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Europe, Russia and Magnitsky Law: friends or foes?

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Human rights defenders and whistleblowers in Russia

Russia is one of the most forbidding climates for investigative journalists, whistleblowers and human rights defenders today. Putin's re-election as President in 2012 has seen an already negative atmosphere worsen with the passing of a number of laws restricting demonstrations,¹ the activities of NGOs² and enabling the state to restrict internet content.³ Just six months after defamation was decriminalised, it was reintroduced to the Criminal Code, with fines of up to RUB 5,000,000 (US\$ 160,000) or up to five years in prison.⁴ Proposed amendments to the Law on Treason have made it particularly dangerous to hold sensitive information, even when it is not shared, and now penalise those who provide financial, technical or advisory

1 The Federal Law No. 54-FZ on Meetings, Rallies, Demonstrations, Processions and Pickets was signed by President Putin together with Amendments to the Code of Administrative Offences (Article 3.2 (1), Article 3.3 (1), Article 3.5 (1), Chapter 3, Article 3.13, Article 4.5 (1), Article 6 (4), Article 7 (11), Article 9) on 9 June 2012. It had been adopted by the State Duma on 5 June and approved by the Federation Council on 6 June 2012.

2 See the amendments to Legislative Acts of the Russian Federation in Part Regulating Activities of Non-commercial Organisations, which Carry Functions of Foreign Agents, Federal Law No. 7-FZ (Article 1 (2), Section 5 (1), Article 13).

3 See, for example, the amendments to the Law on the Protection of Children from Information Detrimental to their Health and Development. Federal Law No. 436-FZ

4 See, ARTICLE 19, Russia at the UPR: Repeal oppressive laws restricting the rights to freedom of expression, assembly and association, 11 April 2013; available at <http://www.article19.org/resources.php/resource/3691/en/russia-at-the-upr:-repeal-oppressive-laws-restricting-the-rights-to-freedom-of-expression,-assembly-and-association>.

information to foreign states or international organisations “directed at harming Russia’s national security”.⁵

In Putin’s Russia, dissent, even when expressed through art, can land one in prison. The Pussy Riot case is an example of just how far Russia is prepared to go to stifle free expression at the grass roots level.⁶

Although the case of Sergei Magnitsky is the highest profile case of the death of a whistleblower in Russia so far, anyone who seeks to expose corruption faces a danger. Since there is no legal recognition of the vital role of whistleblowers in Russia, those who dare to expose economic crimes are often targeted by the judiciary, law enforcement or those whom they are acting against. Some whistleblowers in the regions have even been sent to psychiatric hospitals as a punitive measure - a cruel throwback to the Soviet era.⁷

The Russian government has adopted a new tactic in its battle against NGOs. Labelling foreign-funded NGOs as “foreign agents” allows the Russian government to accuse foreign powers of meddling in Russia’s internal affairs, and employs a synonym for spying. In many cases, the mere accusation of foreign involvement in Russian politics is enough to stop the activities of these organisations, even without evidence. This is already having a chilling effect on human rights defenders and anti-corruption activists.⁸

Holding Russia to account: shaming the government

Until recently, the main method of redress with regards to Russia’s failure

5 See Amnesty International, Russia: Putin’s first year back as President has seen ‘witch hunt’ against NGOs and critics – report, 24 April 2013; available at http://www.amnesty.org.uk/news_details.asp?NewsID=20741

6 See, ARTICLE 19, Russia: Appeals court upholds Pussy Riot jail term and fails to protect political dissent, 10 October 2012; available at <http://www.article19.org/resources.php/resource/3475/en/russia:-appeals-court-upholds-pussy-riot-jail-term-and-fails-to-protect-political-dissent>

7 See Radio Free Europe/Radio Liberty, Whistle-Blower’s Case Revives Concerns of Punitive Psychiatry in Russia, 18 April 2013; available at <http://www.rferl.org/content/russia-whistle-blower-psychiatric/24961309.html>

8 For example, local officers of Amnesty International and Human Rights Watch have been subjected to these inspections, with the Kremlin backed NTV channel filming them; see <http://www.guardian.co.uk/world/2013/mar/27/russia-raids-human-rights-crackdown>. The NGO, Golos (Voice) which campaigns for a new electoral code, has already been fined under the NGO law and labelled as a ‘foreign agent’ despite indicating that it had not received foreign funding since the passing of the law; see Russia NGO law: Election watchdog Golos fined, 23 April 2013; available at <http://www.bbc.co.uk/news/world-europe-22291563>. USAID has been expelled from Russia in September 2012 after being accused of using its grants to influence domestic politics; see Russia expels USAID development agency, 19 September 2012; available at <http://www.bbc.co.uk/news/world-europe-19644897>.

to confront violations of the rights of whistleblowers, journalists and human rights defenders has been criticism of state institutions through international and regional bodies. This includes the review of the Russia's compliance with international and regional obligations, for example, in the form of reports to the Human Rights Committee under various conventions, or during the Universal Periodic Review (UPR). They also involve holding the Russian government accountable through the litigation of individual cases at the European Court of Human Rights.

