Human Rights Law Clinic Papers 2016

THE ENJOYMENT BY HUMAN RIGHTS DEFENDERS OF THEIR RIGHT TO FREEDOM OF ASSOCIATION

To: Brian Griffey, Office for Democratic Institutions and Human Rights, Organization for Security and Co-operation in Europe

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Sussex Law School Human Rights Law Clinic

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Introduction

The importance of enforcing and protecting the right to freedom of association has been discussed in many fora. Human rights defenders have been identified as the main civil players that safeguard and influence the realization of democracy, the rule of law and human rights at the domestic level.[1] Securing their right to freedom of association is therefore necessary, to allow them to defend the most fundamental freedoms of citizens, in their role as key agents of change.[2]

To acknowledge the important role played by human rights defenders (HRDs), regional and international bodies have drafted political and legal documents to protect their right to freedom of association. The European Union (EU) developed the Guidelines on Human Rights Defenders;[3] the Organization for Security and Co-operation in Europe (OSCE) also developed guidelines as well as obligations for its participant States,[4] and the United Nations (UN) developed a Declaration on Human Rights Defenders,[5] and has provisions for the right to freedom of association in its key conventions.

Despite the general acceptance of the important role that HRDs play, there is a growing trend amongst States to limit HRDs' right to association through legislation that hinders their access to foreign funding or places burdensome administrative procedures that adversely affect operations.

This memorandum first provides background on the context that has contributed to the trend of limiting HRDs' right to freedom of association. Applicable laws and standards are then identified, alongside the permissible limitations to freedom of association enshrined in them. Two legislative trends enacted by states to limit freedom of association are then analyzed against the permissible limitations identified. The memorandum concludes with possible recommendations for the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) moving forward.

Background

In the EU Guidelines on Human Rights Defenders, HRDs are defined as: "individuals, groups and organs of society that promote and protect universally recognized human rights and fundamental freedoms".[6] This definition covers individuals like: students, lawyers, scholars and journalists, as well as international non-governmental organizations (INGOs), domestic non-governmental organizations (NGOs) and other social associations. For the purposes of

[1] Xenos, D. (2012). *The Issue of safety of media professionals and human rights defenders in the jurisprudence of the Human rights committee*, 11 Chinese Journal of International Law, 768, p. 783.

[2] Bennet, K. (2015). *European Union Guidelines on Human rights defenders: a review of policy and practice towards effective implementation*, 19(7) The International Journal of human rights, 908, p. 908.

[3] European Union Guidelines on Human Rights Defenders <https://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesDefenders.pdf> (accessed 26 March 2016)

[4] OSCE Guidelines for the protection of human rights defenders. (2014). <http://www.osce.org/odihr/119633?download=true> (accessed 4 February 2016). OSCE Guidelines on freedom of association. (2015). <http://www.osce.org/odihr/132371> (accessed 4 February 2016).

[5] UN Declaration on the Right and Responsibility of Individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms., adopted under General Assembly resolution 53/144 (1999).

[6] European Union Guidelines on Human Rights Defenders, op. cit., para 3.

this memorandum, the human rights defender groups that will be focused on are NGOs and associations.

The post 9/11, global environment has made the public attitude towards human rights more sceptical.[7] Furthermore, the current atmosphere has arguably weakened international criticism of questionable State practice implemented to ensure national security.[8] Several States (such as Russia, Tajikistan, Kyrgyzstan and Kazakhstan) are now following the trend of limiting civil society activity through oppressive legislation that limits foreign funding, to pursue national interests.[9]

In response to these growing trends, the Council of Europe's Committee of Ministers stated that: "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 institutions, individual donors, another state or multilateral agencies…".[10] In the jurisprudence of the UN Human Rights Committee, the Committee has stated that everyone shall have the right to freedom of association with others, and that the protection afforded by Article 22 of the International Covenant on Civil and Political Rights (ICCPR) extends to all the activities of an association, and that any restriction on the operation of an association must satisfy the requirements of Article 22(2).[11] Although the Committee has not yet specifically addressed matters related to limitations on funding for associations, it can be noted that the phrase "any restriction on the operation", encompasses all forms of limitations placed on associations, including the hindering of access to foreign funding and administration impediments.

