

HELŚIŃSKA FUNDACJA PRAW CZŁOWIEKA
HELSINKI FOUNDATION for HUMAN RIGHTS

RADA FUNDACJI

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Warsaw, 13 November 2018

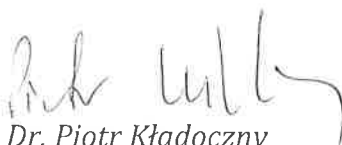
1875/2018/PSP/JB/MSZ

Mr Vincent A. De Gaetano
The European Court of Human Rights
President of the Third Section
Council of Europe
67075 Strasbourg-Cedex
France

Ref. *Levada Centre against Russia*
app. no. 16094/17
and 14 other applications¹

Pursuant to the letters of Mr J.S. Phillips, the Section Registrar of the Third Section of the European Court of Human Rights dated 2 October 2018 and 26 October 2018, granting leave to make written submission to the Court by the 13 November 2018, the Helsinki Foundation for Human Rights with its seat in Warsaw, Poland, hereby respectfully presents its written comments on the case of *Levada against Russia* (application no. 76813/16) and 14 other applications.

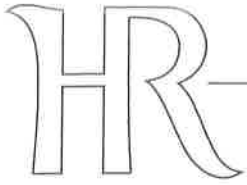
On behalf of the Helsinki Foundation for Human Rights,


Dr. Piotr Kładoczny
Secretary of the Board


Danuta Przywara
President of the Board



¹ 18995/17, 27215/17, 29482/17, 34499/17, 53490/17, 60569/17, 61111/17, 62848/17, 64181/17, 69157/17, 81560/17, 81751/17, 130/18, 15813/18.



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Warsaw, 13 November 2018

Levada Centre against Russia
Application no. 16094/17 and 14 other applications¹

WRITTEN COMMENTS
BY
HELSINKI FOUNDATION FOR HUMAN RIGHTS

Executive summary

- Judgment in the case of *Levada Centre against Russia* may have a broader impact on the standards of protection of the civil society organizations in Europe.
- In many European states, in particular those with the communist past, there is a visible trend of imposing growing limitations on the freedom of association. Because of that, various international bodies expressed their concern with regards to the “shrinking space for civil society”.
- The Russian Foreign Agents Act has to be analysed in the light of these worrisome international tendencies. By requiring Russian NGOs which receive grants from foreign donors to be registered as “foreign agents” and imposing additional restrictions on them, the law severely limits the freedom of association. Moreover, it stigmatises NGOs and discredits them in the eyes of public opinion.
- In the past, the laws which discriminated and stigmatised NGOs which obtain financial resources from abroad were condemned by many international bodies, including those within the system of the Council of Europe.
- Law aimed against organizations which receive grants from foreign donors was adopted, among others, in Hungary, where it caused similar controversies. On the contrary, the Russian law cannot be compared with the US Foreign Agents Registration Act which is applied very narrowly and concerns mostly organizations involved in political lobbying on behalf of foreign governments.
- Human rights standards developed by the Court in the present case may effectively discourage other countries, including Poland, from adopting similar “foreign agents laws”.

¹ 18995/17, 27215/17, 29482/17, 34499/17, 53490/17, 60569/17, 61111/17, 62848/17, 64181/17, 69157/17, 81560/17, 81751/17, 130/18, 15813/18.

I. INTRODUCTION

1. This third party intervention is submitted by the Helsinki Foundation for Human Rights, pursuant to the leave granted by the President of the Section of the European Court of Human Rights (Court) under Rule 44 § 2 of the Rules of the Court on 2 October 2018.

2. Helsinki Foundation for Human Rights (HFHR) is a non-governmental organization established in 1989 in order to promote human rights and the rule of law as well as to contribute to the development of an open society in Poland and abroad. Among the activities of the HFHR there is a participation in legal actions undertaken for the public interest such as representing parties and preparation of legal submissions to national and international courts and tribunals. The HFHR has an established practice as regards of submission of third party interventions to the European Court of Human Rights and in representing victims in proceedings before the Court. In the past we had submitted *amicus curiae* opinions not only in cases against Poland (e.g. *Grabowski v. Poland*, app. no. 57722/12; *P. and S. v. Poland*, app. no. 57375/08), but also those against other countries, which in our opinion, concerned legal problems important also from the perspective of protection of human rights in Poland (e.g. *Baka v. Hungary*, app. no. 20261/12; *Delfi v. Estonia*, app. no. 64569/09; *Big Brother Watch and others v. the United Kingdom*, app. nos. 58170/13, 62322/14 and 24960/15).

