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RUSSIAN PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

Who Holds Russia's Judges and Public Prosecutors to Account?

How the International Community Fails to Effectively Address Judicial Harassment of Human Rights Defenders in the Russian Federation

STEFANIE LEMKE — 29 January, 2018



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This piece is about the growing number of politically-motivated charges and convictions against human rights defenders in Russia and the absence of credible monitoring or audit procedures to hold judges and public prosecutors to account for their misconduct. Despite political backlashes to judicial independence in countries such as Hungary and Poland, Europe is generally perceived as a powerhouse for a strong and working justice system in which courts protect human rights and uphold the rule of law. A danger to a strong and working justice system arises when governments abandon the separation of powers, exerting significant power over judicial authorities. In this context, the political environment in which judges and public prosecutors operate and structural arrangements employed by the executive branch to curtail their independence can play a crucial part in the politicisation of a judicial system. Ways to align judges and public prosecutors with government policies can be, for example,

having no secure tenure in place and the (mass) removal of judges and prosecutors, without following clear, objective and fair rules. In view of Russia, an increasing number of judges and public prosecutors have been brought politically motivated charges and convictions. Specifically, they have used their powers to silence human rights defenders.

Judges and public prosecutors are supposed to set an example to society in the protection of human rights, meaning that their actions should respond to human rights standards. Professional integrity obligations, such as making decisions based on the application of legal rules, through legal reasoning and findings of facts that are based on evidence and analysis, and performing their professional duties free from external pressures or interferences from the government or parliament, are central to their work.^[1] In 2013, the UN Special Rapporteur on the Situation of Human Rights Defenders, however, warned that 'the space for civil society and defenders visibly shrink in certain regions of the world' by 'the application of legal and administrative provisions or the misuse of the judicial system to criminalise and stigmatise their activities'.^[2] This is also illustrated by *Jafarov v Azerbaijan* in which the ECtHR affirmed for the very first time that charges brought against a prominent Azerbaijani human rights defender served the sole purpose of punishing him for his human rights activities.^[3] The ECtHR criticized the Azerbaijan courts for the failure to base their actions against Mr. Jafarov on sufficient evidence. Additionally, the ECtHR considered it necessary to point out that 'in a democratic society both the courts and the investigation authorities must remain free from political pressure'.

In Russia, judges and public prosecutors have been increasingly involved in silencing human rights defenders.^[4] Although the equality of arms and the right to adversarial trial are guarantees of the Russian Constitution, many cases show deep flaws within the criminal justice system and gross misconduct of the judiciary and prosecution. This includes using fabricated evidence, forced confessions and impunity for perpetrators of crimes. At the same time, both professions deliberately target activists. The office of the prosecutor general in 2013 launched a nationwide campaign of extraordinary and unannounced inspections of civil society organizations. The campaign

intended to intimidate and force human rights defenders to register with the 'foreign agents' roster.^[5] Lower rank prosecutors were instructed by the general prosecutor to search, in cooperation with the ministry of justice, the federal tax service and other government agencies, human rights groups and non-governmental organisations that receive foreign funding.^[6] The inspections were unprecedented in their scale and scope. In the history of modern Russia, there has never been such a wide-scale campaign against legal entities. According to the Office of the Prosecutor General, public prosecutors searched about 1,000 non-governmental organisations in the first six months of 2013 alone.^[7] A report published by the 'Closed Society', documenting more than 300 of these inspections, showed that they targeted especially Russian civil society organisation and Russian branches of foreign human rights organisations (e.g., Amnesty International and Human Rights Watch). Both organisations had in common that they addressed political sensitive matters, such as the protection of human rights and government transparency, and received a certain amount of foreign funding.^[8]

Judges regularly side with public prosecutors and find the accused guilty, without reassessing the evidence. Evidence obtained by investigation bodies is usually regarded as true and consistent while testimony given by the defence is dismissed as unreliable^[9]. The ECtHR repeatedly ruled that the right to a fair trial is one of Russia's most frequently violated rights,^[10] with a striking number of cases originating from the North Caucasus. In the case of Suren Gazaryan and Evgeny Vitishko, members of Environmental Watch on North Caucasus, the activists had exposed violations of environmental protection laws in the run-up of the Sochi Olympics for which they were charged with damage to propriety and sentenced to three years in prison.^[11] Their names became synonymous with judicial harassment of human rights defenders and environmental activists in Russia,^[12] the criminal charges were widely seen as revenge for their work.^[13] Ms. Gazaryan and Mr. Vitishko protested against a fence that was illegally constructed in a forest, and spray-painted 'This is our forest' on it. The fence surrounded the residence of Mr. Tkachev, the then governor of Krasnodar Region and now federal minister of agriculture. Their argument that the fence was constructed illegally was dismissed by the court as not relevant, without any further examination. During the

pre-trial stage, the public prosecutor even denied the very existence of the fence in response to a complaint filed by both activists.^[14]

