



People hold a banner reading “Hands off the Internet” during a rally in protest against court decision to block the Telegram messenger because it violated Russian regulations, in Moscow, Russia May 13, 2018. REUTERS/Tatyana Makeyeva

A Traditional State and a Modern Problem: Russia Rewrites its Internet Extremism Laws

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In 2012, the police unexpectedly summoned Vitold Filippov, the leader of a regional nationalist party in Tatarstan, for questioning. The reason for his interrogation, Filippov soon discovered, was that he had “liked” a picture of Edward Norton from the film *American History X*, where Norton displayed a swastika tattoo on his chest. Indicted for extremism, Filippov eventually was charged with the lesser administrative offence of promoting Nazi symbols. The movie itself has never been banned in Russia; indeed, it has appeared on television. Nevertheless, Filippov received a fine of 1,000 rubles and local authorities still refer to his involvement with Nazi propaganda when given the chance.¹

Filippov’s case is by no means an isolated incident. Human rights groups have collected numerous examples of how reposts and other seemingly trivial activity on the internet have resulted in charges of extremism and other criminal violations in Russia.² Such actions have been greeted by repeated demands over the past several years—from legislators, private business, and the public—to change the laws on extremist activity. In an unexpected twist, Russian authorities have now responded to calls for reform. Multiple institutions, including the Supreme Court of the Russian Federation and the office of the Prosecutor General of Russia, as well as the president himself, have

weighed in with substantive proposals that address due process concerns and the underlying law.

Russia is tackling a universal question of how to manage free speech on the internet.³ However, the repost issue also sheds considerable light on how Russian law and state institutions work in practice. The interplay between law and politics highlights President Vladimir Putin's ability to at least partially address the concerns of the Russian population while preserving the state's strong coercive powers.

Reposts, Criminal Liability, and the Russian Internet

Criminal cases involving reposts and the publishing of otherwise non-threatening information on the internet are unpredictable, often seemingly accidental, and yet designed to intimidate. One student received two and a half years in jail for reposting alleged extremist material as part of a survey conducted for class.⁴ Andrei Bubeev, an electrician from Tver, was sentenced to more than two years in jail for reposting statements from right-wing Ukrainian nationalist groups, even though he had no public following (he had all of 12 "friends" on social media).⁵ Russians also have been questioned and detained for alleged extremist activity for reposting punk song lyrics, publishing memes, and telling jokes on the internet.⁶

As the Filippov case suggests, any reference to World War II seems fraught with risk. A Stavropol university student was punished for re-posting a blogger's report about the opening of a Polish World War II museum because photos of the exhibit included swastikas.⁷ Meanwhile, a Perm resident was charged with the rehabilitation of Nazism for reposting factual information on the Soviet

Union's and Germany's coordinated occupation of Poland in 1939.⁸ Critical comments of Putin can lead to criminal charges, but so too, ironically can pro-government statements. The Russian internet pioneer and blogger Anton Nosik, who died in 2017, was a long-time critic of Russia's internet policies. Yet Nosik got in legal trouble for an intemperate blog post supporting Russia's bombing of Syria (he was a strong backer of Israel) that ultimately led to a conviction for extremism.⁹

Russian authorities have not only relied on seemingly innocent reposts and "likes" to conjure up acts of extremism on the internet. They also have instigated such controversies themselves, to the growing objections of Russian society. Most famously, a FSB agent joined a Telegram chat room and ultimately convinced a group of young students to meet in person and make anti-government statements, after which they were arrested and jailed while awaiting trial. Such a provocation triggered strong public protests, and some (but not all) of the defendants ultimately were released into house arrest, although the charges themselves have not been dropped.¹⁰

Several sections within the Russian criminal code deal with hate crimes, acts of terrorism, and other extremist activity. Article 282 serves as the most widely cited provision in extremism cases; it prohibits the incitement to hatred based on sex, race, nationality, religion, language, and membership of any social group, and it punishes attacks on human dignity. Article 282.1 bans the organization of extremist organizations, while Article 280 forbids public calls for extremist activity. Following events in Crimea, the latter provision was subsequently supplemented by Article 280.1 that banned attempts to undermine Russia's territorial integrity.

