

AMICUS CURIAE BRIEF FOR GEORGIAN CONSTITUTIONAL COURT

By Professors Fernanda G. Nicola and Günter Frankenberg

In Cases:

1. Constitutional Complaint # 1828  
The President of Georgia v. the Parliament of Georgia
2. Constitutional Complaint #1829  
NNLE “The Institute for Development of Freedom of Information”, NNLE “Rights Georgia”,  
NNLE “Civil Society Foundation” and others (122 complainants) v. The Parliament of  
Georgia
3. Constitutional Complaint #1834  
Members of the Parliament of Georgia: Tamar Kordzaia, Ana Natsvlishvili, Levan Bezashvili  
and others (38 Member) v. the Parliament of Georgia

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## **1. Identity and Interest**

Professor Fernanda G. Nicola is a tenured Professor at American University Washington College of Law, and she is the Director of the Program for International Organizations, Law and Development. As an independent scholar and an expert in Comparative law and European Union Law, she works as a consultant for several International and Civil society organizations committed to the advancement of the rule of law and the protection of human rights in countries in transition. Her interest in Freedom of Expression and Media Pluralism stems from her expertise in litigation before the European Court of Justice and the European Court of Human Rights, where she has worked to protect these fundamental rights. She has utilized her comparative law expertise to analyze the implementation of various Foreign Agents Registration Laws across different countries and how to challenge them before European courts. Her research highlights that, beyond the purported goals of promoting transparency and protecting national sovereignty, these laws often create chilling effects on free speech for individuals and civil society organizations in violation of their fundamental and due process rights.

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individuals and civil society organizations from unlawful governmental interference and the chilling effects caused thereby.

## 2. Introduction

The Law on Transparency of Foreign Influence (hereinafter “the Law”) is an overt transfer from the Russian law, the Kyrgyzstan and Hungarian laws targeting civil society members with chilling effects for freedom of speech, information and association.<sup>1</sup> The law requires organizations receiving more than 20% of their funding from other countries must register as “organizations serving the interests of a foreign power.” This very low threshold stigmatizes and imposes a disproportionate and burdensome registration requirement on civil society and media organizations. The law is not only in violation of the fundamental rights of free speech, association and privacy protected by International and European conventions to which Georgia is a signatory member but more fundamentally in violation of Georgian constitutional law provisions contained in Articles 15, 17, 22 and 78 that conform to the comparative constitutional standards in many jurisdictions around the world. The Law represents a transfer from democracy to authoritarianism.<sup>2</sup>

Article 15 of the Constitution of Georgia aims to protect the inviolability of the private life. The mention of “private life” emphasizes the interest in safeguarding the privacy of personal correspondence, of the home and workplace. In general, personal life implies the existence of a private sphere of an individual’s life and development, the right of a person to determine one’s own place, attitude, and connection with the outside world independently of the state and society, as well as the ability to form and develop relationships with other people and exchange and share information and opinions with them.<sup>3</sup> Privacy is recognized in international and European documents as well as numerous national constitutions as a necessary condition of human dignity.

The first paragraph of Article 17 of the Constitution of Georgia protects the freedom of opinion and its expression and declares that it is inadmissible to persecute a person because of his opinion and its expression. Paragraph 2 of the same article protects the right to receive and

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<sup>1</sup> For a definition of legal transfer and how the law travels see FERNANDA G. NICOLA AND GÜNTER FRANKENBERG, *COMPARATIVE LAW: INTRODUCTION TO A CRITICAL PRACTICE* (Edward Elgar, 2024)

<sup>2</sup> For a definition of authoritarianism see GÜNTER FRANKENBERG, *AUTHORITARIANISM: CONSTITUTIONAL PERSPECTIVES* (Edward Elgar, 2021)

<sup>3</sup> Judgment N3/14/1687 of the Constitutional Court of Georgia dated November 4, 2022, Giorgi Mikeladze against the Parliament of Georgia and the Independent Council of the Higher School of Justice of Georgia, available at <https://constcourt.ge/ka/judicial-acts?legal=14430>.

disseminate information freely. According to the practice of the Constitutional Court of Georgia, “the right protected by [Article 17] of the Constitution of Georgia experiences a ‘chilling effect’ if a person, fearing the expected sanction, is forced to refrain from fully exercising the right, and self-restriction affects the normatively unrestricted part of freedom of expression as well.”<sup>4</sup>

