisions regulating previously the functioning of Russian NGOs¹⁴⁰ as well, has provoked both international and national criticism for its shortcomings in the protection of human rights by *inter alia* AI¹⁴¹ and HRW,¹⁴² the UN,¹⁴³ the European Union,¹⁴⁴ as well as by Russian sources¹⁴⁵ (from Russian human rights NGOs to Russian Minister of Justice Alexander Kononov).¹⁴⁶

¹³⁸ *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 15.79.

¹³⁹ Federal Law No. 82-FZ, *op.cit.* note 84.

¹⁴⁰ *Inter alia* Federal Law On Non-commercial Organizations no.7-FZ of 12 January 1996 (Compendium of Laws of the Russian Federation, 1996, no.3, p. 145;); Federal Law no.115-FZ On Countering the Legalization (Laundering) of Criminal Income and the Financing of Terrorism of 7 August 2001 (Compendium of Laws of the Russian Federation, 2001, no.33, p. 3418); Code of Laws of the Russian Federation on Administrative Offences (Compendium of Laws of the Russian Federation, 2002, no.1, p. 1); Criminal Code of the Russian Federation (Compendium of Laws of the Russian Federation, 1996); and Article 151 of the Code of Criminal Procedure of the Russian Federation (Compendium of Laws of the Russian Federation, 2001).

¹⁴¹ AI, ‘Press releases Russia: End “smear campaign” against NGOs’, AI Index: PRE01/342/2012, 13 July 2012, at <http://www.amnesty.org/en/for-media/press-releases/russia-end-smear-campaign-against-ngos-2012-07-13> (consulted on 13 May 2013).

John Dalhuisen, AI’s Director for Europe and Central Asia, stated: “This bill will stifle civil society development in Russia and is likely to be used to silence critical voices who often still depend on external funding. Already NGOs operating in the Russian Federation have to wade through many layers of bureaucracy to carry out their work.”

¹⁴² HRW, ‘Laws of Attrition. Crackdown on Russia’s Civil Society after Putin’s Return to the Presidency’, ISBN: 978-1-62313-0060, April 2013, p.2., available at http://www.hrw.org/sites/default/files/reports/russia0413_ForUpload_0.pdf (consulted on 29 June 2013):

“The ‘foreign agents’ law expanded already extensive and intrusive state control over organizations that receive foreign funding by setting out additional reporting requirements and providing for additional inspections by government bodies.” (emphasis added).

¹⁴³ UN, *op.cit.* note 146:

“...expressed serious concern at the ‘obstructive, intimidating and stigmatizing effects’ brought about by the current implementation in the Russian Federation of the law on ‘non-commercial organizations’ (NCOs), adopted on 21 November 2012 by the Duma.” (emphasis added).

Denis Volkov explains that the adoption of the Law on Foreign Agents was a last of the three-phase's government reaction to the protests and civil society mobilisation following the elections in 2011 and 2012. He describes the phases as following: from abashment due to the growing protest movement to the interception of an initiative (*inter alia* organization of counter-demonstration and rallies, mainly organized in collaboration with the Orthodox Church) to the tightening of policy (adoption of the Law on Foreign Agents).¹⁴⁷ As Vlad Sobell puts it "the Law on Foreign Agents reinforces the message that Russia will not tolerate external interference in its domestic affairs and is determined to put a stop to any perceived meddling – even at the risk of damaging Russia's incipient civic society."¹⁴⁸

This argument was also expressed unanimously by all the respondents during the research for this thesis. It can be summarized in what Koroteev said:

"Putin thinks that nobody in Russia can decide on his own, so in his head it must have been some foreign forces who initiated the protests in December 2011 and 2012 as well as before his re-election and he simply decided that it is time now to 'abash' the civil society, the NGOs he understood that it is getting serious and the simplest way for him is to ban it all, starting from restricting NGOs."¹⁴⁹

Not only the representatives of the Russian NGOs (lawyers, managers) but as well independent barristers agreed that the Law on Foreign Agents was indeed adopted

¹⁴⁴ EU, 'Statement by the spokesperson of the High Representative Catherine Ashton on the administrative fines against "GOLOS", A 230/13, 28 April 2013, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136958.pdf (consulted on 13 May 2013):

"The EU has repeatedly expressed its concerns about growing pressure on civil society, the recent wave of restrictive legislation on NGOs and the widespread checks on their activities. The EU will continue to monitor developments closely."

¹⁴⁵ Bekbulatova, Taisa, 'Zakon ob inostrannyh agentah napisan nerazborchivo', in *Kommersant*, 4 September 2012, available at <http://www.kommersant.ru/doc-rss/2014910> (consulted on 27 June 2013).

¹⁴⁶ Khachatryan, Diana, 'Glava Minjusta raskritikoval zakon ob "inostrannyh agentah"', in *Novaya Gazeta*, 16 Januaray 2013, available at <http://www.novayagazeta.ru/news/62237.html%20http://www.novayagazeta.ru/news/62237.html> (consulted on 21 June 2013).

¹⁴⁷ Volkov, 2012, pp. 55-62.

¹⁴⁸ Sobell, Vlad, 'Is Russia's "foreign agents" law justified?', in *Voice of Russia*, 7 June 2013, available at http://english.ruvr.ru/2013_06_07/Is-Russia-s-foreign-agents-law-justified-0107/ (consulted on 1 July 2013).

¹⁴⁹ Interview with Kiril Koroteev, *op.cit.* note 126.

as a reaction to latest protest that occurred after the 2011 and 2012 elections in Russia as the following:

On 4 December 2011 parliamentary elections to the State Duma (the lower chamber of the Russian Parliament) took place. Out of seven parties that participated in the elections (United Russia, The Communist Party of the Russian Federation, The Liberal Democratic Party of Russia, Just Russia, Yabloko, Russia's Patriots, and The Right Cause), United Russia founded by current President Vladimir Putin officially and presently led by Dmitry Medvedev (ex-President and now Prime Minister of Russia) won with a majority of votes (49.3%) and received 238 of the 450 seats in the State Duma. On 4 March 2012 Presidential elections were held in Russia and Vladimir Putin was re-elected President of Russian federation with 63.6% of votes according to the official State Duma information. From December 2011 till May 2012 many public demonstrations were held where tens to hundred thousands of people gathered in Russia (including famous 'Protest of the Satiated', 'Bolotnaya Square', and 'March of Millions'), mainly in Moscow and St. Petersburg protesting against alleged electoral frauds. Russian human rights NGOs such as Golos published electoral observation reports including findings about large-scale fraud and violations of the electoral legislation (the same findings were laid out for example in the OSCE /ODIHR reports) as reiterated as well in the PACE report (their observers made part of the framework of an International Election Observation Mission):

"...the international observers raised a number of very serious concerns... Regrettably, all the stages of the electoral process were marked by a range of violations of the electoral code. This was amplified by the fact that the legal framework for parliamentary elections is complex and confusing." (Emphasis added).¹⁵⁰

Other Russian human rights NGOs were also involved in the protests such as *inter alia* International Memorial, Citizen's Watch, Moscow Helsinki Group, HRC Memorial, and Movement for Human Rights.¹⁵¹

¹⁵⁰ PACE, *op.cit.* note 76, paras. 216-218.

¹⁵¹ Association GOLOS, Domestic Monitoring of Elections of the President of Russian Federation Russian Federation 4 March 2012 Preliminary Report, 5 March 2012, available at <http://european-exchange.org/fileadmin/user_upload/Russland_Wahlen_2012/Presidential_Elections_Preliminary_report_5_March_2012.pdf> (consulted on 7 May 2013);

Why does the law represent a change in Russia's approach towards NGOs? How differently does the Law on Foreign Agents restrict the functioning of Russian NGOs compared to the regulation previously provided for by its predecessors? Why does it target especially human rights NGOs?

4.1. NGOs performing the functions of 'foreign agents'

The regulation of the functioning of NGOs itself is not anything completely 'new' or unknown to the Russian society. For instance, the 1995 Federal Law "On Public Associations" required a re-registration of all NGOs¹⁵² and provided as well for additional restrictive measures.¹⁵³ The 2006 Federal Law regarding the use of "Targeted Capital of a Non-Profit Organisation"¹⁵⁴ contained reporting requirements and provided for sanctions that could lead to closure of NGOs if failed to fulfil all the conditions following the decision by a court. This law was used to restrict the functioning - especially of foreign-funded - advocacy NGOs.¹⁵⁵

What is therefore 'new' about the Law on Foreign Agents is that it introduces afresh established category of NGOs performing the functions of 'foreign agents.' What is new also is that its implementation can indeed lead to suspension of the Russian NGO and to criminal prosecution of its leaders.

OSCE Office for Democratic Institutions and Human Rights (ODIHR), 'Russian Federation Elections to the State Duma 4 December 2011 OSCE Office for Democratic Institutions and Human Rights (ODIHR) Election Observation Mission Final Report', 12 January 2012, available at <http://www.osce.org/odihr/86959> (consulted on 7 May 2013).