The UN Human Rights Committee expressed concern 'about the low acquittal rate and the high percentage of acquittals overturned on appeal' in Russia.^[15] On average, only 0.4 per cent of criminal trials result in an acquittal.^[16] Besides, civil society leaders are frequently charged for criticizing political authorities online (e.g., in blogs and social networks). This is reflected by the case of Yuriy Dmitriyev, leader of a regional branch of the Russian human rights NGO 'Memorial', who was arrested by Petrozavodsk City Court in December 2016. Mr. Dmitriyev was charged with allegedly producing child pornography by posting a photo of his underage stepdaughter on a social network.^[17] It is reported that the photo in question was posted without Mr. Dmitriyev's knowledge and consent.^[18] The investigation bodies did not include any circumstances in their case assessment that could have supported the position of Mr. Dmitriyev, such as his low risk of escape and lack of tampering with evidence. Despite this, Mr. Dmitriyev's stepdaughter was subsequently taken into care by local authorities.^[19] Russian media reported that Mr. Dmitriyev's arrest had been an act of revenge against his research on personal details of officers of the former People's Commissariat for Internal Affairs ('NKVD') known for its political repressions under Stalin.^[20]

In many countries, judicial councils have the role to detect and corroborate breaches of standards, including human rights abuses. If the judiciary and the prosecution, however, are controlled by the government they will be less likely to oppose unlawful orders by superiors and be held responsible for their misconduct. Not surprisingly, Russian judges and public prosecutors do not face disciplinary or criminal consequences for their wrongdoings. Additionally, there are currently no credible audit or monitoring instruments at international or European level in place that could oversee actions of and impose sanctions on individual judges and public prosecutors who fail to comply with their human rights obligations under international law. Complaints and reporting mechanisms provided by, for example, the UN do not periodically review or sanction the human rights violations of judicial authorities and are often only mandated to adopt 'concluding observations'.

Addressing the accountability of judges and public prosecutors also falls short at European level. The ECtHR has the authority to review a country's judicial wrongdoings and issue decisions on individual complaints of human rights abuse perpetrated by or with complicity of judges and public prosecutors. But rulings focusing on politically-motivated charges and convictions by judicial authorities are rare in practice.

Nevertheless, there is much promising (but yet underutilised) potential at both international and European level. International organisations and professional associations are capable to strengthen the professional integrity of judges and public prosecutors. For instance, the Bureau of the Consultative Council of European Judges (CCJE) and the Bureau of the Consultative Council of European Prosecutors (CCPE) are uniquely placed to draw attention to the situation of human rights defenders in Russia and other member states as they are tasked with looking into specific problems concerning the status and the situation of judges and public prosecutors. Yet they have not set up institutional human rights mechanisms, such as requiring members to complete an annual questionnaire and organising country visits to identify best practices that could help the CCJE's and CCPE's to step up their professional integrity polices. Besides, establishing an 'urgent appeal' procedure for cases in which the CCJE and the CCPE may play a role in preventing or mitigating human rights abuses by judicial authorities of the Council of Europe member states (e.g., in situations in which physical and/or mental integrity of an individual or a group is concerned) could contribute to important change in countries, such as Russia, where human rights defenders are at risk.

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the Council of Europe and the OSCE.

[1] Bangalore Principles, principle 5; Magna Carta of Judges, rule 11; UN Guidelines on the role of prosecutors, rule 14.

[2] UN Doc A/HRC/RES/22/6 (2013).

[3] *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECtHR, 17 March 2016).

[4] See, e.g., Freedom House, *The Global Echo of Moscow's Repressive Human Rights Practices* <<https://freedomhouse.org/article/global-echo-moscows-repressive-human-rights-practices>> (accessed 22 January 2018).