3. HFHR believes that although the present case concerns directly the Russian Foreign Agents Act, the future judgment of the European Court of Human Rights may have a broader impact on the protection of civil society in Europe, especially in the countries with the communist past. Therefore our intervention focuses primarily on the international standards on freedom of expression and freedom of association as regards to non-governmental organisations as well as international standards concerning NGOs rights to receive funding (including from foreign sources). We would also like to place restrictions imposed on the NGOs by the Russian authorities in the context of shrinking of civil society space in post-Soviet and CoE states.

II. JURISPRUDENCE OF THE COURT ON FREEDOM OF EXPRESSION AND FREEDOM OF ASSOCIATION IN REGARD TO NGO ACTIVITIES

1. Freedom of expression

4. According to the Court's jurisprudence, freedom of expression is one of the foundations of a democratic society. "It is applicable not only to «information» or «ideas» that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established" (*Observer and Guardian v. the United Kingdom*, app. no. 13585/88, § 59).

5. The Court held that civil society makes an important contribution to the discussion of public affairs. According to the Court's jurisprudence "manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of «public watchdog» in imparting information on matters of public concern (...), just as it is to enable NGOs scrutinising the State to do the same thing." (*Magyar Helsinki Bizottság v. Hungary* [GC], app. no. 18030/11, § 166-168). In the light of the Court's case law, NGOs which serve as "watchdogs" are entitled to similar protection under the Convention as that afforded to the press (e.g. *Youth Initiative for Human Rights v. Serbia*, app. no. 48135/06, § 20).

2. Freedom of association

6. According to the Court's jurisprudence, one of the objectives of freedom of assembly and association guaranteed in Article 11 is freedom to expression (*Faber v. Hungary*, app. no. 40721/08, § 41). In its jurisprudence the Court stated that in the context of Article 11 associations are important to the proper functioning of democracy. "Where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which individuals may integrate with each other and pursue common objectives collectively" (*Gorzelik and Others v. Poland*, app. no. 44158/98, § 92-94). The way in which national law and its practical application by authorities respect the freedom of association is demonstrative of the state of democracy in the country (*Moscow Branch of the Salvation Army v. Russia*, app. no. 72881/01, § 59).

7. The Court stated that the "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" (*Gorzelik*, § 95). "In determining whether a necessity within the meaning of Article 11 paragraph 2 of the Convention 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" (*Moscow Branch of the Salvation Army v. Russia*, §76).

III. INTERNATIONAL STANDARDS ON THE RIGHT TO ASSOCIATION, IN RESPECT TO ACCESS TO FUNDING NGO ACTIVITIES

1. United Nations standards

8. In its report of 2013, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, M. Kiai, stated that the right to freedom of association includes the ability of individuals or legal entities to "seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources".² According to the UN Special Rapporteur, "associations, whether domestic- or foreign-funded, should be free to promote their views – even minority and dissenting views, , challenge governments about their human rights record or campaign for democratic reforms, without being accused of treason and other defamatory terms".³ The UN Special Rapporteur referred to the communication No. 1274/2004 of the Human Rights Committee which observed that fundraising activities of the NGOs are protected under article 22 of the UN International Covenant on Civil and Political Rights and that restrictions which hamper the NGOs' ability to carry out their statutory activities interfere with Article 22.⁴ The Special Rapporteur mentioned also the resolution 22/6 of the UN Human Rights Council in which it called upon States to ensure that reporting requirements do not discriminatorily impose restrictions on potential sources of funding and to ensure that "that no law should criminalize or delegitimize activities in defence of human rights on account of the origin of funding thereto."

9. Among the problematic constraints on the civil society the UN Special Rapporteur mentioned, *inter alia*, stigmatisation and delegitimation of the work of foreign-funded civil

² Human Rights Council, Twenty third session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 24 April 2013, §8, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf (last access: 13 November 2018).

³ *Idem*, §32.