¹⁵² Federal Law No. 82-FZ, *op.cit.* note 84, Art. 52:

"State re-registration of public associations set up before the enforcement of this Federal Law shall be carried out before July 1, 1999 with the exemption from registration dues." (emphasis added).

¹⁵³ Federal Law No. 82-FZ, *op.cit.* note 84, Art. 4:

"...the specific aspects of the creation, functioning, reorganization and/or liquidation of particular public associations, trade unions, charitable and other public associations - may be regulated by special laws to be adopted in keeping with the present Federal Law" (emphasis added).

¹⁵⁴ Federal Law No. 275-FZ: Federal'nyj zakon Rossijskaja Federacii ot 30 dekabnja 2006 g. N 275-FZ, *Rossiiskaia gazeta* (11 January 2006), available at <http://www.rg.ru/2007/01/11/nko-kapital-dok.html>; English translation available at http://www.lawcs.org/index.php?option=com_phocadownload&view=category&id=31&Itemid=33 (consulted on 3 May 2013).

¹⁵⁵ Ljubownikov (2013); Crotty (2009).

Who are thus the ‘foreign agents NGOs’? According to the Law on Foreign Agents the ‘foreign agents’ NGOs (in Russian ‘*inostrannyi agent*’) are represented by those who *a)* receive foreign funding,¹⁵⁶ and *b)* are engaged in ‘political activities’.¹⁵⁷ The expression ‘political activity’ is nevertheless defined in the law very vaguely as

“A non-commercial organization (with the exception of a political party) shall be deemed engaging in political activities, if, irrespective of the goals and objectives stated in its constituent documents, it takes part (including by funding) in the organization and staging of political actions to influence the making by any state agency of a decision to change their public policy, or in the shaping of the public opinion for the aforementioned purposes.”¹⁵⁸

As Dmitry Borisovich Oreshkin, linguistic analyst at the Russian Academy of Sciences, argues, the term ‘political activity’ evokes “old Soviet tradition of the threat of ambiguity, when a formulation like ‘political mistake’ meant all the worst things one could imagine.”¹⁵⁹ The same view was expressed by Professor Mikhail Fedotov, the Counsellor of the President of Russia on Civil Society and Human Rights issues, who added that “the requirement of legal certainty, even taken alone, may lead to the recognition of the law as contradicting the Constitution of the Russian Federation.”¹⁶⁰ Moreover, since the exact definition of the terms ‘political action’¹⁶¹ or ‘political activity’ is not provided for in any Russian legislation,¹⁶² it leaves a wide discretion to decide what actually constitutes it. The danger is therefore that, on one hand, the term ‘political activity’ will be interpreted as involving activities focused on possibly criticizing the gov-

¹⁵⁶ Federal Law of the Russian Federation No. 121-FZ of 20 July 2012 “On Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Functions of Foreign Agents”: Federal’nyj zakon Rossijskoj Federacii ot 20 iulja 2012 g. N 121-FZ “O vnesenii izmenenij v otdel’nye zakonodatel’nye akty Rossijskoj Federacii v chasti regulirovanija dejatel’nosti nekommercheskich organizacij, vpolnjajushhih funkcii inostrannogo agenta”, *Rossiiskaia gazeta* (23 July 2012), Art. 1, para. 2 b, available at <http://www.rg.ru/2012/07/23/nko-dok.html>. English translation available at <http://law-ngo.ru/discussion/expertice/project/1343/> (consulted on 13 April 2013).

¹⁵⁷ *Ibidem.*, Art. 1, para. 1 (9).

¹⁵⁸ *Ibidem.*, Art. 2.

¹⁵⁹ Oreshkin, 2013, pp. 1-4.

¹⁶⁰ Quoted in *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 15.39.

¹⁶¹ Interview with Furkat Tishaev, Senior Lawyer, HRC Memorial/EHRAC, Moscow, 23 April 2013: “There is no procedure on how to exit the register or precisions on what is political activity. Political action is not defined.”

¹⁶² Quoted in *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, paras. 15.31-15.33.

ernment (such as election monitoring)¹⁶³ and that the main target of this law will be human rights NGOs, serving possibly as watchdogs of the state.¹⁶⁴ On the other hand, from the opposite perspective, ‘political activity’ might as well cover any kind of activity and the law may target therefore any NGOs according to the political will or decisions (such as the case of NGO carrying out activities with the aim to assist to cystic fibrosis patients; or hunters’ and fishermen societies¹⁶⁵). In any case, the vagueness of the expression ‘political activity’ leaves a large margin of appreciation to Russia to interpret it according their will and make any NGO the target of the law.

Not only ‘political activity’ but as well the term ‘foreign agents’ has negative connotations in the contemporary Russian language.¹⁶⁶ As explained by the Institute of the Russian Language of the Russian Academy of Sciences (IRL RAS), it is perceived by the native speakers as “1) the representative of an organization; 2) someone acting in the interests of another and 3) a spy.”¹⁶⁷ The findings from Yuri Levada Analytical Centre (Levada)¹⁶⁸ confirm this argument. The Levada survey has shown that 62 % of re-

¹⁶³ Interview with Alexander Sungurov, Professor, Head of Department of Applied Political Science at the SPb Branch of State University - Higher School of Economics, President of St. Petersburg Humanities and Political Studies Centre ‘Strategy’, St. Petersburg, 16 April 2013:

“The government is afraid of the NGOs that were involved in the protest and monitored the elections. For them it is impossible to imagine that people would spontaneously go and protest therefore they think it must have been someone from abroad to push people to protest. The new law on foreign agents will leave the government to choose who is according them doing political activity, which can be any activity they don’t like, mainly human rights activity and they can close the NGO. But I remain positive, young people are connecting together. Once you start the movement it is hard to stop it.”

Interview with Kirrill Koroteev, *op.cit.* note 126: “Nobody decides on their own according to the administration, thus it must be because of foreign funds.”

The same was expressed as well by Denis Volkov, Anton Burkov, Furkat Tishaev, and other respondents (as quoted in this thesis) and as articulated in *Ecodefence, Golos and Other 9 NGOs v. Russia (new application)*, *op.cit.* note 10, para. 16.23.

¹⁶⁴ Interview with Alyona Vandsheva, Program Manager, Transparency International (TI) Russia, St. Petersburg, 18 April 2013:

“Golos was prosecuted because they monitor elections. TI is ok for now, we had a ‘proverka’ from the Ministry of Justice, but they said, we do not convey ‘political activity’ so we are fine.”

¹⁶⁵ See part 4.3. below about the concrete impact of the Law on Foreign Agents.

¹⁶⁶ The term has the same negative connotations as well in Czech language emanating from its usage mainly during communism. ‘Agent StB’ - a secret collaborator of the State police (StB - Státní bezpečnost). Online dictionary available (in Czech) at http://www.totalita.cz/stb/stb_sl_agent.php;

Bobek, Molek, Šimíček, 2009.

¹⁶⁷ IRL RAS, ‘Linguistic Conclusion concerning the use in the modern Russian language of the word agent and the phrase foreign agent and their perception by native speakers of the Russian language’, 13 November 2012, pp. 1-4.

¹⁶⁸ Levada, ‘About Levada-Centre’, at <http://www.levada.ru/eng/> (consulted on 13 June 2013).

spondents (Russian nationals) negatively perceive the term “foreign agent.” 39 % (the highest percentage) understand it as “spy, secret service agent of a foreign state, or a secret service agent acting undercover;” 22 % as masked enemy acting inside Russia in the interests of other countries, the so-called “fifth column – a traitor;” and 18 % as “being a representative of a foreign state or organization.”¹⁶⁹ It is interesting to note that Levada is currently one of the NGOs currently under the impact of the Law on Foreign Agents. Levada received on 15 May 2013 a warning “not to violate the law” based on the argument that they are considered as foreign agents under the Law on Foreign Agents because they have received foreign funding and issued two reports that were disseminated free of charge and even published online to wide Russian public containing criticism about “the country’s most important political processes and in addition to quoting the results of opinion polls, also contain individual views of the authors on political issues.”¹⁷⁰ Levada is therefore considered by Russian authorities to qualify as a foreign agent under the law in question. It was reminded also in the notice that Levada participated jointly with other Russian NGOs (for example with the International Memorial Society) in a series of public seminars on social and political issues related to democratization and overcoming totalitarian past, activities to be qualified as ‘political activity.’

If an NGO is therefore considered as an entity engaging in ‘political activity,’ it is required by the Russian state authorities to register itself in a special register of NGOs “performing the functions of Foreign Agents”¹⁷¹ and to mark all its publications and/or materials as being produced by “an NGO performing functions of a Foreign Agent.”¹⁷²

¹⁶⁹ Levada, ‘The results of the survey conducted by the Levada Centre on the perception of the words “foreign agent” and “political activity”, in relation to the activity of Russian NGOs’, 2 November 2012, pp. 1-3.

