

**PUTIN'S NEW PRESIDENCY AND THE CRIMINAL LAW: PUNISHMENT AS  
THE UNIVERSAL SOLUTION**

by

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The first year of Putin's new presidency saw a surge in attempts to change the criminal law, mostly through adding new crimes and raising punishments. While some of these changes represented the ripening of initiatives already on the policy agenda in the Medvedev years, most of them embodied new ways of addressing the needs of the regime or responding to the interests of the conservative social forces that support it.

Taken as a whole, the initiatives to change the criminal law struck many observers in Russia as excessive, even against the backdrop of frequent changes during the past decade (including the Medvedev program of humanizing criminal law). One commentator blamed legislators for their "mania for criminal law"; another called for a moratorium on initiatives to change the criminal law. The Chair of the Supreme Court, Viacheslav Lebedev, himself criticized the "instability of legislation", pointing out that his court received for comment in 2012 sixty nine draft laws involving changes to the Criminal Code, of which it supported only 12 and completely rejected 38. Some of the changes reversed measures included in the Medvedev reforms (the decriminalization of defamation) or had been rejected by Medvedev when he was president (the extension of treason).<sup>i</sup>

In this paper I examine and assess the changes made in and proposed for Russian criminal law from spring 2012 through winter 2013. I deal in turn with (1) the blatant use of the criminal law to control and constrain civil society in the wake of the protests that followed the flawed parliamentary elections of 2011; (2) the continuing reliance on criminal law in the regulation of business (including redefining fraud; responsibility of legal persons; financial regulations); (3) populist responses to scandals dramatized in the media (offending religious believers; drunk driving); and (4) miscellaneous pending initiatives.

## **Constraining Civil Society through Criminal Law**

From the moment of his return to the presidency in the spring of 2012 Putin and his advisors in the Kremlin sought to enhance the toolkit of measures that they could use to discourage demonstrations, critical speech, and all manner of cooperation with foreign organizations, and in the process limit the capacity of society to criticize, not to speak of oppose, the regime. First, on June 8<sup>th</sup> Putin signed a new law on demonstrations that provided inter alia for severe penalties for heads of groups even without evidence of their personal responsibility for violations, this over the objections of the chief of the Presidential Council on Human Rights Mikhail Fedotov.<sup>ii</sup>

Then, a month later, in early July, a controversial Kremlin sponsored bill (formally initiated by deputies) promised to return to the criminal code the offense of defamation (both libel and slander), and with much higher punishments than before. Only eight months before a law embodying part of the Medvedev humanization package had removed defamation from the criminal law (leaving it as an administrative offense), in part because so many of the charges came from personal accusations and led to acquittals. But the bulk of successful cases of defamation (a few hundred a year in 2008-2011) had been brought by politicians and officials in the regions against journalists who criticized them.<sup>iii</sup> Seemingly to mollify them and restrain protesters from denouncing officials (e.g. calling them “thieves and crooks”, as in the “party of thieves and crooks”, the famous term coined by Aleksei Navalnyi), the Putin team insisted on the criminalization of defamation. In its new version, this was no longer a crime of personal accusation but a charge supported by the procuracy that could bring very high fines (imprisonment was initially included but withdrawn by the president in response to protests, but the law retained fines that were so high as require changes in the general part of the Code).<sup>iv</sup>

There was also a specific category of defamation for criticizing a judge, prosecutor or police officer. The decision to restore defamation to the criminal law as a more serious crime deserved explanation, but the regime did not provide it. Even the official “explanatory note” sent to the Duma with the draft law simply referred to the fact that the criminal law of many countries included defamation, without mentioning that they usually had stringent criteria for its use, including limitations set in case law.<sup>v</sup>