Applicable law and standards

In lieu of the fact that the OSCE is built on a foundation of political consensus and cooperation, it is important to include both the political obligations that promote freedom of association, as well as the international legal standards, when identifying permissible limitations.

Political obligations of OSCE participating States

There is an underlining obligation for participating States to implement and respect the human dimension provisions that are enshrined in OSCE documents. This is enunciated comprehensively in the Paris 1990 document which states: "We declare our respect for human rights and fundamental freedoms to be irrevocable. We will fully implement and build upon the provisions relating to the human dimension of the OSCE".[12] Since there is political consensus on the obligation to implement, participating States are politically bound

[7] Hicks, N. (2005). *Problems confronting Human rights defenders: new pressure coming from states*, International Council on Human Rights Policy, 1, p. 2.

[8] Ibid, p. 3.

[9] Bennet, K. et al. (2015) *Critical perspectives on the security and protection of human rights defenders*, 19(7) The International Journal of Human Rights, 883, p. 886.

[10] Council of Europe, Committee of Ministers Rec 2007 14 (10 October 2007), Section IV (4).

[11] *Raisa Mikhailovskaya and Oleg Volchek v. Belarus*, Human Rights Committee Communication 1993/2010, UN Doc CCPR/C/111/d/1993/2010 (2014), para 7.2.

[12] OSCE Human Dimension Commitments Vol. 1. Thematic compilation. (12 November 2012). <http://www.osce.org/odihr/76894?download=true> (accessed 4 February 2016), Paris 1990, pg. 8.

to respect and uphold all human dimension obligations, including those of freedom of association.

The Paris 1990[13] document confirms the presence of freedom of association, while the Helsinki 2008 document[14] solidifies the right to association and also stipulates the parameters under which the right can be limited. Under this document, these limitations are to be provided by law, and should be in harmony with participating States' obligations under international law.[15]

Two sets of OSCE guidelines provide specific provisions on how States can fulfil their political obligation of promoting and protecting HRDs and their right to freely associate. Three requirements for the limitation to freedom of association are identified in both documents. Firstly, the limitation must be prescribed by law; secondly, it must serve a legitimate aim of either protecting public safety, health, morals or the rights of others, preventing crime, and promoting national security interests; and thirdly, it must be necessary in a democratic society.[16]

There is a reoccurring link to international law within the political framework of these documents that formalizes the obligation of the State and reinforces the international legal structure by promoting complementarity.

Legal frameworks: non-binding and binding

Non-binding

The right to peaceful association and assembly for everyone is enshrined in Article 20(1) of the UDHR.[17] From this starting point, both binding and non-binding instruments have been developed which have provisions that protect and endorse the freedom of association.

Article 13 of the UN Declaration on Human Rights Defenders asserts that: "everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the purpose of promoting and protecting human rights and fundamental freedoms, through peaceful means".[18] Article 17, however, introduces the limitations that can be placed on the right to association if specified requirements are met. These requirements are similar to those that are stipulated in the OSCE documents, as they state that the limitation needs to be in accordance with applicable international obligations, determined by law and solely for the purpose of: securing the rights and freedoms of others, meeting the just requirements of morality and public order, and the general welfare in a democratic society.[19]

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[13] The Charter of Paris for a new Europe. (1990). <https://www.oscepa.org/documents/all-documents/documents-1/historical-documents-1/673-1990-charter-of-paris-for-a-new-europe/file> (accessed 4 February 2016).

[14] Ministerial Declaration on the Occasion of the 60th Anniversary of the Universal Declaration of Human Rights, Helsinki. (2008). <http://www.osce.org/mc/35476?download=true> (accessed 4 February 2016).

[15] Helsinki. (2008), op. cit. p. 2.

[16] OSCE Guidelines for the protection of human rights defenders (2014), op. cit., p. 43.

[17] Universal Declaration on Human Rights, adopted under General Assembly resolution 217A (1948), Article 20(1).