⁴ *Idem*, §16.

society organizations including by requiring them to be labelled as “foreign agents”⁵. According to the UN Special Rapporteur the protection of State sovereignty is not a legitimate ground for restrictions of the right to association under the Article 22 of the Covenant.⁶ The Special Rapporteur emphasized that “affirming that national security is threatened when an association receives funding from foreign sources is not only spurious and distorted, but also in contradiction with international human rights law”.⁷

10. In the report of 2018 the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association noticed that “despite the fact that States have recognized on multiple occasions that resources are necessary for the existence and sustainable operation of associations, there is a clear tendency to discriminate against and stigmatize organizations that receive foreign funding”.⁸ The governments often try to justify such actions arguing that that they are necessary to protect the state’s sovereignty. However, according to the UN Special Rapporteur, such argument unfairly stigmatizes associations that use foreign grants by comparing them to foreign agents.⁹

11. More specifically - the UN Human Rights Committee in its observations expressed the opinion that limitations imposed on NGOs which prohibit them from obtaining more than 10% of their budget from foreign donors impede the realisation of the freedom of association and assembly enshrined in Articles 21 and 22 of the Covenant.¹⁰

2. Council of Europe standards

12. According to the Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe, “NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties”¹¹.

13. The Council of Europe Commissioner of Human Rights noticed with concern that “many human rights and anti-corruption NGOs have no other choice but to look abroad for funding, as government funding for NGOs in some countries is rarely allocated to advocacy NGOs addressing sensitive topics”. Therefore, NGOs should be free to obtain funds also from bodies outside of their state of origin, including “institutional or individual donors, another state or multilateral agencies” and they should not be discriminated on the basis of their sources of funding.¹²

14. In the CoE Commissioner’s opinion “the legislation regulating the activities of NGOs in Russia should be revised, with the aim of establishing a clear, coherent and consistent

⁵ Idem, §20.

⁶ Idem, § 30.

⁷ Idem.

⁸ Human Rights Council, Thirty-eighth session, 18 June–6 July 2018, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, §34, available at: <http://undocs.org/A/HRC/38/34> (last access: 13 November 2018).

⁹ Idem.

¹⁰ UN Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, Consideration of reports submitted by States parties under article 40 of the Covenant Concluding observations of the Human Rights Committee Ethiopia, § 25. [LINK]

¹¹ CM/Rec(2007)14, point 50.

¹² Council of Europe Commissioner for Human Rights, *The Shrinking Space for Human Rights Organisations*, 04/04/2017, <https://www.coe.int/en/web/commissioner/-/the-shrinking-space-for-human-rights-organisations> (last access: 5 November 2018).

framework in line with applicable international standards”.¹³ The law should not impose on NGOs additional reporting and accounting requirements on the basis of their sources of income. Moreover, “any continuing use of the term «foreign agent» in the legislation and practice in relation to non-governmental organisations would only lead to further stigmatisation of civil society in the Russian Federation and will have a «chilling effect» on its activities”.¹⁴

15. The “foreign agents laws” were condemned also by the Parliamentary Assembly in the Resolution 2096 adopted on 28 January 2016. The Parliamentary Assembly noted with concern that after entry of the Russian law into force many NGOs were forced to close down. It therefore called on the Russian authorities to “implement the remaining provisions of this legislation in accordance with the international standards on the right to freedom of association and other relevant human rights.”¹⁵

3. The Venice Commission and OSCE/ODIHR guidelines

16. Also the Joint Guidelines of the Venice Commission and OSCE/ODIHR on Freedom of Association, underlined the necessity to respect the NGOs freedom to seek, receive and use financial resources, including foreign or international, for the purposes of carrying out their activities.¹⁶ “In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources.”¹⁷ The NGOs’ freedom in this area may be restricted only in exceptional, justified circumstances, by the laws of general applicability – e.g. with the aim to prevent money laundering or terrorism.

IV. “FOREIGN AGENTS LAWS” IN EUROPE

17. Recently, various international bodies noted with concern that in many states, including European ones, civil society is threatened by the actions of the governments. In 2017 the Council of Europe’s Commissioner for Human Rights stated that there is “a clear trend of backsliding in several European countries in the area of freedom of association, particularly in respect of human rights organisations and defenders”¹⁸. Similarly, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association pointed out that there are “worrying patterns of the closing of civic space around the globe that have resulted in serious limitations on the exercise of the rights to freedom of peaceful assembly and of association”¹⁹.

18. Therefore, the laws which restrict the NGOs freedom to receive funding from abroad have to be seen in the light of the abovementioned worrisome international trends.