As soon as the draft law was made public in early July, objections were made by such figures as the head of the Presidential council on human rights Fedotov and a leading specialist on media freedom Alexei Simonov. Journalists themselves organized a petition with 1,300 signatures and picketed the Duma, but the head of the relevant Duma committee Pavel Krashenennikov explained apologetically that the bill was moving through the Duma so quickly that there was no time to meet with journalists and hear their objections. The bill went from first reading to adoption in a matter of days, a speed that reflected its priority for the Leader.<sup>vi</sup> Among the keenest critics was retired Constitutional Court justice (and member of the Presidential Council on Human Rights) Tamara Morshchakova. She warned that in evaluating a potential change in the law, one needed to go beyond the text of the law (which might well correspond to international standards) and take into account the way that it was likely to be implemented. With defamation, for example, there needed to be proof of intent to harm, but Russian judges rarely bothered to apply such a standard. But to Vladimir Putin this did not matter in the least. He stated that problems of application should not prevent the adoption of a law; nor should procedural issues be confused with substantive ones!<sup>vii</sup>

Although the new version of defamation became law, its critics did not cease their efforts. At the request of Putin himself, the Presidential Council on Human Rights reviewed the new

definitions and came forward with amendments that would soften the punishments for slander and libel and decriminalize “insulting representatives of power”. They also sought stronger penalties for interference in the work of journalists and a new obligation for officials to answer criticism in the media.<sup>viii</sup>

Also in July 2012 the Kremlin delivered a draft law to the Duma (which was approved quickly) requiring all NGOs that received any foreign funding (that is most of them and all the major ones) to register with the government as foreign agents, announce this fact on their websites, and publish biannual reports and file financial statements. Failure to comply with the law was a criminal violation that could lead to large fines. Like the new law on defamation, this law was intended to restrain civil society, in this case by limiting the activities of NGOs and by discouraging the foreign connections upon which most of them depended. Naturally this law too was opposed by the Presidential Council on Human Rights and other bodies. The anti-foreign message behind the law was reinforced in September by the decision to remove US AID from Russia and eliminate most of its democracy promotion activity, but only a small portion of NGOs received its support from AID. The NGO law with its broader implications itself went into effect only in November, and at first no NGOs came forward to register. The Ministry of Justice insisted that it was not its job to enforce the law, and no criminal prosecutions were launched. But then in March 2013 the Procuracy got its marching orders and launched raids of many leading organizations, leading some foreign governments (e.g. Germany) to register objections.<sup>ix</sup>

Already in early September 2012, when the Duma came back from summer holidays, it received a draft law broadening the definitions of treason and espionage, so that the passing of information to any foreigner or international organization (a novelty), not only classified data but anything about a list of subjects (including ecological conditions, sanitation, demography, level

of criminal activity, violations of human rights and the state of health of senior officials of the RF) could constitute treason. Nor was it necessary anymore to establish the intent of the accused to harm Russia. In short, the language was broad and vague and provided a tool for discretionary use by security officials. But the idea for this law was not new. Almost the identical draft law (and explanatory note as well) was submitted to the Duma in fall 2008 (along with the law that removed juries from trials of persons accused of treason or espionage), but then rejected by President Dmitrii Medvedev because of the risks involved in expanding the definitions of state secrets and the particular crimes.<sup>x</sup>

Representatives of civil society in Russia did not accept these changes without struggle, nor did foreign governments and international organizations appreciate being stigmatized as detrimental to Russia. The former brought a complaint to the Constitutional Court of Russia over the law on demonstrations, and the CC delivered a strong decision condemning and invalidating large sections of the law!<sup>xi</sup> Moreover, the Parliamentary Assembly of the Council of Europe asked the Venice Commission to evaluate both the law on treason and the law on NGOs, and the initial comments from its members were highly critical. In the course of their investigation the Commission's experts met with Tamara Morshchakova to hear the views of Russia's Presidential Commission on Human Rights. The official results were to be delivered in the context of larger reports in the spring 2013. (Note that the Venice Commission was set to assess the law on demonstrations as well, but decided to wait until the Constitutional Court RF had rendered its decision).<sup>xii</sup>

All of the Kremlin sponsored laws relating to control of civil society shared a core trait. They were written in broad, vague language that gave various authorities discretion to use as they saw fit. Potential critics, demonstrators, election monitors, and activists in various spheres

became vulnerable to persecution by officials, acting on their own whim or on the direction of superiors. Just what any of these laws would mean in practice was hard to predict, and, as Morshchakova averred, that was a problem in itself.