¹⁷⁰ HRW, Russia: “‘Foreign Agents’ Law Hits Hundreds of NGOs: Updated June 24, 2013, Periodically Updated List of Nongovernmental Organizations (NGOs) Victimized under the “Foreign Agents” Law’, 14 May 2013, available at <http://www.hrw.org/news/2013/05/14/russia-foreign-agents-law-hits-hundreds-ngos-updated-june-24-2013> (consulted on 30 June 2013).

¹⁷¹ Federal Law No. 121-FZ of 20 July 2012, *op.cit.* note 159, Art. 1, para. 2 (b):

“A public association intending to receive, after its state registration, funding and other property from foreign sources, and to engage in political activities shall file, prior to engaging in political activities, an application with the body which made the decision on its state registration for its inclusion in the register of non-commercial organizations performing the functions of foreign agents.” (emphasis added).

¹⁷² *Ibidem.*, Art. 2, para. 3.

Frank La Rue, the Special Rapporteur on the rights to freedom of opinion and expression reacted on this obligation. He stated that obliging NGOs to label their materials as produced by ‘foreign agents’ is “clearly intended to stigmatize any activity conducted by civil society receiving foreign support, including legitimate ones...Everyone should be entitled to promote their ideas freely without arbitrary restrictions.”¹⁷³

The Law on Foreign Agents imposes additional reporting obligations (and associated costs) on NGOs,¹⁷⁴ evaluated by Russian experts on accounting as “redundant, not needed for effective State control, planning and management”.¹⁷⁵ According to the lawyers Furkat Tishaev and Koroteev,¹⁷⁶ those negative connotations damage the reputation and credibility of NGOs. Those NGOs who are labelled ‘foreign agents’ will be stigmatised¹⁷⁷ and impeded from the collaboration with state officials, civil servants and any other interlocutor who will probably refuse to even use their materials.¹⁷⁸ Therefore the common stance of Russian NGOs is to “never register as Foreign Agents, because it implies spies in Russian language and we are not spies.”¹⁷⁹ Not to register as ‘foreign agent’ nevertheless means to violate the law in question and therefore to be sanctioned. The Law on Foreign Agents provides for two types of sanctions: administrative and criminal.¹⁸⁰ What is again ‘new’ about those sanctions? Firstly, for instance in the 1995 Federal Law on Public Associations requiring re-registration of NGOs there was no provision for financial fines or criminal sanctions. Russian Code of Administrative Offences (RCAO)¹⁸¹ was applied in order to impose fines on NGOs for their activity, such

¹⁷³ UN, *op.cit.* note 146.

¹⁷⁴ Federal Law No. 121-FZ of 20 July 2012, *op.cit.* note 159, Art. 2, para. 4.

¹⁷⁵ ROO KBA NKO, ‘Opinion on the application of Federal Law No. 121-FZ of 20 July 2012 Concerning the Introduction of Amendments and Additions to Individual Legislative Acts of the Russian Federation in particular the Regulation of the Activities of Non-commercial Organisations Acting as a Foreign Agent’, 25 December 2012, pp. 1-2.

¹⁷⁶ Interview with Furkat Tishaev and Kirill Koroteev, Senior Lawyers, HRC Memorial/EHRAC, Moscow, 23 April 2013.

¹⁷⁷ *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para.15.78:

"It is submitted that such a declaration would constitute providing false information publicly which is unacceptable for the applicants...each of the applicants has on numerous occasions, explicitly declared that they will never comply with these requirements and would also never lie about their activity."

¹⁷⁸ Interview with Furkat Tishaev, *op.cit.* note 164.

¹⁷⁹ Interview with Elena Shakova, *op.cit.* note 129.

¹⁸⁰ Federal Law No. 121-FZ of 20 July 2012, *op.cit.* note 159, Art. 2, para. 5.

¹⁸¹ Code of Administrative Offences of the Russian Federation No. 195-FZ of December 30, 2001:

as in the case of Golos in 2011,¹⁸² but the fines were much lower.¹⁸³ Most importantly, the fact that Russian (human rights) NGOs might now face criminal sanctions is a new development. As the Supreme Court of Russian Federation has noted, “the Law on Foreign Agents establishes criminal responsibility not in respect of any socially dangerous acts committed by an NGO or its leaders, but merely for the refusal to acknowledge that the NGO is a ‘foreign agent’.”¹⁸⁴

4.2. *Comparison with US Foreign Agents Registration Act (FARA) and Ethiopian NGO Proclamation*

On the international level, some¹⁸⁵ compare the Law on Foreign Agents with the 1938 US Foreign Agents Registration Act (FARA) because of its use of the expression ‘foreign agents.’ We argue that following the content of the law it is perhaps more comparable to the 2009 Ethiopian “Charities and Societies Proclamation” that provides as well for restrictions on foreign funded Ethiopian NGOs. FARA aims “at ‘agents of foreign principals’ (agents) as defined, who are engaged in covered activities, on behalf of their foreign principal(s), unless exempt.”¹⁸⁶ There are indeed some similarities between the US and Russian ‘foreign agents’ laws: they both use the term ‘foreign agents’ for individuals or organizations which fall with the categories of conducting ‘political activity’,¹⁸⁷ they both arrange for the possibility of criminal sanctions in case of failure to respect the obligations laid out by the law (registration, reporting etc.). Nevertheless the

Kodeks Rossijskoj Federacii ob administrativnyh pravonarushenijah ot 30 dekabnja 2001 g. N 195-FZ, *Rossiiskaia gazeta* (31 December 2001), available at <http://www.russian-offences-code.com/> (consulted on 7 May 2013).

¹⁸² *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 16.23:

“...on 2 December 2011 Golos was prosecuted and fined for 30,000 RUR (approximately EUR 750) under Article 5-5 of the RCAO for publicly revealing the information about violations of the electoral process during the Parliamentary elections in December 2011.”

¹⁸³ Federal Law No. 121-FZ of 20 July 2012, *op.cit.* note 159, Art. 4, para. 1 (c -1) and para. 1 (c -2):

“30,000 RUB required by RCAO compared to administrative fines of 500,000 – 1 million RUB for legal entities (NGOs) as laid in the Law on Foreign Agents.”

¹⁸⁴ Quoted in *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 15.77.

¹⁸⁵ ‘Legal Update – New Law on “Foreign Agent” NGOs’, in *The Russia Monitor*, 2 August 2012, available at <http://therussiamonitor.com/2012/08/02/legal-update-new-law-on-foreign-agent-ngos/> (consulted on 1 July 2013).

¹⁸⁶ The Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. § 611 et seq., available at <http://www.justice.gov/nsd/fara/links/indx-act.html> (consulted on 7 May 2013).

¹⁸⁷ *Ibidem*.

main distinction is that while in practice FARA focuses on lobbying firms,¹⁸⁸ the Russian Law on Foreign Agents targets (mainly human rights) NGOs. Notwithstanding the fact that FARA in theory does not exclude NGOs as possibly holding to account under its provisions, it has been “extremely rare in practice since the purpose of the law is to reveal the amount of money paid to lobbyists in order to impact US government policy on behalf of foreign principles.”¹⁸⁹ The 2009 Ethiopian Charities and Societies Proclamation on the other hand establishes a category ‘Foreign Charities’ under Article 2(4) defining them as “charities that are formed under the laws of foreign countries or which consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign country sources,”¹⁹⁰ and under Article 2 (2) providing that amount of funding received by the CSO from foreign sources must not be more than 10% of its overall funding.¹⁹¹ The law is therefore directly aimed at NGOs and moreover includes provisions for restrictions for foreign funded NGOs and therefore bears similarities with the Law on Foreign Agents. It would go beyond the scope of this thesis to further apply comparative legal approach and study other states’ legal provisions regulating NGOs. To our knowledge there are no other Council of Europe’s member states that would have adopted laws labelling NGOs receiving foreign funding as ‘foreign agents.’ The only one restricting foreign funding of NGOs is the case of Azerbaijani “NGO Act” that will be analysed further below.

What has therefore been the impact of the implementation of the Law on Foreign Agents in practice so far?

¹⁸⁸ *Ibidem*.

¹⁸⁹ Burke, Ingrid, ‘Foreign agents under Russia’s NGO Law and its US doppelganger’, in *Rapsi News*, 27 July 2012, available at http://rapsinews.com/legislation_publication/20120727/263954264.html (consulted on 1 July 2013).

¹⁹⁰ Charities and Societies Proclamation (CSP) No. 621/2009, *Federal Negarit Gazeta* (13 February 2009), Art. 24, para. 2, English translation available at <http://www.molsa.gov.et/English/Resources/Documents/Charities%20and%20Societies%20Proclamation.pdf> (consulted on 3 July 2013).

¹⁹¹ *Ibidem*., Art. 2, para. 2.

4.3. *Impact of the Law on Foreign Agents on Russian NGOs*

Since November 2012 when the Law on Foreign Agents entered into force there have been two types of impact on the functioning of Russian NGOs so far: 1) the inspections so-called “*proverka*”¹⁹² effectuated by the Prosecutors regional offices and Ministry of Justice, and 2) administrative cases against NGOs in regional Courts have been opened.