¹³ Council of Europe, Opinion of the Commissioner for Human Rights on the legislation of the Russian Federation on Non-Commercial Organisations in Light of Council of Europe standards, § 78, available at: <https://rm.coe.int/opinion-of-the-commissioner-for-human-rights-on-the-legislation-of-the/16806da5b2> (last access: 13 November 2018).

¹⁴ *Idem*, §80.

¹⁵ Resolution 2096, point 6.

¹⁶ European Commission for Democracy Through Law (Venice Commission), OSCE Office For Democratic Institutions And Human Rights (OSCE/ODIHR), Joint Guidelines on Freedom of Association, Adopted by the Venice Commission at its 101st Plenary Session (Venice, 12-13 December 2014), Strasbourg, Warsaw, 17 December 2014 § 32, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e) (last access: 13 November 2018).

¹⁷ *Idem*.

¹⁸ Council of Europe Commissioner for Human Rights, *The Shrinking Space...*

¹⁹ A/HRC/38/34.

Unfortunately, also some other European states, following the Russian example, adopted this kind of regulations²⁰.

Hungary

19. In June 2017 the Hungarian Parliament passed the Act on the Transparency of Organisations Supported from Abroad, which “obliges associations and foundations that receives at least 7.2 million HUF annually from foreign source to register with the court as an organization receiving foreign funding, to annually report about their foreign funding, and to indicate the label «organization receiving foreign funding» on their website and publications”²¹. The law provides financial sanctions against NGOs which fail to adhere to the duties imposed on them (fines between 10 and 2900 EUR and possible termination of organization or appointment of trustee)²².

20. The Act was criticized by both Hungarian NGOs and international bodies. The Hungarian Helsinki Committee and the Hungarian Civil Liberties Union pointed out that the law violates, among others, the right to privacy, freedom of association and has a discriminatory character²³. That is because it is based on a presumption that NGOs which receive foreign funding act in the interest of foreign donors instead of public good²⁴. Therefore, the true purpose of labelling of such organizations is to discredit them in the eyes of public opinion. On the other hand, the Venice Commission held that although theoretically the law may seem to be consistent with international standards, there is a serious risk that in practice it may lead to stigmatization of NGOs what could adversely affect their activities²⁵. Such consequences are even more probable taking into account the negative atmosphere surrounding the civil society organisations receiving foreign funding, which was created by the strong political statements of the public officials²⁶.

Azerbaijan

21. Access of NGOs to foreign funding was limited also in Azerbaijan. According to the law adopted in 2014, in order to be allowed to give grants to Azerbaijani NGOs, the foreign donors have to obtain a Government’s permission and moreover the economic reasonability of each grant has to be assessed by the Minister of Finance²⁷. Furthermore, only those foreign donors who have a registered office in Azerbaijan may obtain a permission to give grants²⁸. NGOs which receive funds from abroad with violation of these rules may face

²⁰ M. Hooper, *Russia’s bad example*, „Free Russia Foundation“ 2016, available at: http://www.humanrightsfirst.org/sites/default/files/Russias_Bad_Example.pdf (last access: 7 November 2018).

²¹ Hungarian Helsinki Committee and the Hungarian Civil Liberties Union, *What Is The Problem With The Hungarian Law On Foreign Funded NGOs?*, p. 1, <https://www.helsinki.hu/wp-content/uploads/What-is-the-Problem-with-the-Law-on-Foreign-Funded-NGOs.pdf> (last access: 5 November 2018).

²² Idem, p. 3.

²³ Idem, p. 1.

²⁴ Idem, p. 2.

²⁵ European Commission for Democracy Through Law, *Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad*, CDL-AD(2017)015, para. 65, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e) (last access: 5 November 2018).

²⁶ Idem.

²⁷ M. Guluzade, N. Bourjaily, *Foreign funding in Azerbaijan: challenges and perspectives*, available at: <http://www.icnl.org/research/resources/foreignfund/Article%20Guluzade%20foreign%20funding%20in%20Azerbaijan%20fv.pdf> (last access: 5 November 2018); Z. Ismayil, R. Remezaite, *Shrinking space for civil society in Azerbaijan*, Caucasus Civil Initiatives Center, June 2016, p. 12-13, available at: <https://www.irfs.org/wp-content/uploads/2016/07/Shrinking-Space-for-Civil-Society-in-Azerbaijan.pdf> (last access: 5 November 2018).