According to the Constitutional Court of Georgia, “[f]reedom of information and expression is related to the principle of democracy because, in conditions of information vacuum and restriction of opinion, the existence of a democratic society and the viability of a democratic constitutional-legal order is unthinkable.”<sup>5</sup> Unrestricted sharing of opinions and information promotes diverse viewpoints, encourages informed public discussion on important issues, and allows every member of society to participate in public life.<sup>6</sup> Freedom of expression is the basis of a democratic society. Without the proper provision of this right, it is practically impossible to fully realize other rights. The state cannot be successful without a free and independent media, whose main function is to inform the public and promote discussion of important issues. The degree of freedom of expression determines the level of freedom and democracy in the country or society.<sup>7</sup>

The right protected by Article 22 of the Constitution of Georgia is directly related to a person’s involvement in public life. Man, by his essence, is not only a free, but also a social being, whose inner need is to communicate with others. “Human freedom is not freedom from society; it is freedom in a society where many congruent or conflicting interests exist and intersect. Freedom of association ensures the self-realization of a person in association with other people and social groups.”<sup>8</sup> “The most important function of the first paragraph of Article 22 of the

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<sup>4</sup> Decision N2/2/516,542 of the Constitutional Court of Georgia dated May 14, 2013, II.P.8.

<sup>5</sup> Decision N2/2-389 of the Constitutional Court of Georgia dated October 26, 2007, in the case of Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia. P.II.4; Decision N2/482,483,487,502 of the Constitutional Court of Georgia dated April 18, 2011, political union of citizens “Movement for United Georgia”, political union of citizens “Conservative Party of Georgia”, citizens of Georgia - Zviad Dzidziguri and Kakha Kukava, Association of Young Lawyers of Georgia, citizens Dachi Tsaguria and Jaba Jishkariani, Public Defender of Georgia against the Parliament of Georgia, II.P.25

<sup>6</sup> Decision N1/1/468 of the Constitutional Court of Georgia dated April 11, 2012, II.P.26.

<sup>7</sup> Decision N1/3/421,422 of the Constitutional Court of Georgia dated November 10, 2009, in the case Citizens of Georgia – Giorgi Kifiani and Avtandil Ungiadze vs. Parliament of Georgia, II.P.6.

<sup>8</sup> Decision N2/2/439 of the Constitutional Court of Georgia dated September 15, 2009, Decision on the case of Georgian citizen Omar Alafishvili of Georgia Against Parliament, II.P.2, available at <https://constcourt.ge/ka/judicial-acts?legal=375>.

Constitution is to ensure the creation and functioning of free social groups by persons with a sense of civic responsibility in a democratic society.”<sup>9</sup> Freedom of association is given great importance not only as a fundamental human right. In terms of guaranteeing, but also in terms of forming a democratic and free society and state. Freedom of association has an important function for the integration of a person in a democratic society and the formation of his awareness of civil responsibility. “Not only the process of creating and joining the association is protected, but also various aspects related to the existence and functioning of the association, such as choosing the purpose, organizing activities, making decisions, remaining a member of the association, association liquidation, etc.”<sup>10</sup>

Article 78 of the Constitution of Georgia declares that “[t]he constitutional bodies shall take all measures within the scope of their competences to ensure the full integration of Georgia into the European Union and the North Atlantic Treaty Organization.” In 2014, Georgia signed an Association Agreement with European Union and received the agenda to follow with. In 2023 as a candidate-state received the action plan with nine steps. The restrictions imposed on non-governmental organizations and media by the contested law do not comply with the ninth step defined by the European Commission and the Association Agreement. Since these two documents are crucial for Georgia’s integration into the European Union, the Georgian Law on Transparency of Foreign Influence contradicts Article 78 of the Constitution. The Constitutional Court of Georgia (N3/1/1797), the Constitutional Court evaluated the mentioned constitutional provision and pointed out that “[Article 78] only obliges the constitutional bodies ‘within their powers’ to take all measures against the European Union and to ensure the full integration of Georgia in the North Atlantic Treaty Organization.” Article 78 aims at both forms of integration—such as the status of a candidate country or an associated country in the European Union—and full integration, which implies full membership in the organization. The disputed law contradicts Georgia’s membership in the EU and NATO, thus violating Article 78 of the Constitution of Georgia.

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<sup>9</sup> *Id.* II.P.4.

<sup>10</sup> *Id.* II.P.8–9.

### **3. Reasons for Annuling the Law**

#### **3.1 Constitutional Law Arguments based on the Georgian Constitution**

The President of Georgia, the 38 members of Georgian Parliament and 122 organizations, including media, separately applied to the Constitutional Court of Georgia. The plaintiffs are asking the court to declare the law unconstitutional.