[18] Declaration on Human Rights Defenders, adopted under General Assembly resolution 53/144 (1999), Article 13.

[19] Ibid, Article 17.

Binding

The core binding instruments that have substantial provisions on the right to association and its limitations are: the European Convention on Human Rights (ECHR); the Inter-American Convention on Human Rights (IACHR); and the ICCPR. Although the African Charter on Human and people's Rights has provisions for freedom of association in Article 10(1), it does not follow the structure of the other instruments, wherein rights-specific limits are identified. Article 27(2) of the African Charter instead provides general limitations for all rights under the Charter. Since the structure of the ECHR, IACHR and ICCPR are similar in this regard, and since there are no OSCE participating States that are parties to the African Charter, the focus of this section will be confined to the former instruments.

In all three instruments, the right to freedom of association is a qualified one, meaning that in some circumstances the right can be restricted. In Article 11(1) of the ECHR, Article 16(1) of the IACHR and Article 22(1) of the ICCPR, the right to freedom of association is established for everyone. In the second paragraph of each of those articles, the circumstances under which restrictions can be placed on this right are stated. In all three instruments limitation to the right of association can only be permitted when it is: prescribed by law; necessary in a democratic society; and serves a legitimate aim.

Prescribed by law

The meaning of being prescribed by law, is shown by the European Court of Human Rights (ECtHR) case of *Maestri v Italy*, where a judge had disciplinary proceedings instituted against him because of his membership of a masonic lodge that was allegedly in breach of Article 18 of Royal Legislative Decree no. 511.[20] The applicant argued that his rights under Article 11 of the ECHR had been breached. The Court found a violation of article 11, because the limitation was not prescribed by law, since the wording of the various laws and directives were not sufficiently clear to enable the applicant to realize that his membership of a Masonic lodge could lead to sanctions being imposed on him.[21] The Court's jurisprudence shows that the expression 'prescribed by law' does not only refer to the existence of legislation, it also transcends to whether the legislation is accessible and clear, so as to limit the risk of arbitrary application.

Necessary in a democratic society

The meaning of a limitation being 'necessary in a democratic society' is described in the jurisprudence of the European Court as a limiting action that meets a pressing social need and is proportionate.[22] In the case of *R (on the application of Barda) v Mayor of London*, the applicant, who was a demonstrator, applied for judicial review of a local authority's decision to erect fencing to protect the grassed area of the public square outside the House of Lords. He argued that this action violated his Article 11 rights. The pressing social need for limitation in this case was said to be to ensure that the rights of others who enjoy the square would not be affected by the demonstrations. In its ruling, the European Court deemed the actions of the local authority to be the definition of proportionate, because the

[20] *Maestri v Italy* (2004) 39 EHRR 832.
[21] Ibid, para 3.
[22] *R (on the application of Barda) v Mayor of London* (2016) 4 NLR 20.

limitations started off as light in the form of signs and rope to keep people off the grass, and only graduated to firmer control mechanisms, like arrests, when demonstrators were not taking heed to the restrictions.[23]

Necessary aim

Necessary aims for the limitation of the right to association are limited to the following reasons in all three instruments: national security interests, protection of public order and safety, protection of public health or morals and protection of the rights and freedoms of others.

Summary

The emerging requirements for any limitation of the right to freedom of association is that: the limitation must be prescribed by law, necessary in a democratic society, and thereby proportionate, and serve a legitimate aim. If a limitation checks all these boxes, it is legal; if it does not, it is in breach of internationally agreed upon standards.

Since the object of this brief is to assess the legislative trends of OSCE participating States against international standards - the ICCPR, as one of the most internationally ratified instruments, and the ECHR, as the regional instrument most common to a high number of States within the OSCE region – will be used in the analysis.

Analysis of the trends

There are several trends in the laws enacted by OSCE participating States to limit the ability of NGOs and associations to operate and access foreign funding. For the purpose of this memorandum, two trends are analysed: the establishment of 'foreign agent' laws; and the use of administrative laws to monitor and regulate NGO activity.