As a pure Kremlin initiative, the extension of the criminal law to constrain civil society was not typical of the many proposals to change the law. The Kremlin initiatives were approved quickly with little if any changes (the removal of prison terms for defamation being an exception). In contrast, initiatives that came from the bureaucracy, business groups, the Duma, or regional legislatures usually followed a longer, chequered path. The chances of their being adopted without change were small.

### **Regulating Business through Criminal Law: One step forward, two steps back?**

The overuse of the criminal law in regulating business in the RF, including the initiation of prosecutions to extract rent or worse, has been part of the unfriendly business climate in Russia in the 21<sup>st</sup> century. Under Medvedev a ban on pretrial detention for economic crimes (chapter 22) and limited decriminalization were adopted to reduce these practices. But the key attacks on businesses, including those associated with raiding by competitor firms, relied on Article 159 or fraud, charges for which were all too easy to pursue, too often in aggravated versions that could lead to long and excessive terms of imprisonment.<sup>xiii</sup> Already under Medvedev groups supporting business, along with the Ministry of Economic Development and Trade, proposed changes in the definition of fraud and rules for its prosecution, and a draft law came into circulation. The version developed by MERT disallowed opening of cases without the consent of a victim firm—a measure that business people thought would help their situation; and also called for adding to the Criminal Code illegal pursuit of business by police officials. But the

version of the law approved by the Duma and signed into law in December 2012 dropped this new separate crime on the grounds that the actions of the police were covered by different offenses. The ban on prosecutions without a petition from the victim remained. The new law also contained a provision requiring the prompt return of computers seized by the police (or at least the right to copy their contents), as long as this would not obstruct the investigation.<sup>xiv</sup>

The other positive development for business firms conceived under Medvedev but realized early in Putin's new term was the establishment of the office of the ombudsman for business and appointment to this post of Boris Titov, a figure active in business associations. During its first year, Titov's office has received complaints from businesspeople who claim to have been persecuted, organized inquiries, and made petitions the relevant law enforcement agencies, which too often closed ranks and failed to deliver satisfaction. Titov has managed to bring into the open particularly scandalous incidents and obtain a few releases of incarcerated entrepreneurs, a fact that may deter some would be perpetrators. He has also revived the idea of a mass release of businessmen from confinement, but there has been no response from the leadership to date. Finally, the draft law on the business ombudsman, heard already in first reading, promised to give him the right to appeal directly to the courts on behalf of entrepreneurs, the threat of which might improve his clout.<sup>xv</sup>

Counterbalancing these positive developments were two new attempts to attack business through the criminal law. The head of the Investigative Committee Aleksandr Bastrykin began promoting vigorously the idea of establishing criminal responsibility for legal persons, which meant in practice business firms as opposed to individual entrepreneurs. The idea was not new, and the institution had been included in Russian draft criminal codes of the mid 1990s, but rejected for the Code itself as too poorly drafted. According to Bastrykin, this new form of

responsibility existed in many Western countries (actually only some, and not in Germany) and would enable investigators to do searches of offices that they cannot do now. As a start, he wanted to introduce this collective responsibility for crimes covered in international agreements, especially money laundering, a crime interpreted so broadly in Russia that the responsibility of legal persons would help police conduct raids.<sup>xvi</sup>

Equally threatening to business would be the new powers the government proposes to give to tax officials in its draft law on financial violations. Discussed in the Duma at first reading in February 2013, the law was reviewed by three legislative committees and aroused strong objections on many counts. Thus, the law would give tax authorities the right to demand that banks stop a firm's operations when their inquiries sent to the legal address did not yield answers or reach the addressee. But according to the Budget committee, the mail in Russia was not sufficiently reliable and that the fact that a tax payer was not available at the legal address did not mean that he was dishonest. Other controversial measures included the lowering of the definition of "large" and "especially large" losses in cases of money laundering and the return to the criminal code of a version of "contraband", eliminated by Medvedev, specifically criminalizing the illegal movement of hard currency (i.e. simply undeclared).<sup>xvii</sup>