From 2011 until 2017, the annual number of persons convicted under Articles 280 and 282 increased significantly, from 149 to 604.¹¹ These prosecutions involve undeniably racist and xenophobic statements as well as genuinely extremist organizations. Yet, as the above cited examples indicate, a small but growing subset of cases revolves around reposts, retweets, and “likes” of materials that lack clear criminal intent, thereby raising serious procedural and freedom of

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speech questions. Indeed, in several instances, the person doing the reposting, not the originator of the content, suffered the legal consequences. Moreover, the prosecution of repost cases has been uneven at best. Certain regions, including the North Caucasus, the Volga region, Krasnodar, Tatarstan, and Chuvashia, are known to be more vigilant than others, most likely because local Ministry of Internal Affairs (MVD) officials have assigned a high priority to such cases.¹²

The end result has been increased legal uncertainty. “These cases are very arbitrary because there are lots more people out there who have done the same thing,” noted Alexander Verkhovsky, head of

the Sova Center for Information and Analysis, adding that “no one knows where the red line is: it’s like roulette.”¹³ In the past, Russians petitioned tsars—or general secretaries—to intervene in unjust matters. Critics of the application of the extremism laws used a more sophisticated means of communication in this case; they telephoned Putin.

A Call for Reform

On June 7, 2018, during one of President Putin’s annual direct line phone-in shows, the young writer and Duma deputy from the Communist Party Sergei Shargunov asked the president’s opinion about the abuse of Russia’s extremism laws. Shargunov argued in part that a literal reading of Article 282 theoretically would lead to charges against Pushkin, Dostoyevsky, and Tolstoy and the withdrawal of their collected works from circulation. Parroting Shargunov’s language, Putin agreed that it was not necessary to pursue such charges to the point of “absurdity.”¹⁴ However, he insisted that surely no one opposed prosecution of those who promoted suicide or fascist ideas on the internet. Putin suggested that the All-Russian Popular Front (ONF)—a state-sponsored social-political organization—as well as the Supreme Court further investigate the matter.

Putin’s comment provoked a flurry of responses from private and public actors. The corporation Mail.ru Group, which owns the largest social network (VKontakte), appealed to multiple federal institutions—the Duma, the Supreme Court, the ministry of justice—to change these practices.¹⁵ VKontakte is particularly vulnerable to such investigations; as a Russian entity (unlike Facebook and Twitter), it has to respond to information requests from state authorities, and approximately

90 percent of all extremist cases allegedly originate on VKontakte.¹⁶

Other public institutions and political actors entered this debate as well. Citing the expertise of its members, including prominent representatives of several relevant NGOs, the Presidential Council for Civil Society and Human Rights proposed its own detailed recommendations on how to reform Russia's extremist laws.¹⁷ Meanwhile, Shargunov joined with a representative from the Rodina faction to propose legislation in the Duma that sought to de-criminalize such reposts and instead subject them to administrative penalties.¹⁸ Shargunov emphasized that the repost cases created a growing dissonance between state and society and argued that the law itself did not adequately define the crime as it related to the internet. He further objected to the subjective nature of expert opinions in extremism cases, especially since such testimony often proved critical in the indictment and subsequent conviction of the accused.

While Shargunov's draft amendments received some support, including from the Russian ministry of communications, the ruling United Russia Party never got behind the legislation and it ultimately died in committee.¹⁹ Meanwhile, the ONF, an alliance of government-friendly social organizations, including United Russia, remained silent, perhaps because it lacked interested and expert parties to drive a study. Thus, it was left to the Russian Supreme Court to issue the first official response on this matter.

The Supreme Court Weighs In

On September 20, 2018, the Supreme Court announced a plenum decision on how to investigate

extremism cases.²⁰ Under Russian law, a plenum determination does not involve a live dispute with an individual defendant. Instead, it enables the court to issue guidance to other law enforcement and judicial bodies on how to respond to related cases. While such guidance does not rise to the formal level of precedent or serve as a mandatory legal act under Russian law, it theoretically must be taken into consideration by judges when resolving disputes. Since promotion within the judiciary depends in part on not having decisions overturned on appeal, career-minded judges regularly take such plenum decisions to heart.

The Supreme Court's plenum decision included several sweeping changes for the investigation and subsequent prosecution of alleged extremist activity. It emphasized that courts had to take into account freedom of speech issues in such cases and that the freedom to search for, receive, and distribute information can only be limited in exceptional circumstances to defend the constitutional system, morality, state security, and the country's territorial integrity. Under Article 282, the court added, information distributed via the internet not only must meet the threshold articulated under the statute (i.e., the incitement of hatred), but also represent a genuine social danger. In short, courts henceforth were required to consider the context in which such information was distributed.

Finally, the Supreme Court picked up on Shargunov's complaint about the use of expert testimony in extremist cases. The relative danger of extremist statements is often evaluated in court by linguists, psychologists, and other so-designated experts whose testimony often carries significant weight with a judge. Yet such specialized technical

expertise, arguably, is often irrelevant when assessing the harmful impact of given statement. Thus, the court sought to limit the influence of such cherry-picked expert opinions by ruling that they should not be given priority over any other piece of evidence concerning the alleged extremist content of the information.