Foreign agent laws

The foreign agent laws that have been adopted within the OSCE region are said to have foundational links to the US Foreign Registration Act, which was enacted in 1938, to address pre-WW2 Nazi participation.[24] The Russian foreign agent law (N. 121 FZ) can be described as a more contemporary version of foreign agent laws. The law requires all non-commercial organizations (NCOs) who undertake "political" activities and who receive any monetary assets and property materials from foreign sources to register as foreign agents.[25] Failure to do so can lead to fines and dissolution of the entity.[26] The law defines foreign sources as: foreign States and their public authorities; international and foreign organizations; and foreign citizens.[27] The definition of political activity in this law has been repeatedly criticised

[23] Ibid, para 123.

[24] Venice Commission advisory opinion on Federal Law N. 121 FZ. CDL-AD 025. (2014). <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)025-e> (accessed 30 March 2016), p. 9.

[25] Venice Commission advisory opinion on Federal Law N. 121 FZ. CDL-AD 025. (2014)., op cit, para 44.

[26] Ibid, para 46.

for being too vague.[28] Federal law 1000884-6 was recently passed in the state Duma.[29] This law expands on the definition of political activity as including, inter alia: participating in the preparation and conduct of public events, meetings and demonstrations; participating in public discussions and presentations and Disseminating government decisions and policies using technology.[30] It can be ascertained that, if this law is enacted, its definition of political activity is still wide enough to apply to the activities of most associations operating within the territory.

The provisions of the Russian law have been adopted within draft legislation and proposals in other countries within the OSCE region, such as Kazakhstan, Moldova and Azerbaijan.[31] The Kyrgyz President illustrated this fact in a statement he made in December 2015, in which he stated his expectation that the draft foreign agent law that was currently pending in the Kyrgyz Parliament would be modelled on the Russian law or the US Foreign Registration Act that the former was based on.[32]

Clear, precise and accessible law

The previous section defined prescription by law to mean legislation or regulations that are accessible and precise. In the Venice Commission's 2014 opinion on the foreign agent law in Russia, the vagueness and broadness of what political activity meant was analyzed.[33] The Commission found that the vague framing of political activity provided a wide margin of discretion for state authorities, which in turn made it difficult for NCOs to know which specific actions could qualify as political activity.[34] The Commission found that, in such circumstances, the restriction on freedom of association could not be considered to be prescribed by law.[35]

Furthermore, the registration procedure is not clearly depicted in the provisions of the foreign agent law, and the specific authority that is responsible for the registration is not named.[36] Although a more detailed description of the procedure is provided in FZ-7, the provision allows the authorized state body to determine how to manage the state register

[27] Russian foreign agent law (N. 121 FZ) (as amended 21 February 2014) <http://ivo.garant.ru/#/document/70204242:0> (accessed 18 April 2016), para 6. Note that accessing updated versions of legislation was difficult; Google translate was used to access a more recent version of the law. Any phrasing issues within citations from this source are attributed to this.

[28] CommDH (2013)15, 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, 15 July 2013, par. 50-56; European Parliament Resolution of 13 June 2013 on the rule of law in Russia (2013/2667(RSP)). <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)025-e> (accessed 20 April 2016), para 4.

[29] ICNL Research Monitor. NGO Law Monitor; Russia. <http://www.icnl.org/research/monitor/russia.html> (accessed 20 April 2016).

[30] ICNL Research Monitor. NGO Law Monitor; op cit., cp.

[31] Dean Jackson, (2015). *Resurgent Dictatorship, The export of Russia's Foreign Agent Law*. <http://www.resurgentdictatorship.org/the-export-of-russias-foreign-agent-law/> (accessed 18th April 2016).

[32] The International Center for Not for profit Law, <http://www.icnl.org/research/monitor/kyrgyz.html> (accessed 16 March 2016).

[33] Venice Commission advisory opinion, op. cit., para 73.

[34] Ibid, para 81.

[35] Ibid.