²⁸ M. Guluzade, N. Bourjaily, *Foreign funding...*

financial penalties and confiscation of all grant assets²⁹. The adoption of this law was accompanied by legislative measures imposing further restrictions of freedom of association³⁰.

Slovakia

22. Adoption of law which would label NGO donated from abroad as “foreign agents” was considered in 2016 in Slovakia, however eventually the law has not been passed by the parliament³¹.

Israel

23. Among countries which are not members of the Council of Europe, certain additional legal obligations on NGOs which receive funding from abroad were imposed in Israel³².

The United States of America

24. In this context it is worth to note that the supporters of the “foreign agents laws” often argue that similar rules exist in democratic states, invoking in particular the Foreign Agents Registration Act (hereinafter: “FARA”). FARA was adopted in the United States in 1938³³, in the specific situation that preceded the outbreak of II World War, but since that time it has been fundamentally amended and currently its scope is narrowed compared to the original version³⁴. The original purpose of the law was the prevention of German propaganda before the II World War³⁵. FARA obliges agents of foreign principals to register with the Department of Justice and subsequently submit supplementary information every six months. Although FARA is sometimes criticized as potentially threatening to the civil society³⁶, there are important differences between it and the laws adopted in Russia or Hungary.

25. First of all, the scope of FARA is rather limited. It is not applicable to every NGO that receives funding from abroad but only to those which acts as agents of foreign principals. In practice, “The meaning of «agent of a foreign principal» under FARA has been interpreted with reference to the common law definition of agency. Under this definition, a principal-

²⁹ Idem.

³⁰ Z. Ismayil, R. Remezaite, *Shrinking space...*, p. 9-18.

³¹ E. Gallová Kriglerová, J. Kadlečková, A. Chudžíková, K. Medl'ová, *Standing and operational space of non-governmental organisations (NGOs) in contributing to respecting and promoting fundamental rights in EU Member States. Slovakia 2017*, EU Agency for Fundamental Rights 2017, p. 10, available at: http://fra.europa.eu/sites/default/files/fra_uploads/slovakia-civil-space_en.pdf (last access: 6 November 2018).

³² S. Laufer, *A Difference in Approach: Comparing the US Foreign Agents Registration Act with Other Laws Targeting Internationally Funded Civil Society*, “International Journal of Not-for-Profit Law” 2017, vol. 19, no. 1, p. 6; P. Beaumont, *Israel passes law to force NGOs to reveal foreign funding*, “The Guardian”, 12 July 2016, available at: <https://www.theguardian.com/world/2016/jul/12/israel-passes-law-to-force-ngos-to-reveal-foreign-funding> (last access: 6 November 2018).

³³ See e.g. The International Center for Not-for-Profit Law, *FARA's Double Life Abroad*, available at: http://www.icnl.org/programs/US%20Programs/FARA%20briefing_Final_c.pdf (last access: 6 November 2018).

³⁴ US Department of Justice, *Foreign Agents Registration Act Enforcement*, <https://www.justice.gov/jm/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement> (last access 7 November 2018).

³⁵ US Department of Justice, *General FARA Frequently Asked Questions*, available at: <https://www.justice.gov/nsd-fara/general-fara-frequently-asked-questions#2> (last access: 6 November 2018).

³⁶ See e.g. The International Center for Not-for-Profit Law, *The Danger of the Foreign Agents Registration Act (FARA) to Civil Society at Home and Abroad*, <http://www.icnl.org/programs/US%20Programs/FARA's%20Danger%20to%20Civil%20Society%20at%20Home%20and%20Abroad.pdf> (last access: 6 November 2018).

agent relationship is created when an agent «acts as a representative of or otherwise on behalf of another person» and where «[t]he person represented has a right to control the actions of the agent.» This element of control is fundamental to the principal-agent relationship under FARA, and the principal must «ha[ve] the right throughout the duration of the relationship to control the agent's acts.»³⁷. Without this element of control, given organization is not subject to registration duties, even if it receives funds from abroad³⁸.

26. Secondly, FARA provides relatively wide exemptions for various non-profit organizations³⁹. For instance, obligations provided in this law are not applicable to “Any person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts”⁴⁰ or “Any person engaging or agreeing to engage only (...) in the soliciting or collecting of funds and contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering (...)”⁴¹.

