

EHRAC

Bulletin

Running in Circles - Defamation recriminalised in Russia

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Over the last six months, the Russian law on defamation has been reformed twice. Sadly, the overall result of these reforms cannot be regarded as an improvement. In December 2011, parliamentarians made the long expected move of decriminalising defamation (more specifically, 'slander' and 'insult').¹ A 'softer' administrative liability for these acts was introduced instead, and the Russian Code of Administrative Offences amended accordingly.² Human rights organisations had been fighting an arduous and protracted battle for the decriminalisation of defamation. Several international and intergovernmental organisations issued public statements expressing support for the reforms, which they believed constituted an important step towards respect for the freedom of expression in Russia.³ However, the pendulum soon swung back.

On 13 June 2012, the new State Duma of Russia reinstated criminal liability for slander.⁴ At the same time, a special provision on slander against judges, prosecutors, investigators and bailiffs was introduced.⁵ Many commentators believe that this new incarnation will be used against jour-

nalists and civic activists. Although supporters of the move insist that the new criminal provision is less harsh than its original form (it no longer includes an imprisonment sanction which, whilst encouraging, was rarely used over the last few years), it is difficult to agree with them. Financial sanctions for the offences were drastically increased from 180,000 roubles to an astronomical 5,000,000 roubles,⁶ which will most likely result in severe self-censorship.

It is believed that this reform was politically motivated. The amendments were scarcely debated in parliament, and barely a week passed between the first reading and the signing of the law by the President.⁷ These amendments were part of a series of measures (discussed further below) aimed at tightening control over civil society and freedom of expression and peaceful assembly following the protests after the December 2011 parliamentary election, and the ensuing serious public discussion over the possibility of election rigging. Sanctions for breaching the regulations on public gatherings were increased and control over the Internet tightened.⁸ Draconian amendments were made to the notorious Law on Non-Profit Organisations 2006, which provide for a special status of "for-

eign agents" for NGOs which receive funds from abroad and engage in political activities.⁹ The precise impact of these laws, however, depends on their implementation and enforcement by the authorities.

An overwhelming majority of defamation claims in Russia over the past decade have been in civil cases concerning the protection of honour and dignity. Over 4000 such cases are heard every year. However, between 2009 and 2011, the number of criminal defamation cases increased and 800 people were convicted under Article 129 of the Criminal Code (the old criminal defamation provision) within this period.¹⁰ Most of those convicted were journalists working for the regional media or bloggers. Many of the criminal proceedings were instigated by civil servants and public authorities.

The new crime of slander includes a wider range of measures to curtail criticism and expressions of public opinion than its predecessor, and is drafted ambiguously. For example, Article 128.1(4) of the Criminal Code states that "*Slandorous assertions that a person is suffering from an illness which represents danger to others, and slanderous statements combined with*

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allegations that this person has committed crimes of a sexual nature, are punishable by fines up to 3,000,000 roubles, or 3 years' worth of wages or other income of the convicted person, or by up to 400 hours of compulsory labour. Commentators have expressed concern about this vague provision, and believe that it was only included to intimidate those who criticise the government, and to express doubts as to the sanity of the people who take controversial government decisions. The sanction for the crime also appears disproportionate to the gravity of the offence.

The offence of 'insult' has not been re-criminalised. This is likely to be because what the authorities consider dangerous are not mere value judgments, but any factual information about the abuse of power, corruption, or unlawful enrichment of government officials, which can be easily classified as 'slander'. The administrative offence of slander¹¹ has been abolished since its re-criminalisation,¹² but this too has produced some alarming results. It soon became clear that its decriminalisation had occurred in name, but not in substance. The administrative provision carried much higher fines than the previous crime of slander.¹³ It also included the following ambiguous and peculiar grounds for liability: *"not taking measures to prevent slander in a publicly displayed work or in the media."*¹⁴ This provision was most likely aimed at editors-in-chief, since Article 2 of the Russian law on mass media stipulates that the editor-in-chief is the person who is *"in charge of the editorial staff (regardless of what exactly his or her position is called) and takes final decisions concerning production and publication of the medium."*¹⁵ The administrative offence of slander is likely to have a serious chilling effect by causing self-censorship amongst editors. The mere hint of a potential conflict could cause an edi-

tor to back-pedal and refuse publication of controversial material.