In addition to these new initiatives to extend criminal law regulation of business, the pro business position was weakened by the persecution and cessation of activities of the Centre for Legal and Economic Studies. During Medvedev's presidency the top level economists and jurists at the Centre produced a series of analyses of the mistreatment of business and actively promoted decriminalization of business crimes at seminars and parliamentary hearings. With Putin's return to the presidency the fortunes of the Centre changed. First, its powerful protector the Institute of Social Development (a Medvedev think tank) was disbanded. Then, in November

2012 the Centre became one of the first victims of the new NGO law, when its premises were raided, computers and other materials seized, and its managers treated as suspects in a criminal investigation. The turn against LECs may have been motivated in part by the involvement of some of its principals in the production of a critique of the second Khodorkovsky trial commissioned by the Presidential Council on Human Rights. But the effect of the attack on LECs was the suspension of its activities to improve the business climate in Russia by reducing police pressure on entrepreneurs.<sup>xviii</sup>

To a degree the resulting vacuum has been filled by the activities of the Ombudsman for business Boris Titov and his friend Andrei Nazarov of Delovaia Rossiia and Business against Corruption. Not only did these figures frequently represent business interests in the policy-making process, but they also took initiatives in promoting further improvements in the business climate. In particular, Nazarov offered a new set of proposals in February 2013 that included moving all economic crimes into one chapter of the Criminal Code (especially fraud and embezzlement in a business context); concentrating all investigation of business crimes currently handled by the MVD and FSB to the Investigatory Committee (allegedly a more professional body less engaged than other law enforcement agencies in protection and raiding activities); and eliminating for these offenses the notion of “group” activity as a qualifying factor. It is too soon to know the fate of this promising set of proposals.<sup>xix</sup>

### **Penal populism Russian Style**

Another group of proposed changes to the Criminal Code that appeared in fall of 2012 consisted of initiatives designed to appeal to public opinion, or at least the views of particular publics. Two that merit close attention are the bill that would create a new crime of “offending

the feelings of religious believers” and bills (including competing drafts) to address the problem of drunk driving. As we shall see, both of these draft laws followed upon shocking public incidents covered in the media; both drafts embodied extreme and emotional responses; and, though supported initially by politicians, both of them were softened in the normal process of bureaucratic review. In fact, as of early April 2013 neither bill had yet been adopted, although the prospects of some version becoming law were strong.

The idea of a separate crime of “blasphemy” had been discussed with the Russian Orthodox Church in the past, and conduct offensive to religion was already an administrative offense. But summer 2012 provided Church leaders with a new opportunity to press their cause. The entry of a group of young female punk rockers into a cathedral, their performance of an anti Putin song, and the circulation of a video recording on the internet produced not only a scandal but a criminal case. The authorities chose to treat the conduct of members of Pussy Riot as hooliganism, and to the shock of the outside world the lead perpetrators received sentences of two years imprisonment. This was not enough to mollify Church leaders, who responded to the opportunity by submitting a proposal to add a new article to the Criminal Code on offending the feelings of believers, this despite the presence in the Code of other articles relating to hate crime. The original version of the draft law called for not only fines but terms of imprisonment of up to seven years.<sup>xx</sup>

The draft law appealed to the conservative part of society, a significant part of which thought (according to polls) that the Pussy Riot girls had been convicted of blasphemy and not for hooliganism. Not surprisingly, politicians did not oppose the draft law. Over the course of the fall, however, the draft was reviewed and criticized by the Public Chamber, the Supreme Court, and the Presidential Council on Human Rights, all of which expressed strong criticisms,

including that the punishments were excessive and the content of the offenses too vague to have legal value. The Presidential Council took a leading role in organizing discussions with interested parties and produced its own substitute proposals in January 2013. Almost simultaneously the Government returned its own sharp critique, indicating that there was no need for a new article, because most offenses were covered by other articles in the Code. It suggested that language about religious be added to the article on hooliganism.<sup>xxi</sup>

