

On Foreign Agents & Undesirable Organizations: Regulation of Foreign Capital in Russian Civil Society

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Dear Editor,

Pre-revolutionary Russia had a rich philanthropic tradition and blossoming civil society.¹ It was the progeny of both imperial policy, beginning with the empire-building Peter I at the turn of the 17th century,² and the long-standing Russian Orthodox tradition that contributed to this.³ Civil society was one of the numerous victims of the 1917 October Revolution, bricked up as antecedent to the ideology of the new Marxist-Leninist state, not to be exhumed again for 70 years. Retrospectively, pre-revolutionary Russian civil society served as a magnifying glass, not just as to how Russian society viewed itself and the poor, but more pertinently, how it also viewed the West and its relationship with it.⁴ Today, nearly a century on, the relationship between Russian civil society and the Russian state apparatus is again reflective of the relationship between Russia and the West. Unfortunately, the current fractious state of

¹ Adele Lindenmeyr, *Poverty is Not a Vice: Charity, Society, and the State in Imperial Russia* (Princeton University Press 1996).

² *ibid.*

³ The majority of Russians practiced and continue to practice Orthodox Christianity, with over 70% of the Russian Federation identifying as Orthodox. The predecessor to modern Russia and Ukraine, Kievan Rus', adopted the faith in the 10th century. However, while the Russian Orthodox Church has preached philanthropic attitudes towards the needy, it must be noted that the Russian Orthodox Church's attitude to civil society movements not initiated by the Church has been decidedly more hostile. This is as it is seen as anathema to the Byzantine harmony of Church-State known as *symphonia*. See George Soroka, 'Putin's Patriarch: Does the Kremlin Control the Church?' (Foreign Affairs, 11 February 2016) <https://www.foreignaffairs.com/articles/russian-federation/2016-02-11/putins-patriarch> accessed 12 March 2016.

⁴ Lindenmeyr (n 1).

geopolitical relations is reflected acutely in the state of Russian civil society.⁵ Rather than drinking deep and passively observing Western civil society practices, allowing a domestic civil society to mature in the process, legislative policy has universally condemned foreign non-commercial organisations (NCOs). As a result, any modicum of foreign funding is now regarded as insidious manipulation and unwarranted interference in Russian society. This letter will firstly briefly outline the legislative measures regulating NCOs in receipt of foreign funding, and will continue to address the recently proposed draft amendment definition of ‘political activity’. It will be shown that the legislative framework, compounded by this proposed definition, is unwarrantedly vague and creates the risk of arbitrary application. In so doing, the Russian legislature has overstepped its mandate of legitimate regulation, and in the process missed an opportunity to effectively and productively audit the inflow of foreign capital into Russian civil society.

A number of restrictive legislative acts have been promulgated over the past number of years, the most relevant of these for the purposes of Russian civil society being the Federal Law Introducing Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-commercial Organizations Performing the Function of Foreign Agents (Foreign Agent law), which became law on 21 November 2012. This law obliges NCOs, prior to the receipt of any foreign funding, to register in the registry of NCOs, if they intend to engage in or conduct political activities. NCOs which find themselves on the registry are referred to as ‘NCOs carrying on functions of a foreign agent’. This registry is maintained by the Ministry of Justice. A raft of further legislative amendments and acts affecting NCOs were promulgated subsequently, but the most notable are the Federal Law on Measures of Influence of Persons Relating to Violation of Basic Human Rights and Freedoms

⁵ Russian Prime Minister Dmitry Medvedev just referred to Russian-Western relations as akin to a new Cold War: Sam Jones, ‘Dmitry Medvedev warns of “new cold war”’ *The Financial Times* (Munich, 13 February 2016) <http://www.ft.com/intl/cms/s/0/a14e8900-d259-11e5-829b-8564e7528e54.html#axzz40iYFWQqI> accessed 12 March 2016.

of Citizens of the Russian Federation in 2012, the Federal Law on Amendments to Certain Legislative Acts of the Russian Federation, which affects foreign and international NGOs and their partners in Russia (the Law on Undesirable Organizations) in 2014, and Federal Law on Amendments to Certain Legislative Acts of the Russian Federation also in 2014. The proliferation of these laws has been so rapid, and their locations in varying legislative sources so disparate, that it is difficult to list all of the ways in which they practically affect NCOs.⁶ Notwithstanding this, it can be stated with certainty that an NCO in receipt of any foreign funding is to be added to the ‘Foreign Agent’ registry, and that should an organisation be deemed ‘undesirable’ in the eyes of the Prosecutor General as a threat to national security, individuals participating in said organisation can be held liable to administrative and criminal penalties. However, the effect of addition to this registry was somewhat softened by the Federal Law of 8 March 2015, which delineated the procedure for removal from the list. Such steps include (i) not being in receipt of foreign funding or conducting political activities within 12 months prior to the application for removal; (ii) lack of foreign funding for 3 years in the case of an unplanned audit or inspection; and/or (iii) liquidation of the NCO.