[36] Ibid, para 50.

of foreign agent NCOs without allotting clear legal parameters for the process.[37] This lack of detail and clarity in the procedural component of these provisions leaves it open for the State to arbitrarily decide the duration and parameters of the process. Although the law is lacking in terms of procedural clarity, its provisions stipulate that NCOs which fail to apply for registration will be included in the registry by a competent authority.[38] This decision can be appealed in domestic courts.[39] It can be noted that the ability to appeal such decision provides only a superficial safeguard against arbitrary application, because decisions of Russian courts to date have been far from satisfactory in its dealings with foreign agent cases. The opinion of the International Commission of Jurists (ICJ) confirms this position in its trial observations on foreign agent cases in Russian courts. The ICJ found that the courts' consideration of these cases was beset with procedural flaws, leading to inconsistent and arbitrary decisions.[40] It further stated that the mixture of the vague terms of the legislation and the courts neglect of procedural protection may have led to breaches of the internationally protected rights to a fair hearing and to an effective remedy for NGOs concerned.[41]

The vague and unclear components of foreign agent laws shown thus far disqualify them from being prescribed by law under international standards. Furthermore, it can be stated that even Russia's new law that has been drafted to expand on the definition of political activity still maintains a wide range of general practices that can apply to most associations in the territory, leaving a wide margin for the state to identify 'political' associations.

Necessity and proportionality

A limitation that is necessary in a democratic society was described in the previous section as one that meets a pressing social need and is proportionate. The Venice Commission acknowledges that ensuring transparency of NGOs receiving funding from abroad in order to prevent them from being misused, for foreign political goals, can be considered to be "necessary in a democratic society".[42] It can be concluded, therefore, that a State's objective to protect its territory from potential harm is justified. The issue, however, emerges when their acts of limitation are not proportionate to the desired result. In other words, when more harm than necessary is enforced upon subjects through the act of limitation.

Although the foreign agent legislation in Russia does not stop NCOs from accessing foreign funding, it does isolate them from the rest of society, by highlighting their external affiliations. This in turn may hinder their work within society, as there would be an air of mistrust around the operations of the association.[43] It was reported that some homeless

[37] Federal Law of 1996, N7- FZ On Non-commercial Organisations, p. 10, <https://www.consultant.ru/document/cons_doc_LAW_8824/c59f84005a66a25f8fd3a50d2edba052ec705771/> (accessed 10 May 2016), para 10

[38] Venice Commission advisory opinion, op. cit., para 45.

[39] Russian foreign agent law (N. 121 FZ) (as amended 21 February 2014), op. cit., Article 32(7).

[40] International Commission of Jurists, 'Russian Federation: Court Proceedings in "Foreign Agents" Cases'. (2015). <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/Russian-Federation-NGO-Foreign-Agents-Publications-Trial-Observation-Report-2015-ENG.pdf> (accessed 26 March 2016), p. 30.

[41] Ibid, p. 30.

[42] Venice Commission advisory opinion, op. cit., para 58.

[43] CommDH (2013)15, op. cit., para 58.

people did not want support from representatives of a humanitarian NCO, because they did not want to be helped by foreign agents.[44] The consequences, therefore, of enforcing a limiting provision that requires all CSOs that access foreign funding to register as foreign agents is not proportionate to the original goal of the limitation, as the effects of it, result in organizations not being able to associate or operate within their communities.

The necessary aim for the restriction of funding under foreign agent laws is said to be for the protection of national security and public order through the prevention of money laundering and terrorist financing[45]. The Venice Commission addresses this issue by stating that however legitimate the aims may be, they should not be used as a pretext to control NGOs or restrict their ability to carry out their legitimate work, in defence of human rights.[46] It is difficult to prove that a State is using a legitimate aim as a pretext, but the jurisprudence of the Human Rights Committee in the case of *Vladimir Katsora, Leonid Sudalenko and Igor Nemkovich v Belarus* provides a means to determine the efficacy of a State's limitations by promoting the need for a State party to advance an argument to explain why the limitation of the right to association is necessary in the interests of the legitimate aims provided.[47]

State parties to the ICCPR have not effectively explained how registering NCOs as foreign agents is necessary to protecting national security or public order. No clear link has been made between NCOs and terrorist groups to highlight the necessity of this limitation. To satisfy the international standards of pursuing a legitimate aim, States such as Russia need to explain conclusively how limiting the funding of NCOs, and requiring them to register as foreign agents, is necessary to protecting the legitimate aims of national security and public order. A satisfactory explanation can be viewed as one that is backed up by clear evidence showing actual national security threats that have been championed by NCOs, to show that the risk of occurrence is real, which would in turn justify the legitimate aim.