In the first case, the plaintiff, the President of Georgia, has challenged the Law, declaring that it violates Articles 12, 15, 17, 22, and 78.<sup>11</sup> According to the complaint, the disputed law includes an obligation for the civil society and media to register in the registry of organizations carrying the interests of a foreign power forces organizations and media to register in the registry only because 20% of their income comes from international donor organizations. The law labels and stigmatizes civil society organizations and media, naming them as organizations carrying the interests of a foreign power and forcing them to register, which violates the Freedom of Expression (Article 17) and Freedom of Association (Article 22). The President of Georgia has declared that the disputed law allows the Ministry of Justice to inspect and monitor organizations and media, request, use, and share all information they have without contest, including information about individuals' private lives and special category information. It violates Articles 12 and 15 of the Georgian Constitution, as it allows for the persecution and charging of organizations/individuals that refuse to comply with information requests. Furthermore, the plaintiff argues that the contested law impacts Georgia's European future and creates barriers to becoming a member of the EU. The international community has persuaded the Georgian government not to implement this law, as it contradicts European and international standards and undermines Georgia's integration into the European Union and NATO. It violates Article 78 of the Georgian Constitution, which requires constitutional bodies to take measures within their authority to ensure Georgia's full integration into the EU and NATO.

In a second case, 122 organizations and media have challenged the Parliament of Georgia, arguing that the disputed law violates Articles 17 and 22 of the Georgian Constitution. They claim that the Law has stigmatizing, insulting, and damaging effects on business reputations.

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<sup>11</sup> The Constitution of Georgia, 1995, available at <https://matsne.gov.ge/en/document/view/30346?publication=36>.

They believe that the Law’s legal process, which involves forced registration in a stigmatizing registry and operating under an offensive label, does not eliminate associated risks, thereby violating the Freedom of Expression and Freedom of Association. The monitoring mechanism, frequency of monitoring, and broad rights of the Ministry of Justice violates human rights. The law also requires the immediate provision of information requested by the Ministry of Justice during inspections without protecting specific groups or types of information or setting content limits. Additionally, the Law does not ensure existing information security for media organizations, affecting their activities and ability to access important information. Organizations are unable to refuse information requests, and refusal may result in a significant fine, with only a limited right of appeal to the Court.

Furthermore, the Law is retroactive, causing the plaintiff to believe that the disputed norms have a “chilling effect” on fully realizing the freedom of expression for Georgian civil organizations and media. The norms discredit Georgian civil organizations by assigning the label “organization carrying the interests of a foreign power,” effectively excluding the conduct of their activities without such a label and discrediting legitimate, constitutionally protected activities, which is the real purpose of the disputed law.

As third plaintiffs the 38 members of the Parliament of Georgia applied to the Constitutional Court and requested to declare the Law in controversial to the Constitution Articles 22 and 78. Authors of the complaint are arguing that with the adoption of the law and its future implementation, the process of associating Georgia with the European Union is in danger and facing inevitable damage.<sup>12</sup> The restrictive law imposed on non-governmental organizations and the media does not meet the 9th step defined by the European Commission, an essential precondition for Georgia’s integration with the European Union. Contrary to Article 78 of the Georgian constitution, the Georgian authorities, by adopting the disputed law, damaged the process of associating Georgia with the European Union, thereby violating Article 78 of the Constitution.<sup>13</sup>

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<sup>12</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, at 7, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2014:261:FULL&from=EN>.

<sup>13</sup> Action Plan of Georgia to address the steps defined in the European Commission Communication of November 8, 2023, adopted by the State Commission on EU Integration on November 27, 2023, available at [https://www.gov.ge/files/288\\_86887\\_447978\\_EU\\_9StepAP-revisedDec2023.pdf](https://www.gov.ge/files/288_86887_447978_EU_9StepAP-revisedDec2023.pdf).



### 3.2 International Law Arguments

The recently adopted Georgian Law on Transparency of Foreign Investment<sup>14</sup> represents a clear violation of the fundamental rights enshrined in international human rights Convention to which Georgia is a signatory state. Specifically, this law infringes upon Article 19 of the Universal Declaration of Human Rights (UDHR), which guarantees everyone the right to freedom of opinion and expression.<sup>15</sup> This right enshrined in Article 19 includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media, regardless of frontiers. By imposing restrictive measures on non-governmental organizations (NGOs) and media outlets, the Georgian law poses significant challenges to these freedoms, thereby undermining democratic principles.

