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Time for Europe to enact Magnitsky type legislation

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The Russian Federation is a signatory of major UN and Council of Europe human rights treaties, yet rarely respects these international obligations. Despite numerous judgments by the European Court of Human Rights, there have been only limited efforts to address the root causes of these violations, such as the almost total impunity for Russian state officials committing abuses. We need new ways from European governments and institutions of addressing the very serious human rights violations that take place in Russia. A universalised law modelled on the US Sergei Magnitsky Rule of Law Accountability Act could provide a helpful supplement to regional and international human rights mechanisms, which have, thus far, yielded few improvements.

Russia has never had the rule of law in the true sense. Neither the tsars nor the commissars respected any laws above their own decisions - a culture which persists to this day.

In the words of Russia expert Steve LeVine: "... Even now, a decade into the 21st century, brutality and violent death is so ordinary that it is usually ignored by all but the victims themselves, their families, and their friends."

This is why the Justice for Sergei Magnitsky campaign is of crucial importance to contemporary Russia. The campaign has brought attention

to the brutal - and ultimately lethal - treatment of Sergei Magnitsky by Russian authorities. Today, Magnitsky is remembered not only by his family and friends, but has become an international symbol of the consequences of unchecked corruption.

Indeed, the very same individuals who were implicated in the \$230 million tax fraud, which Magnitsky uncovered, were then able to use state organs to carry out his arrest, imprisonment, torture and murder. They have done so with total impunity in Russia, and have continued to enjoy the right to travel and conduct business abroad. Indeed, a great deal of the money that was defrauded has been traced to bank accounts in the West.

Clearly, neutrality is not an option for Western states, as this case involves not only massive violations of international human rights obligations, but also implicates Western financial institutions and channels in the receipt of this dirty money.

How should European governments and institutions react when their Russian neighbour repeatedly ignores their calls to address this case and to introduce reforms to strengthen rule of law and human rights? Should European countries consider adopting legislation modelled on the US Sergei Magnitsky Rule of Law Accountability Act in order to target the perpetrators of gross violations of human rights?

The adoption of this type of legislation would send a strong signal of support to victims of human rights violations, and would prevent violators from benefiting from Western business, schools, holiday resorts, and other privileges. A European version of this legislation would hurt Russian political elites even more than the current US legislation, since they have more business interests in Europe than in the United States.

The following sections lay out the case for introducing this type of legislation in Europe, and note the need to establish procedural safeguards to protect the rights of the accused.

European Magnitsky legislation

Ideally, I would like to see my own country, Norway, take the lead on this issue. In April 2013, a group of Norwegian Members of Parliament representing the main opposition parties submitted a letter to Norway's Foreign Minister, Espen Barth Eide, urging him to "consider if Norway could also freeze assets and deny entry to Norway of those who participated in the imprisonment, torture and murder of Sergei Magnitsky. Assets freeze and visa ban should take place pending a final judgment after a trial conducted in accordance with recognised fair trial principles."¹

The MPs stressed that "for us it is important that the legal rights of the accused are safeguarded. There must be an opportunity to appeal and a chance to provide information that sheds light on the case from the point of view of the accused."

The letter asks for important elements of the Magnitsky Act to be put in place in Norway; in particular, visa bans and asset freezes against individuals guilty of gross violations of human rights. Under this proposal, the veracity of the list must be ensured by providing an opportunity to appeal, with procedures for removal in place to ensure that innocent people will not be punished.

I depart from this letter in my view that this list should include not only the perpetrators of Magnitsky's persecution and death, but should have universal application, extending to any individual credibly suspected of gross human rights violations.

It is vital that this law not discriminate based on nationality, which I believe to be the weak point of the American Magnitsky Act, which only applies to Russians.

In fact, an early draft of the US Senate version of this Act did have universal application, but this was sacrificed during the political horse-trading which preceded the passage of the law. As US Senator Carl Levin has argued, this law should apply:

¹ The letter is dated 17 April 2013 and is signed by four MPs representing the following parties: Karin Woldseth, The Progress Party; Peter S. Gitmark, The Conservative Party; Hans Olav Syversen, The Christian Democrats; and Trine Skei Grande, Leader of the Liberal Party. The translation into English is mine.

“...the same sanctions to human rights violators wherever they might be – whether in Russia, or Syria, or Sudan, or North Korea, or China, or in any other country ... the violations of human rights that the Magnitsky bill seeks to remedy are far too widespread for us to apply remedies only to Russians human rights violators. The United States has an opportunity here to make a strong, unmistakable statement about the sanctity of human rights. We should want that statement to ring out not just in Moscow, but around the world.”²

A European version of this Act with universal application could herald a new era in Europe’s promotion of human rights. Such a measure would introduce genuine consequences for individuals whose poor behaviour has singled them out for reproach, yet who go unpunished in their own countries.