It was also expressed in the official “Review of the Russian Supreme Court on the legal quality of the draft Law on Foreign Agents from 29 June 2012”¹⁹³ referring to the principle of legal clarity, that the amendment proposed to the Article 330 of the Russian Criminal Code that would establish a rule for criminal responsibility for “malicious avoidance of registering as a foreign agent.”¹⁹⁴ The Supreme Court criticized that there is no clear distinction between this criminal offence and an administrative offence; and that the term ‘malicious’ in the same manner as ‘political activity’ has a subjective evaluative character and is not defined in Russian legislation.

The Russian NGOs were undergoing inspections since March 2013 that were intended to find evidence to prove that the Russian NGOs are falling within the category of ‘foreign agents’.¹⁹⁵ Administrative cases¹⁹⁶ against NGOs¹⁹⁷ have been

¹⁹² CIVICUS World Alliance for Citizen Participation, ‘Press release “Stop the targeting of Russian Civil Society”’, 3 May 2013, at <https://civicus.org/media-centre-129/press-releases/1652-stop-the-targeting-of-russian-civil-society> (consulted on 21 June 2013):

“On 19 March 2013 the Spokesperson for the Office of the Prosecutor stated that at least 5,000 ‘provierkas’ of NGOs would be conducted during the coming months in order to check the compliance with new laws on terrorism, foreign funding and other offences.”

HRW, AI and Frontline Defenders, ‘Russia: New Pressure on Civil Society’, 22 March 2013, available at http://www.frontlinedefenders.org/files/joint_statement_russian_civil_society_22.3.2012.pdf (consulted on 29 June 2013):

“The scale of the inspections is unprecedented and only serves to reinforce the menacing atmosphere for civil society.”

¹⁹³ Quoted in *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 15.46.

¹⁹⁴ *Ibidem.*

¹⁹⁵ Interview with Denis Volkov, researcher at the Yuri Levada Centre, Moscow 25 April, 2013:

“The ‘provierkas’ were in most cases unscheduled, paralyzing the NGOs works for a couple of days (as in the case of HRC Memorial it required diversion of the executive director and secretary for four days, the Chairman of the Board, and the chief accountant and two lawyers for two days.), demanding the NGO to provide enormous amount of copies of documents at their expenses in a very short time frame (as for instance in case of Levada where within two days the NGO was obliged to provide copies of all proposals, reports and other documents regarding any foreign funding.”;

opened since April 2013. We will provide here a short outline of first NGOs that have been found guilty under the Law on Foreign Agents in order to demonstrate what NGOs have been targeted at first and what forms of proceedings have been adapted by the Russian authorities.

4.3.1. Golos

The first NGO found guilty under the Law on Foreign Agents was Golos. The administrative case against Golos was opened on 9 April 2013 by Russian Ministry of Justice. On 25 April 2013 Golos was found guilty in Presnensky Court in Moscow and was given a 300,000 RUB fine (and its director Lilia Shibanova was fined 100,000 RUB) under the formal grounds of the fact that the organisation prepared and promoted the project for a unified Electoral Code and allegedly received the Andrei Sakharov Freedom Prize from the Norwegian Helsinki Committee (which according to Golos they have refused to receive).¹⁹⁸

4.3.2. Kostroma

On 15 April 2013 the Kostroma Regional Prosecutor's Office opened an administrative case on Russian human rights NGO Kostroma Civic Initiatives Support Centre (Kostroma). The announced formal grounds were that Kostroma led a roundtable discussion called “Restarting the restart: Where are Russian-American relations headed?” which took place on 28th February 2013 on the topic of Russia-US relations

‘Over 7,300 inspections of NGOs planned this year - Justice Ministry’, in *Rapsi News*, 10 April 2013, available at <http://rapsinews.com/news/20130410/266969620.html> (consulted on 21 April 2013).

¹⁹⁶ *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application), *op.cit.* note 10, para. 15.42.

¹⁹⁷ HRW, *op.cit.* note 173.

HRW provides periodically updated list of Russian NGOs victimized under the Law on Foreign Agents. As per 10 June 2013 seven NGOs have already been under administrative court cases and if a court of law finds that they failed to register as a ‘foreign agent’, they might be sanctioned according to the Law, as shown in part 4.2.3 of this Chapter.

¹⁹⁸ Frontline Defenders, ‘Russian Federation: First administrative case opened against GOLOS in framework of “foreign agents” law’, 10 April 2013, at <http://www.frontlinedefenders.org/node/22280> (consulted on 25 April 2013);

‘Court Upholds Fines Imposed on Russian Election Watchdog’, in *RIA Novosti*, 14 June 2013, available at <http://en.rian.ru/russia/20130614/181671837/Court-Upholds-Fines-Imposed-on-Russian-Election-Watchdog.html> (consulted on 21 June 2013).

attended by inter alia a representative from the US embassy.¹⁹⁹ Kostroma was consequently identified as a foreign agent; and its director Aleksandr Zamyatynov faces a fine of up to 300,000 RUB, and the NGO a fine of up to 500,000 RUB.²⁰⁰

4.3.3. The Committee of Soldiers' Mothers

On 17 April 2013, the Committee of Soldiers' Mothers, another human rights NGO based in the Kostroma region of Russia, received a letter informing them that they were in breach of the Law on Foreign Agents because of their engagement in political activity by “purposefully influencing the image of the electoral commissions and other state organs, through participation in the electoral process”²⁰¹

4.3.4. Anti-Discrimination Centre “Memorial”

According to the protocol by the Admiralteyskiy district of St. Petersburg prosecutor's office of 30 April 2013 violated the Law by “getting foreign funding and publishing a report on police abuse of Roma, migrants and civil activists” (which was presented for instance to the UN Committee against Torture).²⁰²

4.3.5. Side by Side LGBT film festival

According to the protocol by the Central district of St. Petersburg prosecutor's office of 6 May 2013 “Side by Side” LGBT film festival violated the Law by publishing a brochure “International LGBT Movement: from Local Practices to Global Politics”

¹⁹⁹ ‘Public Prosecutor's Office in Kostroma identifies NGO as “foreign agent” for holding roundtable with political advisor from US Embassy’, in *Rights in Russia*, 16 April 2013, available at <http://hro.rightsinrussia.info/archive/ngos/foreign-agents/charges/kostroma/cisc> (21 April 2013).

²⁰⁰ ‘List of Russian NGOs subjected to harassment for refusing to register as “foreign agents”’, in *Rights in Russia*, 11 May 2013, available at <http://groups.rightsinrussia.info/archive/yhrm/foreign-agents> (consulted on 17 May 2013).

²⁰¹ Frontline Defenders, ‘Russian Federation: Update – Judicial harassment of NGOs under “foreign agents” law continues’, 22 April 2013, available at <http://www.frontlinedefenders.org/node/22434> (consulted on 25 April 2013).

²⁰² HRW, *op.cit.* note 173.

and by participating in a public awareness-raising campaign “Let’s Stop the Homophobic Bill Together.”²⁰³

4.3.6. Cases of NGOs that have received the notice of violations of the Law

The following four NGOs received notices of violations of the Law (failure to register as a ‘foreign agent’) and have been asked to do so within a given term (one month).²⁰⁴ “Baikal Environmental Wave” (notice received on 23 April 2013) was accused from violating the Law by carrying out active advocacy on environmental issues. HRC Memorial (notice received on 29 April 2013) was accused from violating the Law based on the argument that one of its goals (as listed in its Charter) is to carrying out programs and projects on monitoring politically motivated administrative detentions and criminal persecutions that therefore represents ‘political activity.’ AGORA human rights association (notice received on 30 April 2013) was accused from violating the Law by implementing a project on Internet freedom funded by an INGO Internews that supports “the activities of lawyers capable of influencing policy and law enforcement practice” and aims at “forcing the adoption of regulations setting administrative procedures of implementing the law on Internet blacklists by the government and Roskomnadzor.” The “Panorama” Centre (notice received on 6 May 2013) was accused of violating the Law by implementing a foreign-funded research project analysing political processes in Russia, which includes roundtables and discussions and by publishing information on the websites and therefore contributing to the shaping of public opinion on the drawbacks of acting legislation and the protest movement. Other thirty NGOs have been warned of a need to register as a ‘foreign agents’ before they plan to carry out ‘political activities’ or to receive foreign funding in the future, including inter alia the following NGOs whose focus is not ‘purely human rights oriented.’ An example of NGOs not purely human rights oriented targeted under

²⁰³ *Ibidem.*

²⁰⁴ The following information (in this paragraph) is form the International Youth Human Rights Movement, ‘Rights in Russia, List of Russian NGOs subjected to harassment for refusing to register as “foreign agents”’, 11 May 2013, available at <http://groups.rightsinrussia.info/archive/yhrm/foreign-agents> (consulted on 13 June 2013).

the Law on Foreign Agents is for example “Yaroslavl regional hunters” and fishermen society; “Kirov regional hunters” and fishermen society, or “Assistance to cystic fibrosis patients” (Istra, Moscow region). The latter was warned on 24 April 2013 on the basis of the fact that its charter expresses the NGO’s goal as “defending the rights and legal interests of cystic fibrosis patients in the state authorities” and the fact that the NGO in order to achieve this goal might come up with initiatives on various public life issues, submit proposals to the state authorities, represent and defend its rights, the legal interests of its members as well as other citizens in the state and municipal authorities. Muravyev Park of Sustainable Development also received the warning on 30 April 2013 based on the argument that it has received foreign funding for a project aimed on protection and research of birds.

