

2014 OSCE HUMAN DIMENSION IMPLEMENTATION MEETING, WARSAW, 22 September to 3 October 2014**STATEMENT IN WORKING SESSION 3: FUNDAMENTAL FREEDOMS I (23 September 2014)****Prepared by the Public Verdict Foundation****MAJOR ISSUES WITH THE RUSSIAN LAW ON NON-PROFIT ORGANIZATIONS PERFORMING THE FUNCTIONS OF A FOREIGN AGENT AND ITS ENFORCEMENT**

Over the past two years, Russia has adopted a number of laws substantially restricting the exercise of the right to freedom of association. One particularly restrictive legislative novelty is a provision whereby a nonprofit organization may be found to be performing the functions of a foreign agent. The relevant law that came into force on 21 November 2012 requires non-profit, non-governmental organizations (NGOs) which receive foreign funding and engage in political activity to voluntarily file a request with the Ministry of Justice asking to be included in the official registry of organizations performing the functions of foreign agents. NGOs failing to comply with this provision may face heavy fines and criminal prosecution against the director, potentially leading to up to two years of prison. The law has come under strong criticism in and outside Russia. To date, none of independent Russian NGOs has applied to be included in the foreign agents registry. Moreover, dozens of organisations are appealing in courts the official demands to do so from prosecutors and the Ministry of Justice. At least six NGOs have been forced to declare themselves dissolved, as they refuse as a matter of principle to accept the "foreign agent" label and thus fear criminal prosecution against their leaders for non-compliance.

The enforcement practices in regard of Russian NGOs clearly demonstrate that the new legislation fails to meet the criteria of predictability and equality and effectively undermines all safeguards against the government's arbitrary interference in NGOs' activities.

Article 2, para 6, of the Federal Law of 12 January 1996, No 7-FZ, on Nonprofit Organizations (hereinafter, Law No 7-FZ) defines a non-profit organization acting as a foreign agent as "a Russian non-profit organization that receives funds and other property from foreign states and their public authorities, international and foreign organizations, foreign citizens, stateless persons or persons authorized by them, and/or from other Russian legal entities receiving funds or other property from such sources (except for open joint stock companies with government's participation and their subsidiaries) (hereinafter, foreign sources), and engages, including in the interests of foreign sources, in political activity carried out in the Russian territory." The law further stipulates that NGOs engage in political activity when they "participate (including by providing finance) in organizing and carrying out political actions with the purpose of influencing any decisions of public authorities regarding a change of their public policy, and also in shaping the public opinion with the same purpose." Political activity does not include activity in fields such as research, culture, art, health care, public health and disease prevention, social support and social protection, motherhood and childhood protection, social support of people with disabilities, health promotion, physical culture and sports, plant and wildlife protection, charitable work, and promotion of philanthropy and volunteering.

Being labeled a foreign agent entails certain liabilities and legal consequences for non-compliance. In particular, such NGOs are obliged:

- to indicate in any materials intended for publication and/or distribution, including those disseminated via mass media or the internet, that such materials come from an NGO performing the functions of a foreign agent (Article 24 (1) of Law No 7-FZ);
- to file audited financial statements annually with the supervising authority—i.e. the Ministry of Justice (Article 32 (1) of Law No 7-FZ);
- to file activity reports and details on members of its governing bodies twice every year and documents explaining the use of its funds and other property, including those from foreign sources, on a quarterly basis (Article 32 (3) of Law No 7-FZ).

Failure to register as a foreign agent or failure to indicate it on any published or distributed material entails a fine of 100,000 to 300,000 rubles for the NGO director and 300,000 to 500,000 for the legal entity (i.e. the NGO) under the Russian Code of Administrative Offenses.

Failure or delay in filing the reports required by Law No 7-FZ entails a fine of 10,000 to 30,000 rubles for the director and 100,000 to 300,000 rubles for the organization.

Two criteria must be met for a nonprofit organization to be found performing the functions of a foreign agent, namely: 1) foreign funding; and 2) engagement in political activity in the Russian territory.

In establishing the former, courts rely on the ambiguous term “receipt of funds.” Thus, in the case of the Golos Association of NGOs in Defense of Voters’ Rights, Zamoskvoretskiy District Court in Moscow found the receipt of foreign funds to be proven, despite the fact that the funds were credited to the transit account where the recipient NGO could not use them, and that the NGO eventually refused to accept the funds and instructed its bank to return the funds from the transit account back to the sender. In the context of other provisions under Article 2 of Law No 7-FZ, the term “receipt of funds” can be interpreted as meaning that the NGO has effectively accessed the funds and used them to support its political activity as defined in the law. However, the Russian court's position described above is fundamentally contrary to this understanding of the term and suggests that it leaves room for arbitrary interpretation.