Georgia's commitment to international human rights obligations is further solidified by its status as a Member State of the Council of Europe and signatory to the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>16</sup> The Venice Commission, a respected advisory body on constitutional matters in the Council of Europe, emphasized in its recent opinion on the Georgian law that freedom of association is a cornerstone of a vibrant, pluralistic, and participatory democracy.<sup>17</sup> Civil society organizations play an indispensable role in fostering democratic discourse, holding governments accountable, and ensuring the protection of human rights. The new Georgian law threatens to stigmatize these organizations by requiring those that receive more than 20% of their funding from foreign sources to register as entities “pursuing the interest of a foreign power.”<sup>18</sup>

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<sup>14</sup> Law on Transparency of Foreign Influence of Georgia, adopted on May 28, 2024. English translation of draft law available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2024\)021-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2024)021-e).

<sup>15</sup> G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2019,media%20and%20regardless%20of%20frontiers>.

<sup>16</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, 213 U.N.T.S. 221 (Georgia ratified on May 20, 1999); International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (Georgia acceded on May 3, 1994).

<sup>17</sup> Council of Europe. Georgia: Urgent Opinion on the Law on Transparency of Foreign Influence (2024), available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2024\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2024)013-e).

<sup>18</sup> *Id.* at 13.

The Venice Commission has identified fundamental flaws in the Georgian legislation, noting that it presupposes that any entity receiving foreign support will act in the interest of the foreign supporter. This assumption is both unfounded and harmful, as it creates a stigmatizing effect on NGOs and media outlets.<sup>19</sup> Such a perception undermines their credibility and hampers their ability to operate freely and effectively. The Commission has also warned that the law could be used by the government to limit the capacity of NGOs to scrutinize government actions, especially during critical periods such as campaigns and elections.

Moreover, the requirement for NGOs and media outlets to register under this law imposes an undue burden, potentially leading to self-censorship and a reduction in the diversity of voices and opinions in the public sphere. The stigmatizing effects of this law go against the principles of a free and open society, where the exchange of ideas and information is essential for democratic governance and the protection of human rights. This requirement will cause unmitigated stigmatizing rhetoric to ensue for all NGO's and media outlets that rely on some source of foreign funding. The effect of this will inevitably be a government that is able to censor its media.

In conclusion, the Georgian Law on Transparency of Foreign Investment contravenes Article 19 of the UDHR and Articles 8, 10, and 11 of the ECHR and thus poses serious threats to the freedoms of association and expression. The Law stigmatizes civil society organizations and media outlets, undermines their critical role in democracy, and could be exploited to suppress dissent and limit governmental accountability. Georgia must reconsider this legislation to align with its international human rights obligations, the protection of free speech, freedom of association and media pluralism and to ensure the continued vibrancy of its democratic society.

### **3.3 Membership of the Council of Europe & European Convention of Human Rights**

It is universally acknowledged that freedom of expression is not an absolute right. International and regional human rights treaties allow for certain degrees of state interference and restrictions, provided they are necessary to protect other fundamental rights or values, whether individual—such as privacy, honor, or intellectual property—or collective, like democracy,

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<sup>19</sup> *Id.* at 11.

public order, public security, and peace. In any legal system, courts are entrusted with the challenging task of balancing these interests, which can lead to varying outcomes across different jurisdictions, particularly concerning the proportionality test. The case of the Russian Foreign Agents Act provides a pertinent parallel to the current Georgian foreign agent law in which the European Court of Human Rights (ECtHR) jurisprudence applies such important balancing through a proportionality analysis. Enacted in 2012, the Russian law required NGOs receiving foreign funding and engaged in “political activity” to register as “foreign agents,” under threat of administrative and criminal sanctions. Like the Georgian law, the Russian legislation imposed extensive reporting and labelling requirements, severely hindering the operations of NGOs.

In the June 27, 2014, Venice Commission opinion, it was concluded that the Russian law was in violation of Articles 10 and 11 of the ECHR. Article 10 states that everyone has the right to freedom of expression and that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. Article 11 states that everyone has the right to freedom of association with others and that no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. The Russian law violated both these articles and ended up stigmatizing civil society groups by using defamatory terminology through broad, vague definitions of “political activity” and “foreign funding” thus creating chilling effects. Excessively broad provisions can lend themselves to discriminatory interpretation and unjustified restrictions on the right to freedom of expression, which is in violation of Art. 10 of the ECHR.