There is already a firm foundation to undertake such action, with expressions of support for these types of measures from the European Parliament, the Parliamentary Assembly of the OSCE and the Parliamentary Assembly of the Council of Europe. Such initiatives might be the building blocks that eventually lead to EU-wide Magnitsky-type sanctions - restoring faith in Europe as a driving force for human rights and the rule of law, and contributing to the promotion of universal human rights.

Backsliding on human rights and the rule of law

In the early 1990s, Western-style liberal democracy was introduced to the now-defunct Soviet Union, and its satellites in Central and Eastern Europe. For former Eastern bloc countries, the prospect of EU membership led governments to initiate democratic reforms; yet much of the former Soviet Union did not follow this course.

Despite their communist past, the political elites in these countries - Russia included— benefited enormously from privatisations and political corruption. They were not willing to let the people decide who should rule the country and own its natural resources. Instead of initiating reforms that would strengthen democracy, the rule of law and respect for human rights, they opted for a personalised system of government to serve their own interests. In this system, prosecutorial services and courts do as they are told

² Statement available at: <http://www.levin.senate.gov/newsroom/press/release/levin-statement-on-jackson-vanik/magnitsky-legislation/>

by the political leaders, not as they should under an impartial system of laws.

The former President and current Prime Minister of the Russian Federation, Dmitry Medvedev, used to speak about the need to fight legal nihilism and strengthen the rule of law in Russia, but his call has been largely neglected. President Vladimir Putin and his team seem more afraid of the prospect of “colour revolutions” than of the continuation of chronic inefficiencies and corruption.

Recent developments in Hungary underscore the risks of regression by young democracies. Under Viktor Orbán, the Hungarian government has consolidated state control, undermining the independence of courts and the media. Freedom House, a US-based NGO, has warned that Hungary and Ukraine are at the forefront of an anti-democratic drive that could lead to the “Putinisation” of young European democracies.³ The Council of Europe and the EU may eventually succeed in saving full-fledged democracy and the rule of law in EU member states such as Hungary--but for their neighbours in the East, the outcome is far from certain.

The current economic crisis in many EU countries has unfortunately added to a perception of the EU and the democratic model of governance as less attractive. With relative economic growth in China and Russia, they are pointed to as the only models capable of delivering growth in these unstable times. Russia is setting much of this anti-democratic and anti-Western agenda, claiming to represent an alternative set of civilisational values better equipped to represent the interests of the Russian people.

As part of this so-called “sovereign democracy,” the Russian authorities are currently implementing new legislation to undermine the already heavily restricted civil society organisations, independent media and opposition parties. The so-called “foreign agents law” delegitimises Russian human rights organisations that receive foreign funding by requiring them to register as a “foreign agents” - a synonym for “spy” in Russian. If organisations refuse to register as such, the authorities are entitled to shutter their operations.

3 For more information and discussion of the threats to democracy and rule of law in Hungary, see the Norwegian Helsinki Committee report: Democracy and Human Rights at Stake in Hungary. The Viktor Orbán government’s drive for centralization of power. The report is available at: www.nhc.no

I was a witness in the first case lodged against an organisation for failing to register as a “foreign agent”: the case of the independent elections monitor Golos, which was brought before the Presnensky district court in Moscow on 25 April 2013. The trial was surreal: the judge was not interested in hearing the arguments. Golos returned the funds it received as part of the Norwegian Helsinki Committee Sakharov Freedom Award in 2012 and has received no foreign funding since 21 November 2012, when the law came into force. Another point that was not clearly established was whether the organisation conducted “political activities” - the other key criterion in the law. The judge refused to send the overly vague provision to the Constitutional Court for clarification. The organisation was fined 300,000 rubles, while its leader, Liliya Shibanova, was separately fined 100,000 rubles.

There is also legislation in place that could send a person to prison for years for providing foreigners with sensitive information (the so-called “treason law”). Organising or taking part in unsanctioned demonstrations could lead to huge fines, as could “libel”. These laws have been justified through anti-Western propoganda aimed at creating the impression that foreign criticism of Russia’s human rights deficit are equivalent to anti-Russian interference.

Regaining Western influence in promoting human rights

In recent years, the leverage the West once had in promoting democracy and human rights has been diminished. The American “War on Terror” weakened some human rights norms in the US and in some European countries, with respect for the rights of detainees suffering as a result of the perceived exigencies of war.

The economic crisis, which began in 2008, further undermined the perceived connection between democracy and prosperity, leading some to question the notion of whether democratic countries would always economically outperform authoritarian states.

(This argument tends to ignore the fact that in many wealthy authoritarian states, the revenues from extractive industries help rulers maintain power by buying support and funding a large repressive security apparatus.)