According to the information as updated on 12 May 2013 provided by the International Youth Human Rights Movement (IYHRM) at least 38 Russian NGOs are currently labelled as ‘foreign agents’ based on the findings of the ‘proverkas’. This information is confirmed by HRW having its data updated on 24 June and showing therefore slightly higher numbers than the IYHRM.²⁰⁵ The numbers have of course been changing constantly since the implementation of the Law on Foreign Agents is still on-going.

4.4. *Is the Law on Foreign Agents compatible with the ECHR rights?*

Having explored the impact of the Law on Foreign Agents in practice let us analyse here whether Russia by adopting this law did violate the rights to freedom of assembly and association and freedom of expression as enshrined under Articles 11 and 10 of the ECHR. As expressed in the second paragraphs of Article 11²⁰⁶ in the same manner also in Article 10, the state is allowed to restrict both rights under conditions set in second

²⁰⁵ HRW, *op.cit.* note 173.

²⁰⁶ ECHR, *op.cit.* note 14, Art. 11, para. 2:

“No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

paragraphs of both articles, but the restriction can be allowed only if *a*) is prescribed by law, *b*) pursues a legitimate aim, and *c*) is necessary in a democratic society. Should only one of them not be met, there will have been a violation of the ECHR.²⁰⁷

4.4.1. Prescribed by law

As expressed in the 2004 case of *Gorzelik and Others v. Poland*, the state of democracy in a country “can be gauged by the way in which the freedom of assembly and association is secured under national legislation and in which the authorities apply it in practice.”²⁰⁸ Moreover, ‘prescribed by law’ does not only require that the disputed measure should have some basis in domestic law, but also refers to its ‘quality’. As expressed in the 2004 *Maestri v. Italy* case and as it was reiterated for example in the 2008 *Koretskyy and Others v. Ukraine*:

“Even assuming that the law was construed by the courts correctly and the present interference had a formal basis in the national law, the Court recalls that the expression ‘prescribed by law’ in the second paragraph of Article 11 of the Convention does not only require that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question.”²⁰⁹

On the other hand the ECtHR case-law contains cases where the term ‘political’ in a domestic law was considered as “reasonably used.” Such as in the 2007 *Zhechev v. Bulgaria* when it stated that

“However, the Court is mindful that legal opinions on the exact purport of such a wide notion open to largely diverse interpretations – “political” – may differ. It is therefore likewise prepared to accept that these holdings were not as patently unreasonable as to become arbitrary. Moreover, while the reasoning of the national courts, and especially that of the Supreme Court of Cassation, was indeed very scant, it was not altogether lacking, as claimed by the applicant.”²¹⁰

²⁰⁷ Mataga, 2006, pp. 13-14.

²⁰⁸ *Gorzelik and Others v. Poland* (17 February 2004) No. 44158/98, para. 88.

²⁰⁹ *Maestri v. Italy* (17 February 2004) No. 39748/98, para. 30; or *Koretskyy and Others v. Ukraine* (3 April 2008) No. 40269/02, para. 47.

²¹⁰ *Zhechev v. Bulgaria* (21 June 2007) No. 57045/00, para 39.

Since the expression ‘political activity’ is considered to be too vague and is not defined by any specific Russian legislation²¹¹ the Law on Foreign Agents cannot be considered as ‘quality law’ as the lawyers of the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application) argue and they conclude therefore that it is not in accordance with the category of ‘prescribed by law’.

4.4.2. In pursuit of at least one of the legitimate aims

The second paragraph of Article 11 and 10 lay out the also the legitimate aims for a state to interfere with those rights *inter alia* the interests of national security or public safety (or territorial integrity); the prevention of disorder or crime; the protection of health or morals; and the protection of the rights and freedoms (or reputation) of others. When analysing whether an interference (restriction) was in pursuit of at least one of those means, the ECtHR must “determine whether it was ‘proportionate to the legitimate aim pursued,’ and whether the reasons adduced by the national authorities to justify it were ‘relevant and sufficient’” (as expressed for example in the 1998 *Sidiropoulos and Others v. Greece* case).²¹²

Since President Vladimir Putin and the authors of the Law have stated that Russian NGOs who receive foreign funding are in principle national but they represent foreign interests and that Russia needs to “shield itself from the interference with its internal interests,”²¹³ lawyers of the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application) argue that this does not represent a legitimate aim. They explain that, on the contrary, the aim of the Russian authorities was to “to discredit the NGOs and their work”²¹⁴ in order to restrict and limit their influence (allegedly carrying out ‘hos-

²¹¹ See the linguistic expertise in part 4.1.

²¹² *Sidiropoulos and Others v. Greece* (10 July 1998) No. 26695/95, para. 40:

“[...] The Court must [...] determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.”

²¹³ *Ibidem*.

²¹⁴ PACE, *op.cit.* note 76, para. 257.

tile activities' under the instructions of foreign donors whose purpose is to interfere with the domestic interests).

4.4.3. Necessary in a democratic society

As expressed in the 2003 *Refah Partisi (the Welfare Party) and Others v. Turkey* case and reiterated for instance in the 2007 *Bączkowski and Others v. Poland* case “the only necessity capable of justifying an interference with any of the rights enshrined in Articles 11 and 10 is one that may claim to spring from a ‘democratic society’”.²¹⁵ As pronounced for example in the 2004 *Gorzelik and Others v. Poland* case any interference with the Article 11 must correspond to a “pressing social need.”²¹⁶ The ECtHR’ case-law contains cases where violation of Article 11 was found to be a result of *inter alia* conditions imposed on the applicant NGO restricting its ability to function properly; including its “ability to receive grants or financial donations” as expressed in the 2007 *Ramazanov and Others v. Azerbaijan* case.²¹⁷ As lawyers of the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application) argue, the ‘labelling’ of NGOs as ‘foreign agents’ contributes to damaging their image and professional reputation and as a result, their capacity to function effectively. Therefore, the restrictions and sanctions, as laid out in the Law on Foreign Agents, are not necessary in a democratic society as there is no pressing social need for the authorities to impose further significant restrictions and consequently sanctions on the activities of NGOs in Russia.

In conclusion, the lawyers of the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application) argue that Russia violated both the right to freedom of

²¹⁵ *Bączkowski and Others v. Poland* (3 May 2007) No. 1543/06, para. 61:

„As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a “democratic society.”

²¹⁶ *Gorzelik and Others v. Poland* (17 February 2004) No. 44158/98, para. 95:

"Nonetheless, that power must be used sparingly as exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a “pressing social need”; thus, the notion “necessary” does not have the flexibility of such expressions as “useful” or “desirable”.

²¹⁷ *Ramazanov and Others v. Azerbaijan* (1 February 2007) No. 44363/02, para. 59.

assembly and association and the right to freedom of expression of the applicant Russian NGOs as enshrined in the ECHR by adopting the Law on Foreign Agents.

4.4.4. Margin of appreciation

The application of the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* was lodged at the Registrar on 6 February 2013. Since then the Council of Europe publicly criticized the suspension under the Law on Foreign Agents of its first victim, Golos, and is apparently preparing to intervene in the ECtHR's process as third party.²¹⁸ Some of the Russian NGOs under the impact of the Law of Foreign Agents have been working as the Council of Europe 'implementation partners'²¹⁹ in Russia.²²⁰

Since in theory NGOs in general are recognised as one of the pillars of the model of a functioning democracy, it will be interesting to see what decision the ECtHR shall reach. The nature of the decision mainly depends on how wide a margin of appreciation will be accorded to Russia.

²¹⁸ Email from Furkat Tishaev, Senior Lawyer, HRC Memorial/EHRAC, 30 June 2013:

"We received formal declaration about the intention of the Council of Europe Commissioner for Human Rights Nils Muiznieks to intervene to the Court's proceedings as third party on our case which is great news indeed."

²¹⁹ Implementation partner is a technical term designating organisations that are carrying out activities in their respective countries (in our case Russian NGOs carrying out human rights activities) and for this purpose are funded by Council of Europe. The same term is used *inter alia* by EU or UN regarding human rights but as well development oriented projects.

²²⁰ Council of Europe, 'Outline of the 3 Year Framework Co-operation Programme (2008-2011)', 2008, paras. 1-10, available at http://www.coe.int/t/ngo/Source/Russia_3_year_programme_en.pdf (consulted on 7 May 2013).

The programme was implemented from 2008 – 2011 in partnership with civil society actors in Russia implementing projects focused on human rights, democracy, civil society, culture and education, social cohesion and gender equality issues. One of the aims of the programme was to improve Russian NGO legislation and its implementation.