The rejection of a separate crime for offending feelings of believers seemed to carry the day, and as of mid March the Duma proponents of the law agreed to abandon a separate new crime in favour of a modification of an existing article (148) “Violation of the right to freedom of religion and confession”, which provided fines and imprisonment up to three years. However, the first reading of the bill has yet to take place.<sup>xxii</sup>

The draft law on drunk driving was developed after a series of shocking accidents, first one in Kaluga in July where a child was killed, and then another in Moscow in September where on a wide city street an intoxicated driver moving at 190 kilometers an hour crashed and killed seven persons. The Kaluga legislature called for raising the period of loss of licence from two years to nine, a proposal that went nowhere. But in State Duma in Moscow two deputies produced proposals for changes in the criminal law. First, Duma deputy Irina Iarovaia, head of the committee on security and corruption, presented a draft law that would raise the maximum sentence for accidents causing death from 9 to 15 years; and make it a criminal offense to drive drunk with a suspended license. At the same time, deputy Lysakov, deputy head of the Constitutional Committee, proposed criminal liability for drunk driving without accidents or suspensions but only with a clear definition of drunkenness based on the amount of alcohol in the blood.<sup>xxiii</sup>

Both drafts proved controversial, and only some of the initial proposals remained in a later joint draft. To begin, the Supreme Court objected that such severe punishments for accidents would move the offense into the category especially grave crimes that could only be intentional (like murder). Secondly, the definition of drunkenness became a point of contention, as Iarovaia sought to avoid the return to a specified permissible amount of drink. Only recently, with Medvedev's support, had the Government eliminated an earlier limit that amounted to one stiff drink (1.5 ounces of vodka for the average male, with a half an hour waiting period). Lysakov proposed a slightly lower level, but there would still be some leeway. The absence of any set level, he believed, would make the law unenforceable.<sup>xxiv</sup>

On March 29, 2013 the Duma approved in first reading a compromise draft law. It included minimum sentences to prison of two years for killing one person and four years for killing two or more. The new criminal offense of driving drunk with a suspended license was limited to situations where the suspension itself had been due to drunken driving. The return of a lower limit of permissible drink before driving was not included in this draft, but the measure had strong support and might be provided in the next one.<sup>xxv</sup>

During the months of discussion of the bill on drunk driving, two related initiatives were also proceeding—one involving more serious administrative sanctions for the whole panoply of driving offenses; and the other returning drunkenness to the Criminal Code as an aggravating circumstance for any crime. Both of these initiatives reflected the same public concerns with reckless driving and the consequences of alcohol.<sup>xxvi</sup>

In short, the criminal law in Russia was subject to the influence of penal populism, even though the degree of electoral competition was minimal. The leaders found it useful to try to mollify the parts of the public offended by the Pussy Riot incident or shocked by reckless drunk

driving.<sup>xxvii</sup> Fortunately, in these instances the pursuit of the normal bureaucratic vetting of legislative proposals checked some of the excesses contained in draft laws that reflected emotion more than reason.

### **Other Proposals for the Criminal Law**

As of early 2013 there were dozens of other proposals for changes in the criminal law, often with draft laws submitted to the Duma, dealing with a wide range of subjects. Here I provide illustrations of initiatives that have been discussed in the press.

First come initiatives to address policy problems that leaders, including in Kremlin, consider urgent. One example was the proposed enlargement of responsibility for arranging and taking part in “contract matches”, that is sporting events whose results were rigged. Arranged outcomes have been a particular problem in professional football (soccer), where often the conspiracies of culprits leads back to bookmakers. The draft law addressing these matters was submitted in the name of the President.<sup>xxviii</sup>

Another new presidential initiative in 2013 would make it a crime for government officials, deputies in parliament, or their spouses and children to have foreign bank accounts—a measure connected to the latest anti corruption campaign. The presidential draft law called for removal from office of persons who failed to divest themselves within three months of the passing of the law, with criminal sanctions as a last resort. A competing draft law submitted by opposition factions in the Duma already in 2012 called for large fines and prison sentences from the start. Yet another bill would require candidates for positions of deputy or governor to get rid of foreign accounts.<sup>xxix</sup>