The human rights mechanisms of the UN, the Council of Europe and the OSCE are also limited. Even though Russia has been compelled by the European Court of Human Rights to compensate victims of human rights abuses, the country has not responded to these punitive measures with reforms that would halt the flow of new applications to the ECHR. No other country has been found guilty by the ECHR of violating the right to life, the prohibition against torture and the rights to effective remedy as often as Russia.⁴

In another example of hypocrisy, while Russia supports resolutions in the UN Human Rights Council that give human rights defenders the right to receive foreign funding without being delegitimised, its own “foreign agents law” does precisely the opposite at home.⁵

Faced with the diminishment of its own influence, and with indifference to human rights by the Russian authorities, how can the West regain leverage on this crucial issue?

First, the conception that Western states are propagating Western-specific values and dominance must be challenged. Human rights are not Western - they are universal values.

Secondly, Western countries should improve their protection of human rights at home. In order to restore its image as a consistent promoter of human rights, the US in particular must address its own abuses in the “War on Terror” and in other contexts.

The introduction of a European version (or versions) of the Magnitsky Act should be seen as part of this process of strengthening human rights at home. In addition to sending an important signal to the violator’s country, such measures would also ensure that the legislating country does not become a haven for violators.

Such legislation should function according to the complementarity principle

4 Statistics available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/>

5 The resolution on “protecting human rights defenders” (A/HRC/22/L.13) was adopted at the 22nd Session of the UN Human Rights Council in Geneva on 21 March 2013. The resolution was tabled by Norway, and received the support of 62 states across 6 continents. It was adopted without a vote. According to paragraph 9 of the resolution, States should ensure “that no law should criminalise or delegitimise activities in defence of human rights on account of the origin of funding thereto”.

of the ICC Statute, which holds that the ICC cannot prosecute a crime that is prosecuted genuinely by a state.⁶ In the same way, a person who has committed gross violations of human rights should not be put on a Magnitsky list if he or she is investigated and brought to trial in his or her home country.

It is also important to ensure that the Magnitsky legislation cannot be reasonably portrayed as prejudiced towards a particular nation. The Russian government's claims that the Magnitsky legislation is anti-Russian ignore the benefits that this legislation will have for the Russian people. To begin with, the US Magnitsky Law is part of the same legal act that authorises extension of normal trade relations to Russia (and to Moldova), repealing the Jackson-Vanik amendment.

Secondly, even without the repeal of trade restrictions, the Magnitsky legislation does not punish the Russian people, as more broad sanctions or a judgment against Russia in the European Court of Human Rights would do - it targets individual perpetrators.

Indeed, polls suggest that a significant number of Russians actually support the Magnitsky legislation. A survey conducted in December 2012 by the Levada Center showed that 44 percent of Russian citizens were in favour of the law, while only 21 percent were against (35 percent held no opinion).

If the Magnitsky legislation came into effect in all 27 EU member states and in several other European states (such as Norway), as parties of the Schengen cooperation or by their own legislation, this would likely provoke strong reaction from the governments of Russia and of other affected states.

In order to deflect retaliatory steps, it would be wise to put in place measures designed to incentivise cooperation and improvements in human rights from these countries - for example, attaching eased visa requirements for Russians travelling in the EU to the Magnitsky legislation would provide both a carrot and a stick. This would send a powerful message: law-abiding Russians are more than welcome in Europe, but human rights abusers and criminals are not.

⁶ See articles 1 and 17 of the Rome Statute of the International Criminal Court, available at: http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm

Precautions

Could listing a person infringe upon her or his rights to the presumption of innocence? In order to protect the principle enshrined both in the European Convention on Human Rights (Article 6(2)) and in the Charter of Fundamental Rights of the European Union (Article 48), certain precautions should be put in place, even though individuals included on the list will not be subject to criminal charges.

This type of legislation should include an appeals process, including opportunities to provide new information (as is the case in the US law).

Receiving a visa to enter a country is not a right - it is a privilege, as the head of the Justice for Sergei Magnitsky campaign, Bill Browder, often says. Yet imposing visa bans specifically on Russian human rights violators could be viewed as a discriminatory measure. Clearly, there should be a universal approach.

States already have procedures in place for freezing assets, which is a common practice for fighting money laundering and other financial crimes. The European Magnitsky legislation would require these procedures to be activated in relation to the listed persons. Furthermore, as a way of ensuring that human rights are safeguarded, the Venice Commission of the Council of Europe could be asked to review draft legislation as well as existing procedures in different countries.

There is no time to lose. Europe should act now by enacting the Magnitsky legislation. If done forcefully, this could start a new chapter in Europe's promotion of human rights worldwide - and at home.