Conference of INGOs of the Council of Europe, 'Implementation in 2010-2011 of the 3-year Framework Co-operation Programme "Strengthening Civil Society and Civic Participation in the Russian Federation" (2008-2011) Draft list of activities for 2010 to June 2011 (as of July 2010)', 2010, available at http://www.coe.int/t/ngo/Articles/Russia_3_year_prog_implementation_2010_2011_en.asp (consulted on 7 April 2013).

“The term “margin of appreciation” refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention).”²²¹

The states in general “shall have only a limited margin of appreciation” as laid out for example in the 2011 *United Macedonian Organisation Ilinden and Others v Bulgaria* (No. 2)²²² or 2009 *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* cases.²²³

4.4.4.1. 2009 Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan case

In the Azerbaijani case the ECtHR’s interpretation was following the principle of proportionality (necessary or not in a democratic society) and accorded small margin of appreciation to Azerbaijan. The applicant was an NGO who claimed that its right to freedom of association had been violated by Azerbaijan. Based on the provision in Azerbaijani “NGO Act” the applicant NGO was accused of violating the provision by not having complied with the duty to hold annual general assemblies (as states one of its requirements). The NGO claimed that the dissolution was ordered because they were challenging the state’s and private commercial companies’ environmental practices. The ECtHR ruled that it is true that following the pure ‘legal logic’ the NGO did not comply with the specific conditions of the “NGO Act.” It ruled also that since the only sanction under the Act for any type of misconduct (such as not holding an annual meeting) was directly an immediate dissolution it cannot be considered as proportionate and necessary in a democratic society and consequently ECtHR ruled a violation of Article 11 by Azerbaijan. The ECtHR further claimed that the Azerbaijani NGO Act contains

²²¹ Council of Europe, ‘Margin of Appreciation’, at http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (consulted on 9 June 2013).

²²² *United Macedonian Organisation Ilinden and Others v Bulgaria* (No. 2) (18 October 2011) No. 34960/04, para. 33 (e):

“...the exceptions set out in Article 11 are to be construed strictly; only convincing and compelling reasons can justify restrictions on freedom of association. In determining whether a necessity within the meaning of Article 11 para. 2 exists, the States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts.”

²²³ *Tebieti Mühafize Cemiyeti and Israfilov v. Azerbaijan* (8 October 2010), No. 37083/03.

provisions that are not necessary in a democratic society such as direct criminal responsibility for the NGO's managers. In other words, the ECtHR did consider the quality of the law and based its decisions on an assessment of whether the legal provisions were necessary in a democratic society. There are many similarities with the case of *Ecodefence, Golos and Other 9 NGOs v. Russia* (new application) and it means that there are precedents to be used by the ECtHR. There are currently 16 cases in the ECtHR database concerning Russia and Article 11. In only one occurrence a non-violation of Article 11 was found that is the 2012 *Berladir and others v. Russia* case.²²⁴

4.4.4.2. 2012 *Berladir and others v. Russia* case

The applicants in the 2012 *Berladir and others v. Russia* case were a group of individuals who wanted to organise a contra-demonstration against an anti-immigration march in Moscow. They were banned to protest in the same place as the anti-immigration march but were accorded by Moscow city authorities an alternative venue (considered by the applicants as not appropriate). The applicants decided to protest against this decision in front of the premises of the Moscow city authorities. The protest led to arrests of some of the participants and the applicants were prosecuted for failure to comply with the so-called “notification-and-endorsement procedure” for public gatherings under the Russian 2004 “Public Gatherings Act.” In this case the ECtHR decided to accord a wide margin of appreciation to Russia and decided that the national law can be considered as reasonable (requiring notification or authorisation of public gatherings) provided that the purpose of such procedures was to allow domestic authorities to take the necessary preventive security measures. The ECtHR decided that the legitimate aim expressed by the state (that the security of the protester might be in danger) was valid and out weighted the reasons presented by the applicants (that the newly proposed venue was not appropriate). Nevertheless this is only one case out of 16 where the ECtHR did not recognise a violation of Article 11 concerning Russia.

²²⁴ *Berladir and others v. Russia* (10 July 2012) No. 34202/06.

4.4.4.3. 2012 Markin v. Russia case

The issue of the margin of appreciation is very political and often shows how much the Council of Europe can and is willing to interfere with the sovereignty of one of its member states. In 2012 the ECtHR opposed for the first time a decision made by the Russian Constitutional Court in the 2012 *Markin v. Russia* case,²²⁵ and only a limited margin of appreciation was accorded to Russia. It was held that “Russia’s refusal to grant parental leave to a military serviceman on the same basis as his female counterparts constituted impermissible discrimination under the ECHR.”²²⁶ This case was a clear sign to Russia that its state sovereignty can be challenged. As a reaction to this judgement, Valerij Zor'kin, the current Chairman of the Constitutional Court of Russia in his 2010 article “Predel ustupchivosti” stressed that the priority in defining the public interest must reside in the state and its authorities, and should not be defined by international judges. He claimed that a margin of appreciation should have been accorded to Russia acknowledging its historical, cultural, and social situation and that in future Russia’s application of the ECHR may be conditional.²²⁷ Zor’kin’s approach echoes Putin’s claims during his 2012 electoral campaign to create the ‘Euroasian Union’²²⁸ in order to balance the potential interference coming from the West. Other scholars such as Starzhenetskii argue as well that the priority should be to protect public interests by “balancing different conflicting values.”²²⁹

When considering what will happen now with the case of Russian NGOs against Russia (even though for example Koroteev claims that “The only possible real solution for Russian NGOs would be a new revolution.”²³⁰), we need to acknowledge another

²²⁵ *Markin v. Russia* (22 March 2012) No. 30078/06.

²²⁶ Mälksoo, 2012, p. 836.

²²⁷ Zor'kin, Valerij, ‘Predel ustupchivosti’, in *Rossiiskaia gazeta*, 29 October 2010, available at <http://www.rg.ru/2010/10/29/zorkin.html> (consulted on 13 June 2013);

Translated as “The limit of compromise” by Antonov; or “The Margin of Giving In” by Mälksoo.

²²⁸ Cohen, Ariel, ‘Russia’s Eurasian Union Could Endanger The Neighborhood And US Interests – Analysis’, in *Eurasia review*, 15 June 2013, available at <http://www.eurasiareview.com/15062013-russias-eurasian-union-could-endanger-the-neighborhood-and-us-interests-analysis/> (consulted on 7 June 2013).

²²⁹ Starzhenetskii, 2012, p. 356.

²³⁰ Interview with Kiril Koroteev, *op.cit.* note 126.

aspect that is the time frame. It might indeed take years for the ECtHR to actually start the process and to eventually rule a judgement in the future case of *Ecodefence, Golos and Other 9 NGOs v. Russia*. When looking at Russia's 2013 ECtHR record, the average period from the time of application to the final judgement has been three to ten years.²³¹ It is therefore very probable that the judgement will not come immediately, and that in the meantime the implementation of the Law on Foreign Agents will probably lead to severe sanctions and suspension of many of Russian NGOs falling into the category of 'foreign agents'.²³² Moreover, when the judgement will be published even if positive, the question shall remain - what will happen in practice?

While Russia's record in paying monetary judgments²³³ (usually in form of non-pecuniary damages and costs and expenses for the applicant whose rights were found to be violated by its state) awarded by the ECtHR seems to be almost flawless²³⁴ how does Russia enforce the foreign judgments in national courts?

²³¹ ECtHR, Overview 1959-2011 (February 2012), pp. 3-5, available at http://www.echr.coe.int/Documents/Overview_2011_ENG.pdf (consulted on 7 April 2013).

Since the ECtHR was established in 1959, it delivered more than 15,000 judgments (in over 83% of which at least one violation by the respondent state was found, the highest percentage of 45.01% for Article 6 - Right to a fair trial), out of which almost the half concerned four member states: Turkey (2,747), Italy (2,166), Russia (1,212) and Poland (945). In the period from 1959-2011 ECtHR brought in total 12,425 judgements finding at least one violation, out of which 1140 were concerning Russia (just to give some comparative idea: 161 for Czech Republic; 627 for France, and the highest number belongs to Turkey with 2404 cases).

²³² The first case of Russian NGO (Golos) suspended for six month under the Law on Foreign Agents happened on 26 June 2013:

Golos, 'Informacionnoe soobshhenie 26 ijunya 2013 goda iz sredstv massovoj informacii Associaciya nekommercheskih organizacij v zashhitu prav izbiratelej "GOLOS" uznala o prinjatom Ministerstvom Justicii reshenii o priostanovlenii dejatel'nosti Associacii', 27 July 2013, available at <http://www.golos.org/> (consulted on 3 July 2013);

Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Russian Federation: Suspension of the Golos Association for six months, 28. June 2013, available at <http://www.fidh.org/russian-federation-suspension-of-the-golos-association-for-six-months-13566> (consulted on 3 July 2013);

'Inostrannyj agent raskryl sebja Minjustu V reestre pojavilas' pervaja organizacija', in *Kommersant*, 29 June 2013, available at <http://www.kommersant.ru/doc/2223218?isSearch=True> (consulted on 3 July 2013).