Nevertheless, the crux of the legislation was the engagement of NCOs in ‘political activity’, a term which remained undefined up until January 2016. On 21 January 2016, the Russian Ministry of Justice posted a draft amendment to the NCO law, with a definition of ‘political activity’.⁷ While the list of specific activities vary, they satisfy the definition if they are carried out

in the area of state-building and of the basics of the constitutional order of the Russian Federation, federal governance of the Russian Federation, ensuring the sovereignty and territorial integrity of the Russian Federation, ensuring

⁶ For further detail on potential ramifications of the legal framework: <http://www.icnl.org/research/monitor/russia.html#glance> accessed 12 March 2016.

⁷ See <http://regulation.gov.ru/projects#npa=45477> accessed 12 March 2016.

lawfulness, law order, state and public security, national defence, foreign policy, the socio-economic and national development of the Russian Federation, the functioning of the political system, bodies of state power and of local governance, legal regulation of the rights and freedoms of a person and citizen, with the purpose to influence the development and implementation of state policy, and the establishment of state bodies, local governance bodies, their decisions, and actions.

Foreign NGOs and recipients of foreign funding are labelled ‘foreign agents’ (*innostranye agenti*), and are obliged to register as such publically, and mention same on all of their documentation and correspondence. ‘Foreign agent’ has distinctly negative connotations emanating from the Soviet era, when the term was commensurate to ‘traitor’ or ‘spy’. An action against the Foreign Agents law which forwarded this argument was rejected by the Russian Constitutional Court in April 2014.⁸

‘Political activity’ is crucial in defining whether an NCO qualifies as a ‘foreign agent’. The draft definition, however, is vague in the extreme, encapsulating any activity which can be categorised as ‘state building’. The vagueness of the definition, compounded by the negative connotations associated with being branded a ‘foreign agent’, will more than likely render it more difficult for NCOs to conduct work in Russia, and easier for the authorities to obstruct them. Furthermore, such a hostile working environment for NCOs invites a notable level of risk for the recipients of foreign funding.⁹

Regulation and oversight of civil society’s receipt of foreign capital is not a crime. On the contrary, such financial regulation and oversight, if carefully drafted and applied, can

⁸ ‘The Constitutional Court Makes Life Easier for “Foreign Agents”’ (*BBC*, 8 April 2014) http://www.bbc.com/russian/russia/2014/04/140408_ngo_constitutional_verdict accessed 12 March 2016.

⁹ ‘Human Rights NGO Attacked in Chechnya’ (*Meduza*, 3 June 2015) <https://meduza.io/en/news/2015/06/03/human-rights-ngo-attacked-in-chechnya> accessed 12 March 2016.

beneficially serve financial accounting and due diligence standards. It falls into broader debates about the legitimate extent of host country policy priorities, and the thornier and more divisive questions of national sovereignty.¹⁰ Further, it must be noted that overt Western funding of civil society, democratic movements, and grassroots political organisations over the years leading up to the promulgation of this legislation did also unnecessarily invite some of this hostility, as well as determined State policy.¹¹ However, it is submitted that the Russian legislative regime has overstepped the mark. The vagueness and negative connotations the legislation imposes on civil society merely lends itself to a stifling of legitimate activities and freedom of speech, rather than legitimately regulating civil society's receipt of funding and day-to-day activities. If it is accepted that one of the functions of Russian civil society from an outside perspective is as a vignette which reflects Russia's attitude towards and relationship with the West, then it bodes ill that the vice-grip is being gradually tightened on its civil society. An opportunity to effectively regulate civil society has been missed, but not permanently, it is hoped.

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Nicholas Liddane

¹⁰ Oonagh Breen, 'Allies or Adversaries? Foundation Responses to Government Policing of Cross-Border Charity' [2015] 17 International Journal of Not-for-Profit Law 1, 45.

¹¹ Sada Aksartova, 'Why NGOs? How American Donors Embraced Civil Society after the Cold War' [2006] 8(3) International Journal of Not-for-Profit Law http://www.icnl.org/research/journal/vol8iss3/special_4.htm accessed 12 March 2016.