Further, the foreign agent legislation amounted to unforeseeable and excessive restrictions upon the freedom of association and press enumerated in Articles 10 and 11 of the ECHR. The court found that there were not adequate or effective safeguards against the discriminatory exercise of wide discretion used by the government in deciding how to define “foreign funding” and “political activities” and thus this constituted an Article 11 violation. The Venice Commission noted that these measures unjustifiably hampered the activities of NGOs

operating in the fields of human rights, democracy, and the rule of law, and called for a reconsideration of the special regime established by the law.<sup>20</sup>

More recently, the European Court of Human Rights (ECHR) held in 2024 that the Russian Foreign Agents Act failed to meet foreseeability requirements and provided inadequate safeguards against arbitrary and discriminatory enforcement.<sup>21</sup> The Court emphasized that the law's vague definitions and broad interpretations by the authorities resulted in a negative effect on the activities of NGOs, forcing them to choose between accepting foreign funding with burdensome requirements or limiting their operations due to insufficient domestic funding. The ECHR concluded that the interference was neither "prescribed by law" nor "necessary in a democratic society," highlighting the disproportionate and unjustified restrictions imposed on NGOs.<sup>22</sup> The court examined whether this government interference was necessary in a democratic society and whether it furthered a legitimate aim. It determined that the new foreign agent status of organizations restricted the organization's ability to participate in public life and to carry out activities as they had prior to the law's enactment. The government has claimed that their legitimate aim for the new law was to increase transparency in respect to foreign funding. However, the court found that the means used by the government surpassed proportional means and thus the interference was not necessary in a democratic society.

Applying these findings about the Russian Foreign Agents Act to the Georgian context, it is evident that the new law in Georgia similarly risks stigmatizing and undermining NGOs and media outlets. The Transparency of Foreign Influence Law, like the Russian law, requires certain NGO's and media outlets to register as organizations "pursuing the interest of a foreign power". Much like the Russian law this has a stigmatizing effect on NGO's and media outlets that impacts freedom of association.

By presuming that any foreign-funded entity acts in the interest of a foreign power, the law fosters an environment of suspicion and distrust that creates a chilling effect for civil society, media outlets and freedom of expression more generally. This not only damages the reputation

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<sup>20</sup> Opinion on Federal Law N. 121-FZ on Noncommercial 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, CDL-AD(2014)025, Venice Commission (2014).

<sup>21</sup> *Ecodefence and others v. Russia*, App. Nos. 9988/13 and 60 others (June 14, 2022), available at <https://hudoc.echr.coe.int/fre?i=001-217751>.

<sup>22</sup> *Id.* at para 113.

of NGOs but also impedes their ability to function effectively when they are criticizing the government. The extensive reporting and labelling requirements, along with the threat of administrative and criminal sanctions created by the Georgian law, place undue burdens on these organizations, diverting valuable resources away from their core activities and discouraging engagement in politically or socially sensitive issues.

Furthermore, the Georgian law's potential to limit NGOs' capacity to scrutinize government actions during campaigns and elections poses a direct threat to democratic governance. Free press is essential for holding authorities accountable and ensuring transparent and fair electoral processes. By stifling these critical voices, the law undermines the democratic fabric of Georgian society and violates Articles 10 and 11 of the ECHR.

Additionally, the Georgian law has privacy implications that have the potential to impact many citizens' private lives. Once an organization registers with the government, all of the information the organization has becomes public. This could include information about taxes and medical history. This constitutes a tremendous violation of Article 8 of the ECHR, which states that everyone has the right to respect for their private and family life, home and correspondence.

In conclusion, the new Georgian Law on Transparency of Foreign Investment is contrary to Article 19 of the UDHR and poses serious threats to the freedoms of association and expression. It stigmatizes NGOs and media outlets, undermines their critical role in democracy, and could be exploited to suppress dissent and limit governmental accountability. The experience of the Russian Foreign Agents Act provides a stark warning of the negative consequences such legislation can have on civil society. Georgia must reconsider this legislation in order to align with its international human rights obligations and to ensure its democratic society.

### **3.4 The Transfer of Unconstitutional Laws on Foreign Influence**

The Georgian law is not a novelty, as other authoritarian governments both inside (Hungary) and outside the European Union have previously passed (Kyrgyzstan) or are in the process of passing (Venezuela) similar laws with chilling effects before elections. These laws aim to limit

free speech, the right to receive information, and the freedom of association for civil society organizations that hold different perspectives from the government; they are earmarked as laws of authoritarian regimes.<sup>23</sup>

In December 2023 the Hungarian Parliament adopted the Protection of National Sovereignty Law was adopted by the Hungarian Parliament and by February 2024 the government had designated an office for its enforcement with the mandate to carry out a variety of different activities aiming to protect national sovereignty. The Sovereignty Protection Office (SPO) was established as a new agency tasked with investigating activities conducted in the interest of another state, foreign body, organization, or individual if these activities are likely to violate or jeopardize Hungary's sovereignty. The SPO also targets organizations whose activities, funded by foreign sources, may influence the outcome of elections or the will of voters.