Administrative laws

Administrative legislation is used by many States to monitor and control the operation of NGOs and associations within their territory. Article 24 of the Belarusian Law on Public Associations articulates this sentiment, as it solidifies the role of the department of Justice, and executive regulatory bodies, as one that ensures the presence of conformity between the activities of an association and domestic legislation.[48] The trend of adopting administrative laws is popular amongst States because it allows them to limit NGOs under the guise of coordinating the function of State departments and local institutions. As a key component of administrative legislation, associations are required to register with State authorities to be able to attain legal personality. States such as Azerbaijan, Belarus and Uzbekistan all have registration legislation for associations.

The registration process for all these States is long and bureaucratic. Under Cabinet Ministers' Resolution 543 of 2003 in Uzbekistan, associations have to submit inter alia, their

[44] Venice Commission advisory opinion, op cit., para. 67.
[45] Ibid., para. 68.
[46] Ibid., para. 67.
[47] *Vladimir Katsora, Leonid Sudalenko and Igor Nemkovish v Belarus*, Human Rights Committee Communication 1383/2005, UN Doc CCPR/ C/100/D/1383/2005 (2005).
[48] On Public Associations, Law of the Republic of Belarus, No.3252-XII of October 4, 1994, Article 24.

charter, by-laws, proof of payment of registration fee as well as a written declaration of funding sources to the Ministry of Justice.[49] If registration is approved within the two-month review period, associations are then required to provide annual reports to the registering body, which include information on the source and use of their funding, incoming and outgoing personnel, and implemented activities.[50] If the registering body however, makes a reasoned decision not to register an association after reviewing the documents submitted, the management of the association can appeal to domestic courts.[51]

In Azerbaijan, the Ministry of Justice has been identified as the relevant state authority to handle association registration.[52] Associations are required to submit inter alia, their charter, address details and proof of payment of state duty.[53] It has been noted under this study that unlike legislation in Uzbekistan, Azerbaijan's law on state registration and state registry of legal entities,[54] an extension of up to 30 days for review can be allotted to the state authority in "exceptional circumstances", if there is need for further checks.[55] It can be noted that the characteristics of an exceptional circumstance are not provided in the law, giving the state authority a wide margin of discretion to determine what an exceptional circumstances is. Similar to the legislation in Uzbekistan, however, the 2013 amendments to the law on NGOs also requires an association to include details of the source of grant donations and expenditures in the annual report sent to the registering authority.[56] In the case of Azerbaijan, registration can be rejected, however, if the documents submitted contradict the Constitution.[57] Associations can resubmit their application after addressing deficiencies raised. They can also lodge a complaint on a decision with the domestic courts.[58]

Under the Law on Public Associations of Belarus, local associations are required to register with the department of justice.[59] Associations have to submit, inter alia, their statute, proof of payment of registration fees and list of founders.[60] The state registration authority has a month to review their application. Registration can either be approved, postponed or refused. Postponement results if amendments to the statute are needed, or if there was a