Also from the President in January 2013 came a draft law introducing criminal responsibility for Russians and foreigners who violated the rules of registration of their place of residence. While the main target was persons who use false documentation, often to register at places where they do not live, the draft promised to make almost any violation of the rules of registration a criminal offense. Critics of the law claimed that it exposed to potential prosecution persons who visited ailing parents for a week or rented a cottage in the countryside. The draft law led to protests on the squares of Moscow and Petersburg in March against the “return of propiska” or Soviet era rules that control movement of persons. Tighter rules of registration promised to provide authorities with another instrument of social control, joining the already created limits on the activity of civil society.<sup>xxx</sup>

Not surprisingly, there were further initiatives in the works reflecting the interests of social conservatives or simply playing to this constituency. A draft law introduced in 2012 on behalf of the Novosibirsk regional legislature, currently supported by the Kremlin and the Orthodox church, would make it illegal everywhere to provide juveniles with information relating to the sexual activities of gays (with the new crime of “propaganda of sodomy lesbianism, bisexuality and transgenderism”) and ban public events that promote gay rights. Restrictions of this kind already existed in some cities (e.g. St. Petersburg), but the new bill would establish them for all of Russia. Although three quarters of Russians consider homosexual acts immoral, the draft law has aroused controversy and was put aside until recently.<sup>xxxi</sup>

Public concerns with strengthening morality in public life were reflected in two separate initiatives that would add new offenses to the Code of Administrative Violations. One would make it illegal and provide large fines (and potential confiscation of materials) for expressions of obscenity in the media. This initiative came from deputy in the Duma as part of a package of

measures to protect children: the same package included new penalties for illegal shooting of guns in urban areas. There was also a separate proposal to designate as a form of “petty hooliganism” the act of urinating in public places, including parks, courtyards, and entry ways to apartment buildings. The supporters of this measure envisage punishment of 15 days administrative arrest imposed by a justice of the peace. Critics of the proposal called for more public toilets.<sup>xxxii</sup>

Finally, there were also initiatives relating to everyday crimes, such as the theft of cars without mercenary intent. Deputy Lysakov proposed changing the punishments for this offense, eliminating the frequently used fines and suspended sentences and raising the maximum from five to fifteen years imprisonment. While such changes might help police impose prison on offenders whose intent they could not prove, they could also lead to inappropriate punishments for joy riders and persons who borrowed a friend’s case without permission.<sup>xxxiii</sup>

## **Conclusion**

In the first year of Vladimir Putin’s new term as president, Russia saw an overabundance of changes in the criminal law, not to speak of proposals for change. The criminal law of the Russian Federation continued to be highly unstable (as stressed by many critics). It also became increasingly vague, as one provision after another was construed in a broad fashion, so that its implementation required discretion on the part of law enforcement officials. While discretion could be productive, in the Russian context it was all too easily misused, whether to serve regime interests or the convenience of enforcers.

As we have seen, the changes in the law concerned many controversial issues in Russian politics and society and represented multiple directions of change. At the same time, the bias was

anti-liberal, as the regime fashioned tools to control if not muzzle civil society or appeal to social conservative support in the face of opposition from the modern urban part of the population. This bias contrasted sharply with the emphasis in the previous few years, where President Medvedev's commitment to humanizing criminal law underlay many (though not all) of the changes in the criminal law and one could speak of a reformist tendency.

To be sure, the tendency of Duma deputies to indulge themselves with proposals to change the criminal law contributed to both the disorder and the bias. Fortunately, for some issues the process of bureaucratic review eliminated some unwise emotional proposals. But overall Putin and his colleagues did not stem the flow of proposals as quickly or decisively as had their predecessors. Russia may well have joined the USA as a place "governs through crime."<sup>xxxiv</sup>

There have also been calls for the production of a whole new criminal code, if only to sort out the many changes of years past and improve the legal principles in the Code's general part. While needed, this project would be premature, for in Russia there is too much disagreement about the values the criminal law should embody and the functions it should serve. In short, criminal law in Russia is unsettled, because of the divisions in Russian society itself, not to speak of the weakness of the Russian state.

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#### NOTES

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