The first case involving an administrative offence of slander was against Milrad Fatullayev, the editor-in-chief of the newspaper 'Nastoyashcheye vremya' ('Present time') in Makhachkala, Dagestan. He was charged after his newspaper published an article entitled "Kavkaz lideruyet" ("Caucasus in the lead"), which the court deemed to offend the honour and dignity of the President of Dagestan, Mr Magomed-salam Magomedov. The President of Dagestan was represented by the director of his own administration's legal department, and engaged a prosecutor when he did not have to. The case was heard rapidly – taking only

2 months with appeal. The editor was convicted on 28 April 2012 and fined. Although the fine was not a major sum (10,000 roubles, or £200), the case demonstrates the debilitating potential that the administrative offence of slander has on the right to freedom of expression, despite its decriminalisation.

In reaching its decision against Mr Fatullayev, the court skipped the crucial stage of establishing whether defamation had actually taken place. Instead, it moved swiftly on to consider the grounds for "failing to take measures in order to prevent" the 'slander'. The court appeared to rely solely on the President's word, and a presumption that the article was defamatory. Its author, Nadira Isayeva (a well-respected journalist and former editor-in-chief of the newspaper 'Chernovik') was not questioned. Any questions as to what exactly had constituted 'defamation' in the text and whether the facts complained of were true were addressed tangentially. Mr Fatullayev appealed to the Supreme Court of Russia, but to no avail. He is currently preparing an application to the ECtHR under Article 10 ECHR.

Mr Fatullayev's case clearly demonstrates how the law can be used to suppress freedom of expression, even after seemingly encouraging reforms such as the decriminalisation of slan-

der. Even though this particular administrative provision has since been abolished, it is still vital to debate such cases, as an identical sanction for the 'failure to prevent publication' is applicable within the administrative offence of 'insult'.¹⁶ There is a high risk that, following the precedent in Dagestan, this provision will also be used against editors-in-chief to stifle political debate in other regions.

The sanction for this reinstated criminal offence of defamation represents a grave financial risk for the Russian press and journalists, who may face bankruptcy should it be used against them. No journalist, regional publication, blogger or civic

activist is likely to be able to afford a fine of 5,000,000 roubles. Journalists who work for glossy magazines are unlikely to be affected, however - this is all a bit too political.

1 Federal Law № 420-FZ "On Amendments to the Criminal Code and Certain Legislative Acts of the Russian Federation" (enacted 07.12.2011)

2 See Articles 5.60 (now abolished) and 5.61.

3 OSCE welcomes Russian decriminalization reform <http://www.osce.org/fom/85154>

4 Article 128.1 of the Russian Criminal Code.

5 Article 298 of the Russian Criminal Code.

6 Article 128.1 of the Russian Criminal Code.

7 <http://www.rg.ru/2012/07/30/kleveta-anons.html>

8 http://ria.ru/law_meeting/20120608/668743782.html

9 http://www.bbc.co.uk/russian/russia/2012/07/120706_ngo_law_duma_hearings.shtml

10 <http://www.change.org/ru/петиции/государственная-дума-отклонение-законопроекта-о-введении-в-ук-статьи-клевета>

11 (Former) Article 5.60 of the Code of Administrative Offences.

12 Federal Law № 420-FZ "On Amendments to the Criminal Code and Certain Legislative Acts of the Russian Federation" enacted 07.12.2011.

13 (Former) Article 5.60 of the Code of Administrative Offences.

14 Article 5.60(4) of the Code of Administrative Offences.

15 The Law of the RF «On Mass Media», № 2124-1, adopted 27.12.91.

16 Article 5.61 of the Code of Administrative Offences.