These have been important mechanisms through which states and, indirectly, NGOs such as ARTICLE 19, have been able to level criticism at Russia while asking it to take concrete action in a number of cases. For example, during the last UPR in 2009, many recommendations were made to Russia regarding freedom of expression, freedom of association and protections for whistleblowers. The Council of Europe has also been active in calling on Russia to reform and investigate.

Unfortunately, these mechanisms have not been sufficient to effecting change in Russia's behaviour. Indeed, the Russian government has a tendency to accept recommendations, often by saying that it is already in the process of adapting to international standards on a number of fronts, and then refrain from applying these obligations in any practical way.

The Government has infamously paid compensation in individual cases, as mandated by the European Court, but doing nothing to prevent a repeat of those human rights violations. Although it often states that it is ready to take action in a number of cases, few of these assertions ever yield concrete improvements. Promises to open investigations have become commonplace, but are often hindered by lack of cooperation by concerned parties and by judicial decisions which ignore the facts.

The Magnitsky example is case in point. An investigation into his death in pre-trial detention was closed after Russia's Investigative Committee decided that "no crime had been committed". This happened despite the Kremlin's own Human Rights Council concluding that Magnitsky had been denied appropriate medical treatment.⁹ The evidence of the involvement of a number

⁹ See BBC News Online, *Is Russian Crime Arriving on UK Shores?* 28 April 2013; available at <http://www.bbc.co.uk/news/world-europe-22310575>

of Interior Ministry officials and Security Service personnel in the Magnitsky case has had little impact on the Russian top brass. To this day, no one has been held responsible for the death of Magnitsky so far. Moreover, the posthumous trial of Magnitsky seems to have been motivated by a desire to provide a cautionary tale to other potential whistleblowers.

The case for naming and shaming individuals

If there has been a failure to hold Russia to account through the current mechanisms alone, it may be time to broaden the number of measures used. One of the main areas which should be explored is the practice of targeting individuals and holding them accountable for abuses, as opposed to just demanding accountability from the state. Measures such as preventing the entry of those implicated in corruption and human rights abuses to the country concerned, and preventing access to the financial system can be powerful ways of ensuring that impunity does not prevail for the perpetrators of serious crimes.

The Magnitsky Act is an example of how these kinds of targeted sanctions can be employed. Instead of demanding action from Russia through the UN or the Council of Europe, the United States has taken unilateral action in the hope that it will compel Russia to take action in relation to the Magnitsky case. Under the terms of the US Sergei Magnitsky Rule of Law Accountability Act, the US government will impose sanctions on those involved in the Magnitsky case. The legislation can also be used in relation to other suspected human rights abusers from Russia, such as those allegedly involved in the murder of journalist Anna Politkovskaya.

The most obvious result of the Magnitsky Act has been the tit-for-tat retaliation from Russia, including their decision to ban the adoption of Russian children by US citizens, imposing visa bans on a number of high profile US officials involved in the Guantanamo Bay detention centre, and the prosecution of arms dealer Viktor Bout and alleged drug dealer Konstantin Yaroshekno.¹⁰ Because of this negative reaction, some argue that the Magnitsky Act has actually been counter-productive, forcing Russia into a corner and allowing it to play to populist anti-American sentiments at home.

¹⁰ See RT, Russia strikes back with Magnitsky list response, 22 April 2013; available at <http://rt.com/news/anti-magnitsky-list-russia-799/>

Yet it can also be argued that the Act has succeeded in keeping the case at the top of the international news agenda, highlighting the pervasive human rights abuses within Russia and serving as a cautionary tale for those considering doing business in the country. To hold only the state to account for the actions of individuals is insufficient, and - when dealing with an authoritarian government like Russia's - usually ineffective. Without reference to the specific individuals involved, it is next to impossible to demand that those truly responsible for their failure to do their job are brought to justice. As long as the Russian government allows individuals to act with impunity, there can be no true justice without the individuals involved being punished.