27. Thirdly, FARA is not directed against NGOs, but mostly against organizations involved in political lobbying on behalf of foreign governments⁴². Thanks to the abovementioned narrow definition of the “agent”, “the current FARA register of «foreign agents» consists almost exclusively of commercial and other representatives of foreign states and international organizations, as well as advertising and lobbying agencies that openly admit to promoting the interests of their «foreign principals» as their main purpose.”⁴³

V. THREATS TO THE CIVIL SOCIETY IN POLAND

28. In Poland there are no similar laws directed against the NGOs which receive funds from abroad. However, certain public officials stated that such regulation should be adopted. Moreover, recently the Government and the Government-owned public have media undertaken certain actions which attacked NGOs and suggested their links with foreign powers.

29. In this context it is worth to note that the nationalist political party “National Movement” (pol. *Ruch Narodowy*), although not having a separate representation in the Parliament, presented a draft of the “Act on the prohibition of foreign financing of non-governmental organizations”⁴⁴. According to the draft, foreign financing of NGOs would be completely prohibited, with exception of funds granted on the basis of international treaties concluded

³⁷ S. Laufer, *A Difference in Approach...*, p. 7.

³⁸ Also the Venice Commission noted that “The FARA law does not prevent US NGOs from receiving financial support from foreign organisations and countries and these NGOs are not required to be registered under the FARA Law.” (European Commission of Democracy Through Law, *Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations (“Law On Foreign Agents”), on Federal Laws N. 18-Fz And N. 147-FZ and on Federal Law N. 190-Fz on Making Amendments to the Criminal Code (“Law On Treason”) of the Russian Federation*, 27 June 2014, CDL-AD(2014)025, §36).

³⁹ S. Laufer, *A Difference in Approach...*, p. 9.

⁴⁰ FARA, §613(e).

⁴¹ FARA, §613(d).

⁴² S. Laufer, *A Difference in Approach...*, p. 9-11.

⁴³ O.B. Sidorovich, G.V. Vaypan, *Expert opinion on the results of a comparative legal analysis of Russian Federal Law of July 20, 2012, No. 121-FZ “On making changes to various legislative acts of the Russian Federation regarding the regulation of non-commercial organizations performing the functions of a foreign agent” and the U.S. Foreign Agents Registration Act of 1938, 22 U.S.C. § 611-21*, 28 February 2014, available at: http://ilpp.ru/netcat_files/userfiles/%D0%90%D0%BD%D0%BE%D0%BD%D1%81%D1%8B/Amicus%20Brief%20on%20Russian%20NGO%20Law%20US%20FARA%20ENGL.pdf (last access: 7 November 2018).

⁴⁴ The draft, in Polish, is available at: <https://ruchnarodowy.net/wp-content/uploads/2017.07.27-Projekt-ustawy-o-zakazie-zagranicznego-finansowania-NGO-v.3-1.pdf> (last access: 7 November 2018).

by Poland. Grants obtained by NGO with violation of this rule would be forfeited. Moreover, members of organs of such NGO could face criminal sanctions.

30. The draft has not been officially submitted to the Parliament. Nevertheless, public statements of politicians of the current ruling party suggest that the government might share the idea of adoption of similar law. For example, Mr. Arkadiusz Mularczyk, member of parliament, stated on Tweeter that "It is urgently necessary to prepare legal regulations regarding the operation and financing of «independent» NGOs in PL"⁴⁵. Prof. Andrzej Zybertowicz, advisor of the President of Poland, said that "If there is a situation that an institution, the third-sector one, has the majority of financing from outside Poland, then it is not an emanation of interest groups within the country. (...) It is an expression of interests of someone who tries to win something in Poland within the democratic space. We have to distinguish the authentic social movements that come from contributions and the time of volunteers, from social movements, which are paid by various foreign entities that promote certain cultural visions, not growing from our own traditions"⁴⁶.

31. Also the Government-owned public media tried to discredit NGOs, especially those involved in campaigns aimed against newly adopted laws threatening independence of the judiciary, by underlining their links with foreign donors. For instance, in September 2017 the main news program in the public television, "Wiadomości", published a material entitled "Germans fund anti-government protests"⁴⁷. The video suggested that the huge protests against the controversial new Act on the Supreme Court were funded by the Germans. In 2016 "Wiadomości" published a series of materials aimed against certain NGOs, mostly those which are critical to the Government. The videos were illustrated with graphics of arrows which showed alleged financial and personal links between NGOs activists and politicians and foreign donors, including George Soros⁴⁸.