[49] Cabinet Ministers Resolution 543, Uzbekistan, 11 December 2003, Article 3.
[50] Ibid, para 26.
[51] Ibid, Article 8.
[52] Decree of the President of the Azerbaijan Republic on implementation of the law of the Azerbaijan republic "on non-governmental organizations (social communities and foundations**).** **(**2000) <http://www.legislationline.org/documents/action/popup/id/6476> (accessed 20 April 2016).
[53] Law of the Republic of Azerbaijan On state registration and state registry of legal entities, № 560-IIG. (2003) <http://www.azpromo.az/uploads/legislation/Law_on_registration_of_legal_entities-eng_51b1e3b6b2ceb.pdf>, (accessed 20 April 2016), Article 5.
[54] Ibid.
[55] Ibid, Article 8.2.
[56] Venice Commission advisory opinion on amendments to the law on Non-governmental organisation in Azerbaijan (2014). <www.legislationline.org/topics/country/43/topic/1/subtopic/18>, (accessed 20 April 2016), para 5.
[57] Law of the Azerbaijan Republic On Non-Governmental Organizations (Public Organizations and Funds) (2000). <http://www.legislationline.org/documents/action/popup/id/6475> (accessed 16 March 2016), Article 17.
[58] Ibid, Article 17.
[59] Law of The Republic of Belarus on Public Associations *As amended on July 19, 2005.* (2005) <http://www.legislationline.org/documents/action/popup/id/6405> (accessed 16 March 2016), Article 13.
[60] Ibid, Article 13.

violation to the creation order.[61] Refusal is made in the case of, inter alia, violation of established creation order, if the violation has an "irremovable nature".[62] It can be argued that the quality of this provision, does not allow associations to foresee the violations that will lead to their application being refused, since a violation that has "irremovable nature" is not defined in the law. Associations can however, appeal decisions of the state authority under domestic courts.[63]

In some participating states, including Belarus, Azerbaijan and Uzbekistan, if associations are registered, but found to be in violation of domestic legislation during state monitoring activities, they can be subject to warning letters, suspension or liquidation. This processes is displayed comprehensively in the case of *Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan*, where a state authority made a request for the liquidation of an association to the district court after monitoring activities showed that the association's charter was not in line with domestic law and all three state issued warning were ignored. It can be noted that the European Court's judgment in this case, serves as a useful tool for identifying the legality and permissible limitations of state monitoring. The following section will look at the judgment in more detail.

Clear, precise and accessible law

In European practice, registration of NGOs is a formal legal act, allowing them to acquire legal personality and thus become capable of possessing rights and obligations.[64] Legal personality can therefore be seen as an element that ensures the effective implementation of activities, as it opens up opportunities for an association. In some countries like Azerbaijan, affiliates of foreign legal entities can only operate when they have registered.[65] In this case therefore, registration is a prerequisite to operation. Whether registration is required or not, it has been noted under this study, that associations are able to operate more effectively when they have access to the opportunities that come with legal personality.

The different aspects of the administrative laws that have been described leave a wide margin of discretion to State authorities to affect and influence association registration. It can be noted that the "exceptional circumstances" that provide a review time extension to state registration bodies in Azerbaijan, and the violations of "irremovable nature" that warrant registration refusal in Belarus, do not provide enough guidance for associations to foresee the consequences of certain administrative errors. The vague nature of these administrative provisions leaves it open for state authorities to decide the circumstances around registration. Since the law is not precise, exceptional circumstances can apply to any association and situation. This poses a risk to local associations, as well as ones that have funding affiliations with foreign sources, as the state can arbitrarily apply the law to their situation. This may result in extended delays in registration, which may in turn limit the

[61] Law of The Republic of Belarus on Public Associations *as amended on July 19, 2005.* (2005), op cit., Article 15.
[62] Ibid, Article 15.
[63] Ibid, Article 15.
[64] Report by OSCE: Problems of NGO Registration in Azerbaijan - a Survey Summary of Findings. <http://www.osce.org/baku/42386?download=true> (accessed 20 April 2015), p. 4.
[65] Law of the Republic of Azerbaijan On state registration and state registry of legal entities, op. cit., Article 4.1.

operations of associations as they would not have legal personality. Furthermore, for foreign affiliated associations that need registration as a pre requisite for operation, postponement and refusal hinder their operation completely.