Though it may not impose sanctions *per se* the SPO, while enforcing the Protection of National Sovereignty Law may resort to publishing libelous reports in which it publicly labels those who violate the law as “non-compliant”, and it may suggest summoning the leadership of such violators before the Parliament’s Committee on National Security. Under this Law, the government has the power to investigate and identify organizations that have received foreign funding aimed to influence voters, but individuals and organizations are not required to register. Without exceptions, nearly all individuals and legal entities, except for the members of the diplomatic corps, can be investigated regarding foreign influence and foreign funding. Individuals and organizations that are “named and shamed” are not entitled to due process or transparency surrounding the investigation and may not appeal against defaming assertions.

The Protection of National Sovereignty Law makes it a criminal offense for candidates, political parties and associations participating in elections from using foreign funding to influence or attempt to influence the will of voters for the elections in question. Not surprisingly, this law was strategically adopted right before the European Parliament elections on June 2024. In its timely opinion on this law in March 2024, the Venice Commission articulated serious criticism resulting from the failure to “provide sufficient guarantees of the [Sovereignty Protection] Office’s independence”, so that this administrative organ fully

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<sup>23</sup> *Hungary’s Sovereignty Protection Act is the Orbán government’s latest attack on pluralism*, Heinrich Böll Foundation (Dec. 18, 2023), <https://cz.boell.org/en/2023/12/18/hungarys-sovereignty-protection-act-eu>.

controlled by the government whose President is appointed and dismissed by the executive branch is by no means an independent agency. Because of the vaguely and broadly defined competences of the Sovereignty Protection Office (SPO) that enabled it to name and shame any legal or natural entity without any review mechanism, the Venice Commission found that there was “a high risk that the establishment and activities of the [Sovereignty Protection] Office will have a chilling effect on the free and democratic debate in Hungary.”<sup>24</sup>

Equally concerned was the European Commission, which in February 2024 declared that it would start an infringement procedure against Hungary for violating EU law by the adoption of the Protection of National Sovereignty Law.<sup>25</sup> In this case, the Commission considered that the Hungarian legislation was in violation of primary and secondary EU laws that included: “the democratic values of the Union; the principle of democracy and the electoral rights of EU citizens; several fundamental rights enshrined in the EU Charter of Fundamental Rights, such as the right to respect for private and family life, the right to protection of personal data, the freedom of expression and information, the freedom of association, the electoral rights of EU citizens, the right to an effective remedy and to a fair trial, the privilege against self-incrimination and the legal professional privilege; the requirements of EU law relating to data protection and several rules applicable to the internal market.”<sup>26</sup> This infringement might show when it will reach the CJEU how the Commission has moved from a narrow towards a more systemic litigation approach to rule of law violations in Hungary.

The adoption of the Protection of National Sovereignty Law is not the first attempt on the Hungarian government’s behalf to substantiate the political assumption that funding received by Hungarian NGOs and watchdog organizations from abroad attempts to undermined the objectivity of these organizations as mere “obedient mouthpieces of the donors.”<sup>27</sup> When in 2017 the Hungarian government adopted the Law on Transparency of Organisations that

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<sup>24</sup> Hungary: Opinion on Act LXXXVIII of 2023 on the Protection of National Sovereignty, CDL-AD(2024)001, Venice Commission (Mar. 18, 2024).

<sup>25</sup> INFR(2024)2001; *May Infringements Package: Key Decisions*, European Commission (May 23, 2024), [https://ec.europa.eu/commission/presscorner/detail/EN/inf\\_24\\_2422](https://ec.europa.eu/commission/presscorner/detail/EN/inf_24_2422) (relating memo by Commission).

<sup>26</sup> *See February Infringement Package: Key Decisions*, European Commission, Point No. 4 (Feb. 7, 2024), [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_24\\_301](https://ec.europa.eu/commission/presscorner/detail/en/inf_24_301).

<sup>27</sup> Fernanda Nicola & Miklós Ligeti, *Protecting National Sovereignty: What is the Real Threat? Comparing U.S. Foreign Agents Registration Act to Hungary’s Protection of National Sovereignty Law*, 8 *Transparency International Hungary* (2024), [https://transparency.hu/wp-content/uploads/2024/07/TI-HU\\_Comparative\\_Report\\_Fara\\_Protection-of-National-Sovereignty-Law.pdf](https://transparency.hu/wp-content/uploads/2024/07/TI-HU_Comparative_Report_Fara_Protection-of-National-Sovereignty-Law.pdf).