Further, for activities to be recognized as political under Law No 7-FZ, the NGO’s efforts to organize political actions and to shape public opinion should pursue a certain purpose, namely, to influence decision-making by public authorities in order to change their public policy. However, there is no uniform understanding among those who enforce the law of such terms as political action, public policy, change of public policy, or public opinion, since neither the said law nor the Russian law generally provide clear definitions of these terms. The emerging practice reveals that Russian executive authorities and judges use them at their discretion as evaluative terms subject to ambiguous and broad interpretation. We can therefore conclude that the wording of provisions concerning NGOs with the functions of a foreign agent lack the definition and clarity necessary for NGOs to adjust their activities in such a way as to comply with this law. Those responsible for enforcing this provision interpret the term “political activity” broadly to mean virtually any type of interaction between an NGO and government authorities.

For example, in the case of JURIX—Lawyers for Constitutional Rights and Freedoms, Zamoskvoretsky District Court in Moscow ruled that political activity can include “*inter alia*, public appeals to government authorities and dissemination, using modern technology, of their own [NGOs'] assessment of any decision or policy of government authorities.” Similarly, the court found political activity in “efforts to shape Russian citizens' opinions concerning violations of human rights and fundamental freedoms” and in “conducting a review or evaluation of the current

legislation.” In the cases of Memorial Human Rights Centre, the same Zamoskvoretsky Court found “gathering and dissemination of information on politically-motivated arrests and detentions, including information on specific criminal cases and law enforcement practices” to be political activity. On the case of the Public Verdict Foundation, the same court, once again, found the service of providing legal advice to participants of public events and the activity of gathering and dissemination of information on human rights violations during arrests at public events to be political activities. In its decision based on an appeal from the prosecutor's office, a court in Novochoerkassk, Rostov Province, found Women of the Don Union, a regional human rights NGO, to be engaging in political activity by posting on its website its reports filed with the Ministry of Justice—something NGOs are required to do by Russian law. The above examples are not exhaustive, but perhaps sufficient to illustrate how broadly Russian courts interpret the term “political activity.”

Finally, Law No 7-FZ states that an NGO may be found to engage in political activity, *inter alia*, for the benefit (“in the interests”) of foreign sources. Similarly to the terms described above, the phrase “in the interests of foreign sources” is evaluative rather than descriptive, as it lacks a clear legal definition in the text of the law in question. Criteria for establishing that an activity serves the interests of a foreign source are left to the discretion of judicial and administrative authorities enforcing the law, unreasonably expanding their mandate to include legislative functions. As an example, the Ministry of Justice department in Kaliningrad initiated an administrative case against Ecodefence!-Zhensovet, a regional NGO, and the court accepted it as proven that the NGO was acting for the benefit of a foreign source based solely on a contract between the NGO and its grantor, with no regard to the nature and content of group's work to protect the environment in Kaliningrad region. This approach seriously affects the rights and legitimate interests of NGOs unreasonably found to be working “in the interests of foreign sources.”

Based on a review of Law No 7-FZ and other provisions regulating the procedure of establishing whether a particular NGOs is performing the functions of a foreign agent, and also on a review of the emerging enforcement practices, we conclude that NGOs in Russia may face the following issues today:

- arbitrary changes in established requirements and selective exceptions from general rules at the authorities' discretion for NGOs labeled as performing the functions of a foreign agent;
- vague, unrealistic, and burdensome requirements for NGOs which may not have sufficient human and material resources to comply with the rules imposed on NGOs performing the functions of a foreign agent; and
- legal and linguistic ambiguity in the regulatory terminology, such as using ambiguous and evaluative terms lacking a universal interpretation, which, in turn, adversely affect the image and reputation of NGOs working to defend rights and liberties.

In addition to the above, amendments to Law No 7-FZ were adopted in June 2014 adding grounds for unscheduled inspections of NGOs and allowing the Ministry of Justice to forcibly declare NGOs to be “performing the functions of a foreign agent” and to include them in the foreign agents registry against their will. These changes have further expanded the already broad powers of Russian authorities to interfere in NGOs' activities. To date, the Ministry of Justice has forcibly included 13 NGOs in the registry (bringing the total to 14 NGOs). Being forcibly included in the foreign agents registry denies these NGOs the right to defense, as in some cases they are still litigating against the prosecutors and the Ministry of Justice and appealing the decisions to label them as engaging in political activity and performing the functions of a foreign agent. NGOs included in the registry face heavy fines for failure to indicate on their publications that these are

coming from a "foreign agent" and for failure to submit all required reports to the Ministry of Justice in time.

All the above indicates that the said provisions of Law No 7-FZ are inconsistent with Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms that stipulates that no restrictions shall be placed on the exercise of the freedom of association 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. Furthermore, the provisions in question also conflict with Article 55, part 3, of the Russian Constitution stating that human rights and civil liberties may only be restricted by a federal law and only to the extent necessary for the protection of the constitutional system, morality, health, rights and legitimate interests of others, and for enabling national defense and security.

The legal provisions described above seriously hinder the work of non-profit organizations while lacking any of the legitimate justifications for placing restrictions on the freedom of association.

Notably, proposals to introduce similar legislation have been increasingly supported in other OSCE countries, posing new risks to the exercise of the right to freedom of association. It appears particularly important for the OSCE to address this challenge now and to take practical steps in order to stop the introduction of such unreasonable restrictions and to have them abolished in countries which have already adopted them.