²³³ ECtHR, 'Russia Press Country Profile' (June 2013), at http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf (consulted on 7 July 2013).

Moreover, Russia is an important contributor to the ECtHR budget, which in 2013 amount to approximately 67million EUR. 47 member states contribute to it according to the scales based on population and GDP. Russia contributed 26 755 615 EUR, representing almost 40%.

²³⁴ Kahn, 2011, p. 539-540;

Interview with Kiril Koroteev, *op.cit.* note 126.

4.5. *Domestic enforcement of foreign judgements and decisions in Russia*

In theory international treaties are part of the Russian legal system which means that the Constitutional Court recognizes judgements from international tribunals, including the ECtHR²³⁵ decisions against Russia as sources of Russian law.²³⁶ The international judgements serve as a ground on which a Russian domestic court can pass a decision on a particular case. Moreover, judgments delivered by Russia's domestic courts can be reviewed, based on judgments of the ECtHR and ECHR thus makes for an inherent part of Russian jurisdiction.²³⁷

Many Russian scholars criticize²³⁸ Russia's defiance to implement the judgments issued by the ECtHR in domestic courts.²³⁹ Others²⁴⁰, although acknowledging the fact that there are obstacles in the implementation of the ECtHR judgements, are reluctant to criticize this fact and hold a more optimistic viewpoint, explaining this defiance in the light of systemic difficulties faced by a country in transition from a soviet system to a democratic one. Zor'kin, for instance, claimed that the ECtHR decisions are to some

"It is very important for us thought to be part of the Council of Europe, to be able to bring our case to Strasbourg. But I really wonder how Strasbourg will react on this situation and whether there will be some political will to make Russia change the Law not to just make it pay, since as we all know paying has never been a problem for my country."

Interview with Elena Shakova, *op.cit.* note 129:

"Russia does not have problem with money, therefore they pay always the fees imposed by ECtHR but they are not really working as any kind of sanctions. Russia just pays and that's all."

²³⁵ Council of Europe, 'Execution of Judgments of the European Court of Human Rights', at http://www.coe.int/t/dghl/monitoring/execution/default_en.asp (consulted on 3 July 2013).

²³⁶ Based on civil law system with judicial review of legislative acts (significant influence of preexisting Czarist and Soviet legal systems, as well as several Western liberal systems.

²³⁷ Burkov, 2012, p. 416.

²³⁸ Lapitskaya, 2011, p. 480.

Lapitskaya argues that Russia violates the spirit and letter of the ECHR "by ignoring the substance of the ECtHR judgments, failing to implement measures that are necessary to punish wrongdoers and prevent human rights violations in the future."

²³⁹ Burkov, 2012, p. 415:

"The first judgment delivered by the Constitutional Court of the Russian Federation in regard to the domestic application of international law was judgment No. 2-P of 4 February 1992 'On the Constitutionality of Law Enforcement Practice Concerning the Termination of Employment Contracts Under Clause 1 of Article 33 of the Labor Code of the RSFSR.' It stated inter alia that '[c]ourts are also obliged to evaluate a statute subject to application from the standpoint of its conformity to the principles and norms of international law.'"

²⁴⁰ Starzhenetskii, 2012, pp. 349-356.

extent implemented (in some cases the federal legislator ordered to reform the supervisory review according to them),²⁴¹ yet the challenges are caused mainly by practical obstacles such as absence of an official translation of the ECHR. While some Western scholars acknowledge as well that the Constitutional Court of Russian Federation refers to the Strasbourg system,²⁴² some Russian lawyers argue that “The Constitutional Court quotes Strasbourg a lot, but the problem is that the judgements are not enforced. The Court has become an ‘advisory board’ of the Duma. It always defers to the legislative body.”²⁴³ Moreover Russia’s lower courts are even more reluctant to implement the ECHR and use the ECtHR case-law judgements as precedents.²⁴⁴

There are different arguments amongst Russian legal scholars explaining the reasons why Russian courts are facing challenges in the implementation of the decisions made by foreign courts. While some, such as Antonov, argue that the roots of the problem lie in the ‘Soviet education’ of legal professions, especially judges²⁴⁵ “who apply the state-centred and paternalist attitude and treat foreign decisions and awards as something possibly infringing upon state sovereignty”;²⁴⁶ or, as Burkov argues, are simply unfamiliar with the ECHR or do not have access to official translations of it,²⁴⁷ others (such as Trochev) argue that the Russian judiciary may be the most ECtHR-friendly branch of Russian government nevertheless “facing a host of pressures to do otherwise.”²⁴⁸

Starzhenetskii argues that the Russia’s violations as found in the ECtHR case-law are showing more of “structural and practical problems of the Russian legal system

²⁴¹ Zor’kin, *op.cit.* note 230.

²⁴² Kahn, 2011, p. 542.

²⁴³ Interview with Kiril Koroteev, *op.cit.* note 126.

²⁴⁴ Mälksoo, 2012 (a), p. 839.

²⁴⁵ Interview with Mikhail Antonov, *op.cit.* note 75:

“85% of judges are women, usually clerks before. There is an implied rule (convention) that policemen and lawyers (advocates) cannot become judges because they are connected to criminals. It is presumed to affect the quality of the system...Judges have the task to keep society safe, they represent the state. The general idea is that acquittal is bad because it is not good for safety. It is better to presume guilt.”

²⁴⁶ Antonov, 2012 (a), p.3.

²⁴⁷ Burkov, 2012, p. 419.

²⁴⁸ Trochev, 2009, p. 145.

still in a transition period after the collapse of the Soviet Union.”²⁴⁹ He is proving this theory by stressing the fact that the biggest groups of violations found in the ECtHR judgements regarding Russia regards Article 6 of the ECHR (the Right to a Fair Trial). As the second biggest group from the ECtHR case-law he ranges the ‘Chechen’ cases and explains that again the decisions regarding those cases have not been enforced in Russian domestic courts mainly because of the lack of proper measures and solutions to address the ‘new’ challenges Russia is facing (as the ‘terrorism, extremism, separatism, nationalism’), moreover emanating from its multinational and multicultural structure.

The fact is that the issue of implementation of ECtHR’ judgements has of course political connotations. While the Constitutional Court might be really striving to use the ECtHR’ decisions as precedents and while the problem of lower courts may be caused by lack of education of the judges,²⁵⁰ the core of the problem lies in the fact that the Russian government does not accept the implementation of the judgements of the ECtHR. The question therefore is: will the Council of Europe be able and willing to interfere with Russian sovereignty now when the Russian NGOs are being restricted under the Law on Foreign Agents in a manner that is not compatible with the ECHR?

The decision the ECtHR will take in the future case of *Ecodefence, Golos and Other 9 NGOs v. Russia* will show whether Council of Europe decided to take a more anthropological interpretation²⁵¹ of human rights acknowledging the socio-cultural, historical and political Russian context and according Russia wide margin of appreciation; or whether the decision will take a firmer stand, and to start interfering

²⁴⁹ Starzhenetskii, 2012, pp. 352-353.

²⁵⁰ Interview with Kirill Koroteev, *op.cit.* note 126:

“The only sustainable solution to change the judicial system effectively would be to recruit the judges from lawyers not from clerks and secretaries and reduce the total number of courts under Supreme Court, which has now eighty-three Civil Courts and ten Military Courts (in comparison to Arbitrazh Court – under which are ‘only’ ten Courts).”

²⁵¹ Goodale, 2006, pp. 1-8.

Goodale describes Melville Herskovits’ 1947 ‘Statement on Human Rights’. Herskovits who was asked as an anthropologist to provide an opinion about the draft of UNDH opposed the universal applicability of human rights and introduced into the post-Second World War human rights discourse new concept of cultural relativism. Herskovits based his theory on the issue of individual personality as shaped by her culture and he argued that respect for individual differences entails the respect for cultural differences.

with Russia's sovereignty, as we have seen for example in the 2012 *Markin v. Russia* case.

5. Conclusion

We have first examined the legal and normative framework adopted by the Council of Europe for NGOs. We have also scrutinized the origins of Russia-Council of Europe relationship and studied the emanating concept of dichotomy of Russia's state sovereignty versus the potential willingness and ability of the Council of Europe to interfere with Russia's domestic affairs (and analogically the opposition of state-centred versus individual-centred approach to international law). Secondly, we have described the Russian system of NGOs protection, and thirdly focused on the case-study of the newly adopted and implemented Law on Foreign Agents and its impact on the functioning of Russian NGOs.