receive Support from Abroad,<sup>28</sup> this law immediately raised international concerns and this law was seen as a tragedy requiring immediate action. An opinion of the Venice Commission highlighted the problems with a Hungarian law that portrayed NGOs receiving foreign funding as acting against the interests of Hungarian society.<sup>29</sup>

In 2018, following an infringement procedure, commenced by the European Commission against the Hungarian government, the Court of Justice of the European Union (CJEU) found that the Law on Transparency of Organizations received Support from Abroad “introduced discriminatory and unjustified restrictions on foreign donations to civil society organizations” and as a result of which this legislation was repealed.<sup>30</sup> Despite this ruling, the political determination to expose certain civil society organizations to potential sanctions prevailed, and soon after the government adopted the so-called “Stop Soros” legislation, which served to outlaw people who assist asylum-seekers to claim asylum by threatening them with punishments of up to one year in prison.<sup>31</sup>

However, in 2021 a second CJEU decision triggered by an infringement procedure initiated by the Commission held that with the introduction of this law, Hungary has failed to fulfill numerous asylum and international protection obligations under several EU directives.<sup>32</sup> Preceding the CJEU’s ruling, the Venice Commission voiced severe criticism, too, in an opinion which it concluded by calling on Hungary’s government the repeal the “Stop Soros” law.<sup>33</sup> Therefore, Hungary had to utterly amend the most intrusive provisions of the “Stop Soros” law, among others the ones criminalizing assistance to asylum-seekers.

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<sup>28</sup> 2017. LXXVI évi törvény a külföldről támogatott szervezetek átláthatóságáról [Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds], *translated in* Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds, (Hungarian Helsinki Committee 2017), available at <https://helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>.

<sup>29</sup> Hungary: Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad, CDL-AD(2017)015, Venice Commission (June 20, 2017).

<sup>30</sup> Judgment of the Court in Case C-78/18, ECLI:EU:C:2020:476 (June 18, 2020). For the infringement procedure, *see* Hungary: Commission launches infringement procedure for law on foreign-funded NGOs, European Commission (Jul. 13, 2017), available at [https://ec.europa.eu/commission/presscorner/detail/es/ip\\_17\\_1982](https://ec.europa.eu/commission/presscorner/detail/es/ip_17_1982).

<sup>31</sup> 2018. évi VI. törvény egyes törvényeknek a jogellenes bevándorlás elleni intézkedésekkel kapcsolatos módosításáról [Act VI of 2018 amending certain laws in relation to measures against illegal immigration].

<sup>32</sup> Judgement of the Court in case C-821/19, ECLI:EU:C:2021:930 (Nov. 16, 2021). For the infringement procedure, *see* Hungary: Commission launches infringement procedure for law on foreign-funded NGOs, European Commission (Jul. 13, 2017), [https://ec.europa.eu/commission/presscorner/detail/es/ip\\_17\\_1982](https://ec.europa.eu/commission/presscorner/detail/es/ip_17_1982).

<sup>33</sup> Hungary: Joint Opinion on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs, CDL-AD(2018)013, Venice Commission (June 25, 2018).



On April 2, 2024, Kyrgyz Republic's President Japarov signed the Law on Amending the Law of the Kyrgyz Republic on Noncommercial Organizations (Law on "Foreign Representatives").<sup>34</sup> The law is almost identical to the Russian law on foreign agents in that it requires NGOs receiving foreign funding and engaging in "political activity" to register as "foreign representatives," under threat of administrative sanctions. Further, the Kyrgyzstan's new law requires extensive reporting and labelling requirements, creating challenging and burdensome environment for the NGOs to operate. Specifically, the law requires the entities to mark all their materials and products as produced by "a foreign representative", to provide annual financial audit reports conducted by independent parties, to submit new reports on activities and publish it on the website, and to open themselves for random checks by government officials. The law creates these arbitrary requirements so the local NGOs will be forced to terminate its activities because they may not have sufficient funds to comply with them and because of inevitable public stigmatization and government harassment. Similarly to other Russian-style foreign agent laws, Kyrgyz law has broad and vague definition of "political activities" giving unfettered discretion for government officials to selectively apply the law and to target NGOs working in the area of rule of law, democratic governance and human rights.