Some countries have begun moving towards these so-called "smart sanctions", targeting individual criminals instead of states. In 2013, Switzerland has updated its list of sanctions against individuals to target people linked to Osama Bin Laden, Al Qaeda and the Taliban as well as a number of figures from Zimbabwe, Syria and North Korea¹¹. Arguably, the use of these targeted sanctions allows countries to maintain better contacts on a diplomatic level, which may increase their leverage in pressing for action on human rights violations.

For this strategy of targeting individuals to be effective, however, it will not be enough for the US to act alone on the Magnitsky case.

What European countries can and should do

European countries, which often enjoy stronger links to Russia, should consider implementing similar measures. Europe is not only closer physically to Russia but also attracts a large number of wealthy Russian individuals who wish to partake of their financial centres, private schools, legal protections and personal freedoms.

The European Union (EU) should seriously examine whether it is a time to pass its own version of the Magnitsky Act. Although the EU has imposed sanctions on individual elites in countries including Iran, Syria and Zimbabwe, it has been far more reluctant to do so in relation to Russia. While Putin has fought vigorously against the prospect of such legislation and sanctions, he

11 See Swiss Info, Measuring the Real Impact of Sanctions, 27 March 2013; available at http://www.swissinfo.ch/eng/politics/Measuring_the_real_impact_of_sanctions.html?cid=35329522

has also pursued a policy of encouraging visa liberation between his country and the EU - dangling the carrot of increased business and trade at a time when Europe remains economically stagnant.

The EU, as well as being an important trading bloc, is also a union based on human rights and the rule of law. Its own Charter of Fundamental Rights enshrines the rights to life, freedom of expression and assembly. In accordance with these principles, the European Parliament first passed a resolution in December 2010 urging member states to consider imposing sanctions on those implicated in the Magnitsky case¹². In October 2012, the Parliament passed another resolution recommending common visa-restriction regimes and asset freezes.¹³

While it is important that presumption of innocence is respected, the naming and shaming of implicated figures also leaves less room for Russia to be evasive when responding to the concerns of other states and NGOs about particular cases.

Moreover, the European countries also need to be mindful of the fact that Russian dissidents, whistleblowers and human rights defenders often have to seek refuge in European countries following threats made against them or punitive legal actions by the Russian state. European countries should be prepared to offer political asylum to these individuals. The tragic case of Aleksandr Dolmatov in the Netherlands highlights the need for European countries to treat Russian political refugees with sensitivity and consideration for their security and health. Dolmatov, a Russian activist, committed suicide in a Rotterdam prison after his asylum application failed. An Inspectorate for Safety and Justice report in the Netherlands highlighted the failure of the system to effectively deal with asylum seekers; in response the Dutch State Secretary Teeven has implemented a number of measures in order to prevent a repeat of such an incident¹⁴.

12 See The Telegraph, Sergei Magnitsky: European Parliament recommends tough sanctions on Russian officials, 16 December 2010; available at <http://www.telegraph.co.uk/finance/globalbusiness/8207690/Sergei-Magnitsky-European-Parliament-recommends-tough-sanctions-on-Russian-officials.html>

13 See Radio Free Europe/Radio Liberty, EU Lawmakers Call For Sanctions On Russians Involved In Magnitsky Case, 23 October 2012; available at <http://www.rferl.org/content/eu-parliament-calls-for-sanctions-on-russians-involved-magnitsky-case/24748786.html>

14 See Russian Legal Information Agency, No connection between activist's suicide and prison conditions, 14 February 2013; available at <http://rapsinews.com/news/20130419/267092478.htm>

The way forward

In conclusion, it is well past time for Europe to adapt its approach towards Russia by adding the use of “smart sanctions” to our diplomatic toolbox. The Magnitsky Act is an intriguing exercise in holding individual human rights abusers to account. If European countries implement similar measures, it could herald a trend towards more individual advocacy aimed at both challenging impunity and pressurising the Russian government to take action on human rights abuses to avoid negative media attention and challenges to the loyalty of the political elite.

While high-ranking Russian businessmen, officials and politicians may be able to stomach losing access to the United States to some extent, being banned from Europe would be a hard pill to swallow. It is important to continue to challenge the Russia’s poor human rights record through the established mechanisms of international organisations, but we may find that more concrete results are achieved through the holding of individuals to account for their actions.