In the European Court judgment of *Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan*, the Court affirmed States' right to satisfy themselves as to whether the activities and aims of an association are in conformity with the rules in their legislation, but cautioned that this must be done in a manner compatible with their obligations under the Convention.[66] The Court went on to say that for domestic law to meet the requirement of being prescribed by law, it must afford a measure of legal protection against arbitrary interference from public authorities, by having provisions that indicate with sufficient clarity the scope of any discretion and the manner of its exercise.[67]

The Court found that the domestic law did provide for the states use of the warnings sent to the association, but noted that the provisions of the NGO act were far from being precise on what could be a basis for a warning that could lead to dissolution.[68] This rendered it difficult for the association to foresee which specific actions could be qualified as "incompatible with the objectives" of the NGO Act.[69]

Although the existence and presence of administrative laws cannot be faulted, the discretion that they often provide to State authorities, creates the opportunity for them to be arbitrarily applied. It can be held that the administrative provisions that have been supplied to describe the registration, monitoring and liquidation processes, do not indicate with sufficient clarity the scope of any discretions and the manner of their exercise. As a result, states are free to arbitrarily apply components to their monitoring, interfere with the internal workings of an association and determine violations to the law arbitrarily.[70] Using the viewpoint of the European Court, it can be ascertained that because of this, the registration and monitoring limitations framed within these laws are not prescribed by law under international standards.

Necessity and proportionality

As previously stated, a limitation that is necessary in a democratic society is one that meets a pressing social need and is proportionate. The need to monitor and ensure that associations are operating in line with domestic legislation was recognised as a pressing need in Azerbaijan's submission for the *Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan case.*[71] Similar to the foreign agent laws, as much as the social need may exist, the limitations imposed, are not proportionate to the desired aim. The need to monitor and protect public order does not justify the arbitrary application of components of administrative laws.

The legitimate aim of protecting public order and the rights of others have been accepted as valid aims to justify the limitations within administrative laws.[72] Following the argument put

[66] *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* (2009) ECHR 1473, para. 52.
[67] Ibid, para 57.
[68] Ibid, para 61.
[69] Ibid, para 61.
[70] Ibid, para 77-78.
[71] *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* (2009). op cit., para 47.
[72] Ibid, para 66.

forward for the legitimate aims of foreign agent laws, and in accordance with the human rights committee's opinion, it is important for States to not only mention the aims, but also advance an argument to explain why the limitation is necessary. Even though the aims of these laws may be necessary under international law, States still need to be proportionate with their limitations and clearly explain why they are necessary. It can be noted that a satisfactory explanation of necessity would include not only evidence to depict the need, but also jurisprudence from domestic bodies that shows proportionality in the action of the state in related cases.

Recommendations

To assist ODIHR in ensuring that participating States' legislation is in line with permissible limitations, the following recommendations are made.

Complimentary checklist for the Guidelines on the Protection of Human Right Defenders

The Guidelines encourage States to review and repeal any provisions that are vague, and thus promote broad interpretation.[73] To build on this foundation, it is recommended that a minimum standards checklist be created to be used alongside the guidelines to assist with ODIHR's internal monitoring of State compliance. This checklist could include the following requirements:

To address arbitrary application of limitations:

- Presence of clear registration procedures;
- Presence of review timeframes for State registration authorities that are not unduly lengthy;
- Presence of response timeframes for communication between associations and registering authorities; and
- Presence of minimum safeguards for State monitoring of funds and activities, including clear monitoring and site visit procedures.

To address proportionality and necessity of limitations

- Presence of a range of sanctions and not just liquidation of an association; and
- Presence of executive summaries that provide clear and strong evidence to show the existence of real threats to national security, or other justifiable objectives in a democratic society, for further justification of the legitimate aims of limitations. This information can help regional courts build on their jurisprudence on the proportionality of state limitations, as it provides knowledge of domestic context.

Institutional initiatives

ODIHR may also consider organising a regional HRDs conference or include a focus on HRDs protection within its annual Human Dimension Implementation Meetings. Interactive sessions between State representatives and defenders, may help to humanize themselves in each other's eyes for better working relations.

[73] OSCE Guidelines for the protection of human rights defenders, op. cit., para 25.

ODIHR may also consider using key domestic social structures such as public figures and social entities to endorse and encourage the work of HRDs. Public support can provide a majority voice that would help to hold the State accountable for any limitations put on HRDs, thus creating a more enabling environment.