International community and local civil society vehemently opposed adoption of the law calling on Kyrgyzstan's government to conduct comprehensive review of the bill making it compliant with international standards as established in relevant treaties to which Kyrgyzstan is a party. Organization for Security and Co-operation in Europe (OSCE) expressed concerns over the law repeatedly calling on the Kyrgyz Republic Government to review the bill and bring it into compliance with established standards.<sup>35</sup> OSCE's Office for Democratic Institutions and Human Rights (ODIHR) provided an Urgent Interim Opinion on the Draft of the law in December of 2022.<sup>36</sup> And while the Kyrgyzstan's government partially addressed

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<sup>34</sup> The Law of the Kyrgyz Republic on Amending the Law of the Kyrgyz Republic on Noncommercial Organizations, No. 72, adopted on April 2, 2024, available at <https://cbd.minjust.gov.kg/4-5321/edition/6031/kg>. English translation by International Center for Not-for-Profit Law available at [https://www.icnl.org/wp-content/uploads/Eng\\_Law-of-the-Kyrgyz-Republic-on-Foreign-Representatives\\_April-2-2024.pdf](https://www.icnl.org/wp-content/uploads/Eng_Law-of-the-Kyrgyz-Republic-on-Foreign-Representatives_April-2-2024.pdf).

<sup>35</sup> *Kyrgyzstan's bill on so-called "foreign representatives" worrying and should be reviewed: OSCE Human Rights Director and Media Freedom Representative*, Organization for Security and Co-operation in Europe (Feb. 7, 2024), available at <https://www.osce.org/odihr/562449>.

<sup>36</sup> *Id.*

some of the concerns raised in the interim opinion, the law remains incompatible with international human rights standards and OSCE commitments.

On July 13, 2023, the European Parliament (EP) adopted a resolution on the crackdown on the media and freedom of expression in Kyrgyzstan where it called on the Government of the Kyrgyz Republic "to respect and uphold fundamental freedoms, in particular media freedom and freedom of expression, in line with the EU-Kyrgyzstan Enhanced Partnership and Cooperation Agreement."<sup>37</sup> The EP further called on the government to review the draft laws on 'foreign representatives' because it was inconsistent with Kyrgyzstan's international commitments. Thus, Kyrgyzstan's foreign representatives law is one more example of a growing trend of authoritarian governments adopting foreign agent-type laws and using it as a political tool against civil society.

#### **4. Conclusion**

The year 2024 is marked by general elections in numerous regions across the globe, with 76 countries, including South Africa, India, Russia, Venezuela, and Mexico, holding significant elections. Within Europe, this includes the recent EP elections, as well as parliamentary and presidential elections in several European Union Member States, such as Portugal, Belgium, and Austria. Additionally, elections are taking place on the fringes of the EU, including in the UK and Georgia and across the Atlantic in the United States. In this context, laws that restrict access to information or create chilling effects to free speech among civil society organizations undermine a fundamental pillar of democratic society.

This democratic principle is recognized by a variety of constitutional courts such as the U.S. Supreme Court in *New York Times v. Sullivan*, Justice Brennan underlined that "The maintenance of the opportunity for free political discussion [...] is a fundamental principle of our constitutional system." The South African Constitutional court that linked free speech to freedom of association, as "One of the more positive features of our nascent democratic order is vibrant, vigilant and vociferous civil society participation in public affairs. In a truly broad-

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<sup>37</sup> European Parliament Resolution of 13 July 2023 on the Crackdown on the Media and Freedom of Expression in Kyrgyzstan (2023/2782(RSP)), C/2024/4010 (July 17, 2024), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C\\_202404010](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C_202404010).

based participatory democracy characterized by that kind of active participation, our Constitution's aspirations and values find meaning in the lives of the populace for whose benefit the Constitution was ultimately enacted."<sup>38</sup> Finally, by the ECtHR in *Bowman v. The United Kingdom* held that "Free elections and freedom of expression, and particularly the freedom of political debate, form the foundation of any democracy. The two rights are inter-related and operate to reinforce each other. It is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely."<sup>39</sup> In these cases, courts have protected the right to freely express and receive information without undue pressure or misinformation, especially when the public is called upon to directly express its preferences through political elections.

## 5. Summary

Laws like the Georgian one are emblematic of authoritarian regimes and have been condemned by national constitutional courts, international organizations, and civil society groups alike. The Georgian Law is the result of an authoritarian transfer that threatens the very foundation of democracy, even in contexts where democratic procedures, as mandated by fundamental constitutional rules, are formally observed. However, in their application, these laws are disproportionate and illegitimate

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<sup>38</sup> *Mineral Sands Resources (Pty) Ltd and Others v. Reddell and Others* (CCT 66/21) [2022] ZACC 37; 2023 (2) SA 68 (CC); 2023 (7) BCLR 779 (CC), at 3, para 1 (Nov. 14, 2022).

<sup>39</sup> *Bowman v. U.K.*, App. No. 24839/94 (Feb. 28, 2007), available at <https://hudoc.echr.coe.int/eng?i=001-79832>.