[5] See, e.g., Human Rights Watch, *Laws of Attrition: Crackdown on The Russian Federation's Civil Society after Putin's Return to the Presidency* (24 April 2013) <<https://www.hrw.org/report/2013/04/24/laws-attrition/crackdown-the-Russian-Federations-civil-society-after-putins-return-presidency>> (accessed 22 January 2018).

[6] Prosecutor General, Order of 27 December 2012, no 27-07-2012/14п1861-12В (not published).

[7] Prosecutor General, Report by the Prosecutor General to the Council of Federation (10 July 2013) <http://genproc.gov.ru/smi/interview_and_appearances/appearances/83568/> (accessed 22 January 2018).

[8] Closed Society, *Analytics* <<http://closedociety.org/analytics/>> (accessed 22 January 2018).

[9] This is reflected by the case of Valentina Cherevatenko, chair of the NGO 'Women of the Don' and laureate of the 2016 Franco-German Prize for Human Rights. Criminal proceedings were initiated against Ms. Cherevatenko for allegedly failing to register as 'foreign agent'. The arguments put forward by her lawyer, claiming that the prosecution lacked a legal basis for bringing charges against her, were dismissed by the Leninskiy District Court of Rostov-on-Don and the regional court of appeal. The judges limited their judicial review to the issue of the

formal legality of the case. See, e.g., UK Government, *Human Rights Priority Country Update Report: January to June 2016* (updated on 21 July 2016) <<https://www.gov.uk/government/publications/russia-human-rights-priority-country/human-rights-priority-country-update-report-january-to-june-2016>> (accessed on 22 January 2018).

[10] *Navalnyy and Yashin v The Russian Federation* App no. 76204/11 (ECtHR, 20 April 2015); *Karelin v The Russian Federation* App no. 926/08 (ECtHR, 20 September 2016); *Kasparov and Others v The Russia* App no. 51988/07 (ECtHR, 13 December 2016); *Navalnyy v. The Russian Federation* App nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 (ECtHR, 2 February 2017); *Lashmankin and Others v Russian Federation* App nos. 57818/09 and 14 others (ECtHR, 7 February 2017).

[11] See, e.g., Amnesty International, *The Russian Federation: Release environmentalist banished to a prison colony* (15 April 2015) <<https://www.amnesty.org/en/latest/news/2015/04/the-Russian-Federation-release-yevgeniy-vitishko/>> (accessed 22 January 2018).

[12] See, e.g., International Federation for Human Rights (FIDH), *Russia: Prolonged arbitrary detention of environmental rights activist Mr. Evgeny Vitishko* (3 December 2015) <<https://www.fidh.org/en/issues/human-rights-defenders/the-Russian-Federation-prolonged-arbitrary-detention-of-environmental>> (accessed 22 January 2018).

[13] See, e.g., Shaun Walker, *Sochi environmentalist jailed for three years for spray-painting a fence*, *The Guardian* (12 February 2014) <<https://www.theguardian.com/environment/2014/feb/12/sochi-environmentalist-jailed-painting-fence-revenge>> (accessed 22 January 2018).

[14] Sergey Golubok, *The Role of the Judiciary in the Prosecution of Human Rights Defenders and Non-Governmental Organizations in the Russia* (The Hague: Netherlands Helsinki Committee and the Helsinki Foundation for Human Rights 2016).

[15] UN Human Rights Committee 'Concluding Observations of the Human Rights Committee on the Seventh Periodic Report of the Russian Federation', CCPR/C/RUS/CO/7 (28 April 2015), § 17.

[16] Sergey Golubok, note 15.

[17] As reported (in Russian) at <<https://7x7-journal.ru/anewsitem/90125>> (accessed 22 January 2018).

[18] As reported (in Russian) at <<https://7x7-journal.ru/item/90170>> (accessed 22 January 2018).

[19] Reported by Novaya Gazeta (in Russian) at <<https://www.novayagazeta.ru/articles/2016/12/21/70964-papa-skazal-chto-so-vsem-razberetsya>> (accessed 22 January 2018).

[20] Reported by Novaya Gazeta (in Russian) at <<https://www.novayagazeta.ru/articles/2016/12/21/70964-papa-skazal-chto-so-vsem-razberetsya>> (accessed 22 January 2018).

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