The Council of Europe has presented an (ideal) model of sophisticated protection for NGOs. The 'NGOs' rights to freedom of assembly and association, as well as the freedom of expression, are protected under the ECHR. The Strasbourg model recognises NGOs as legal personalities and subjects to international law and they have the same status as an individual or group of individuals with a right to file a complaint at the ECtHR. In its practice ECtHR often refers to the principles of NGOs as necessary for a pluralistic democracy, serving as watchdogs of the state or simply as one of the state's inherently pro-democratic elements. Moreover, the Council of Europe contains a large framework of additional conventions, regulations, orders and other documents further providing for NGOs protection and recognition. This theoretical concept is implemented in practice as well: apart from the implementation of ECtHR decisions in national courts; there is also Council of Europe's program implementing human rights activities through Russian human rights NGOs.²⁵² Russian NGOs are therefore perceived by the Council of Europe as 'equal partners,' subjects to international law and as human rights defenders protecting the rights of their fellow citizens in their respective countries, therefore fulfilling the Council of Europe's

²⁵² Council of Europe, *op.cit.* note 224.

The Council of Europe implements in Russia human rights programs via the funding of projects of local human rights NGOs. This programme was implemented from 2008 until 2011 in partnership with civil society actors in Russia implementing projects focused on human rights, democracy, civil society, culture and education, social cohesion and gender equality issues. One of the aims of the programme was to improve Russian NGO legislation and its implementation.

principles. Russia has been criticized every year by PACE and other Council of Europe's institutions (and other international bodies as well) for its shortcomings in the protection of human rights, including the disapproval of the restrictions of Russian human rights defenders (including NGOs) and of general non-compliance with the Strasbourg model.

The overall human rights situation in Russia changed dramatically after the collapse of the USSR. The adoption of the 1993 Constitution that was written analogically to the ECHR was received by the West as a clear sign that Russia is willing to comply with the Strasbourg jurisprudence, at least on paper. In theory, 'NGOs rights' are therefore protected under the Constitution (even though it does not mention directly NGOs). The specific legislation - which had regulated the functioning of NGOs from 1991 until last year - had respected the Constitution more-or-less and Russian NGOs had been allowed to function (not without obstacles, of course, as criticized often by various international bodies and foreign states). It was argued that this approach was changed last year and it was demonstrated by the case-study of the Law on Foreign Agents. It was argued also that this law has represented a landmark in the NGOs protection in Russia because it has introduced new discourse in the human rights protection: by using the terminology of 'foreign agents' and 'political activity' that has a strong negative connotation in modern Russian language (as a legacy to the Soviet period), it takes the problem to a new level where it becomes not anymore purely legal but political. It was shown that in practice, the NGOs that have been impacted by the law as first culprits are the largest Russian human rights NGOs *inter alia* representing Russian victims of human rights violation at the ECtHR, challenging Russia as watchdogs (for example by electoral reporting), and promoting the fundamental human rights principles as enshrined in the ECHR in Russia. It was also demonstrated that the Russian NGOs play an important role in the human rights promotion and protection, *inter alia* directly providing legal assistance both at domestic courts and in Strasbourg.

We can therefore conclude that since Russian human rights NGOs play an important role as human rights defenders and as they are directly connected with the Strasbourg system of protection, they are perceived as danger to the Russia's concept of sovereignty and state-centred approach to international law. Following the findings

from the analysis of the Law on Foreign Agents, both in theory and practice, we can conclude that the law is clearly incompatible with the human rights as enshrined in the ECHR. We can also conclude that the ECtHR's decision in a specific case will be based not only on a 'pure legal' analysis but also on political reasoning to a certain extent since it will depend on how large the margin of appreciation will be accorded to Russia and what will be considered as 'necessary in a democratic society' (whether Russia will be, for example, allowed to use arguments of state security, *i.e.* claiming that the 'foreign agents NGOs' represent danger to its security). We can also conclude that this decision will show how much the Council of Europe can and is willing to respect its core fundamental principles and to interfere with Russia's sovereignty (such as in the 2012 *Markin v. Russia* case when a decision from the Russian Constitutional Court was overruled by the ECtHR).

The 'battle' of Russia's concept of sovereignty versus Council of Europe's ability to interfere in its domestic affairs has been present in their relationship since the very beginning. Some argue²⁵³ that since Russia was accepted as a new member on a conditional basis, the Council of Europe had not exercised enough pressure to make her complete the fulfilments as promised at the moment of accession. The fear of Western member states was that Russia's non-compliance with the required norms and obligations would destroy the Council of Europe from within²⁵⁴ as the Chairman of the Council of Europe's Committee of Ministers at the time René Felber had stated: "Opening the doors of the Council of Europe, which has the institutional responsibility to defend human rights and the rule of law, to a country that leaves much to be desired in these respects represents a clear danger."²⁵⁵ The conditionality of the Russian accession was criticized for instance by HRW, quarrelling that the Council of Europe's failure to secure adequate measures of reform prior to offering membership to Russia not only deteriorated its perceived commitment to fundamental principles of democracy and respect for human rights as enshrined in the ECHR, but also sent a message to other Member States and applicants that the Council of Europe "is sometimes willing to turn

²⁵³ Burkov, 2012, pp. 407-461.; Jackson, 2004, p. 23-33.

²⁵⁴ Kahn, 2008, pp. 532-533.

²⁵⁵ Quoted in Huber, 1999, p. 58.

a blind eye to abuse.”²⁵⁶ On the other hand, one of the members of Russia’s delegation at the decisive 1996 PACE Assembly, Sergei Kovalev,²⁵⁷ argued that notwithstanding of Russia’s incompatibility with core human rights requirements was crucial for Russia to be able to become a member of the Council of Europe, especially at a time when human rights violations in Chechnya were taking place, as membership allowed Russian victims to seek justice in Strasbourg.²⁵⁸ Russia is still now the only member of the Council of Europe not to have ratified either Protocol 6 (death penalty) or Protocol 13 (abolition of the death penalty in all circumstances) even though the originally set deadline had expired in 1999.

Starzhenetskii argues, on the contrary, against overly pessimistic approaches to the Council of Europe-Russia relations and refuses the argument that the controversies are caused by the incompatibility between European and Russian values or based on Russia’s ideological disagreement with European values.²⁵⁹

We conclude that notwithstanding what the original reasons might have been, the current approach of Russia towards NGOs (considering them as ‘foreign agents’) goes against the core principles of the Strasbourg jurisprudence, norms and principles and therefore represents an important landmark in the Council of Europe-Russia relations that shows that now more than ever the Western model of human rights and democracy is not in practice applied within the Russian context.²⁶⁰

The question of international organs interfering with state sovereignty goes back to the origins of international community born after the Second World War and the consequent establishment of the UN and five years later of the Council of Europe. We have opened this thesis, mentioning the importance of the NGOs at the 1945 San

²⁵⁶ HRW, ‘A Review of the Compliance of the Russian Federation with Council of Europe Commitments and Other Human Rights Obligations on the First Anniversary of its Accession to the Council of Europe’, No. 3 (D), February 1997, available at <http://www.hrw.org/legacy/reports/1997/rusfed/> (consulted on 29 June 2013).

²⁵⁷ Kovalev was a member of the State Duma of the Russian Federation and a prominent former dissident who served eleven years in the gulag and three years’ internal exile under the Soviet regime, he was until recently chief of the presidential human rights commission and chairman of the Duma Committee on Human Rights, until being removed for his criticism of government action in Chechnya.

²⁵⁸ Kovalev, 1995, pp. 396-398.

²⁵⁹ Starzhenetskii, 2012, pp. 352-353.

²⁶⁰ *Ibidem.*

Francisco Conference²⁶¹ where new norms of international law were adopted and agreed on. Unsurprisingly, as Clark argues, the countries taking a more state-centric position were from the beginning against the idea of including NGOs in the decision making process or recognising them as legal personalities. “They see NGOs as secondary, not primary, referents, and as being ‘dependent’ variables in their activities.”²⁶²

It seems that Russia is currently (re-)adopting the same approach to NGOs and is using such specific tools for this purpose that might be hard to understand for non-Russians emanating from its socio-cultural and political specific context.

Russia is now more than ever proving its aim to remain a sovereign state *vis-à-vis* the Council of Europe and other international mechanism. That is why the ECtHR’ decision in the (future) case of *Ecodefence, Golos and Other 9 NGOs v. Russia* will be very important, as well as any other measure taken in support of Russian NGOs, in order to show what is the stance of the Council of Europe in its political relationship with Russia.

As Václav Havel stated already in 1990 in his speech addressing the PACE in Strasbourg: “Without dreaming of a better Europe we shall never build a better Europe.”²⁶³

²⁶¹ Nelson, 1945, p. 1.

In the Article from 9 June 1945 in Saturday Evening Post, Frederic Nelson called the Russian diplomacy style “cat-and-mouse” when describing the ‘panic’ accompanying the San Francisco Conference leading to the naissance of the UN Charter when Molotov made it clear that Russia does not intend to permit any interference in the creation of post-Soviet “co-prosperity sphere” in Eastern Europe.

²⁶² Clark, 2007, p. 132.

²⁶³ PACE, ‘Václav Havel Human Rights Prize’, at <http://www.assembly.coe.int/vaclav-havel-human-rights-prize/> (consulted on 7 July 2013).

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