32. Although, as mentioned above, the Polish authorities have not yet adopted laws aimed directly against the NGOs which obtain grants from abroad, they nevertheless took certain dangerous actions in the sphere of financing of the civil society. In particular, in September 2017 the Parliament adopted a law which created a new institution, the National Institute of Freedom, which is responsible for distribution of public and EU funds between NGOs. The new law was widely criticized by NGOs and the Ombudsman as dangerously politicizing the decision-making process with regards to the distribution of funds⁴⁹. Moreover, the Government took many controversial, possibly politically motivated, individual decisions

⁴⁵ <https://twitter.com/arekmularczyk/status/888729767649923072> (last access: 7 November 2018).

⁴⁶ *Kto stoi za Fundacją Otwarty Dialog? Wychodzą na jaw kolejne fakty*, „Niezależna.pl“ available at: <http://niezalezna.pl/103194-kto-stoi-za-fundacja-otwarty-dialog-wychodza-na-jaw-kolejne-fakty> (last access: 7 November 2018).

⁴⁷ Video, in Polish, available at: <http://wiadomosci.tvp.pl/33888246/niemcy-finansuja-antyrzadowe-protesty> (last access: 7 November 2018).

⁴⁸ See e.g.: <https://wiadomosci.tvp.pl/27602918/kolejne-pytania-o-fundacje> (last access: 7 November 2018).

⁴⁹ See e.g. opinion of the Helsinki Foundation for Human Rights, available at: http://www.hfhr.pl/wp-content/uploads/2017/07/HFPC_opinia_instytut_wolnosc_i_17072017.pdf (last access: 7 November 2018); opinion of the Ombudsman, available at: <https://www.rpo.gov.pl/sites/default/files/Do%20Marsza%C5%82ka%20Sejmu%20w%20sprawie%20projektu%20o%20Narodowym%20Instytucie%20Centrum%20Rozwoju%20Spo%C5%82eczno%C5%84stwo%20Obywatelskiego%2013.07.2017.pdf> (last access: 7 November 2018); see also: OSCE/ODIHR, *Opinion on the draft Act of Poland on the National Freedom Institute – Centre For The Development Of Civil Society*, 22 August 2017, available at: <https://www.osce.org/odihr/336546?download=true> (last access: 13 November 2018).

regarding the denial of funding to NGOs critical to it and favouring those politically close to the ruling party⁵⁰.

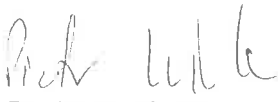
33. The Government undertook even more radical actions, which may likely induce a chilling effect with regards to all NGOs critical to the ruling party. In November 2017 the Minister of Internal Affairs submitted to the court a motion to suspend the management board of the foundation "Wolni Obywatele RP" and to appoint a trustee. The Minister argued that such a radical step is necessary because the foundation organized unlawful counter-protests against the assemblies held every month in order to commemorate the victims of the Smoleńsk air crash of 10 April 2010, called on its website to protest against the Government even with the use of civil disobedience and claimed that the President of Poland is a liar and perjurer. The motion has not yet been reviewed by the court.

VI. CONCLUSIONS

34. HFHR believes that the judgment in the present case will be of an utmost importance to the situation of civil society in all countries of the Central and Eastern Europe. In many countries of the region one can observe a worrisome trend of "shrinking space for civil society" manifested in smear campaigns against NGOs, attempts to dissolve or suspend management board of "politically inconvenient" organizations or adoption of laws restricting the freedom of association. The "foreign agents laws", such as those enacted in Russia and Hungary, are one of the elements of this dangerous trends. Their negative effects is not limited only to deprivation of NGOs of a substantial sources of their revenues. Such laws also discredit the civil society organizations in the eye of the public opinion by suggestions that those organizations (and their activists) which obtain grants from abroad are in fact enemies of the state and work on behalf of foreign powers. The judgment of the Court, clarifying the relations between Article 11 of the Convention and the rules regarding the finances of NGOs, could therefore not only protect the individual applicants in the present case but also discourage governments in countries like Poland from enacting a Russia-patterned laws.

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⁵⁰ Helsinki Foundation for Human Rights, *The Situation of Civil Society Organisations in Poland*, available at: http://www.hfhr.pl/wp-content/uploads/2017/09/HFHR_situation_ngos_in_Poland_brief.pdf (last access: 7 November 2018).