Expanding Prosecutorial Oversight

The plenum's guidance was followed one day later by an Ukazanie (henceforth "Instruction") from the prosecutor general's office on how to address reposts and other non-threatening publications on the internet.²¹ The procuracy has been engaged in a rear-guard (and largely unsuccessful) effort over the past decade to defend its oversight authority over criminal investigations. The establishment of the Investigative Committee (roughly akin to the FBI) in 2011 represented the most serious blow to the procuracy's supervisory powers, and it subsequently has engaged in an institutional tug of war with the Investigative Committee in several high-profile cases. The Instruction can be seen an attempt at pushback against this erosion of authority as it specifically ordered local prosecutors to review all extremist cases, both those that led to indictments and those that were stopped. Prosecutors were to verify that all procedural rules and requirements, most notably the presence of a motive to commit an extremist act, had been observed. Moreover, the Instruction expanded the procuracy's oversight powers by placing all investigations of extremist cases conducted by the MVD, the FSB, and Federal Penitentiary Service (FSIN) under prosecutorial supervision.

In asserting greater supervisory powers, the procuracy assumed responsibility for evaluating

the legality (zakonnost') of any extremist case. Per the Instruction, however, prosecutors still were required to take into account the guidance issued by the Supreme Court in its plenum decision. Furthermore, the Instruction indicated that charges could not be brought under Article 282 for reposting materials on the internet without evidence of an underlying crime. Therefore, as the Sova Center for Information and Analysis later argued, the Instruction theoretically shifted attention in Article 282 investigations to real criminal acts, as opposed to alleged extremist expressions.²²

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But while it appeared that the prosecutor general's office and the Supreme Court had issued a coordinated response, the twin directives illuminate an underlying tension within the legal system that dates back to the Soviet period, if not earlier. From the 1950s onward, a strong accusatorial bias has led to a negligible (less than 1 percent) acquittal rate in criminal cases, a trend that continues to the present day. This statistic admittedly fails to reflect charges that are dropped before trial (i.e., hidden acquittals). Nevertheless, the deep-rooted accusatorial bias within the Russian legal system suggests that the decisive role in the criminal process is played by the

procuracy, the institution responsible for bringing charges, and not the judge interpreting the law and rendering a verdict. The procuracy, known for centuries as the “eyes of the sovereign,” saw its supervisory powers bolstered by the Instruction, even as it simultaneously contained some deference to the Supreme Court’s plenum decision.

Going forward, it will be interesting to see which institution—the procuracy or the judiciary—ultimately gains the upper hand and sets the legal standard for bringing criminal charges in extremist cases. For the Supreme Court to achieve greater influence, it most likely would have to move beyond issuing mere guidance and overturn some convictions in actual extremism cases, something that it apparently has been unwilling to do.²³ What the debate over the extremist law most clearly demonstrated, however, was the need for a legislative solution, and such a proposal appeared just two weeks after the above flurry of rule-making activity.

Putin’s Proposed Legislative Change

On October 3, 2018, President Putin introduced new legislation that essentially de-criminalized any first offense under Article 282 that lacked sufficient criminal intent. Any repost that fell under this provision would be subject to fines of between 10,000–20,000 rubles, the performance of up to 100 hours of public service, or administrative detention.²⁴ A second offense within a single calendar year, however, would be subject to criminal prosecution.²⁵

Putin’s draft law, at a minimum, can be seen as a positive first step in the reform process. Emphasizing how his direct appeal to the president had led to concrete results, Shargunov effusively praised Putin’s proposal.²⁶ At the same time, human

rights activists were quick to criticize the narrow scope of this draft law, which only addressed charges brought under Article 282. Other provisions in the criminal code dealing with extremist activity remain loosely defined and unchanged. Therefore, Russian law still possesses sufficient flexibility both on paper and in practice to continue to criminalize reposts and otherwise punish innocuous activity on the internet.

Putin’s draft legislation points to another underlying reality of Russian law as well, namely that it is the presidential administration—and not the Duma—that drives the legislative agenda. Since the 1993 Russian constitution assigned the right of legislative initiative to the president—as well as to the Constitutional Court of the Russian Federation, the Supreme Court, the Russian government, and regional-level legislatures—Putin does not need to find a sponsor within the parliament to propose his legislation, and his administration wrote the new amendment to Article 282. Given the president’s status, his bill unsurprisingly breezed through its first reading in the Duma, while Deputy Shargunov never got his draft amendments out of committee.²⁷ Thus, while opposition parties within the Duma first raised this issue, it was Putin who set the reform process in motion and his staff that dictated the changes.

Conclusion

The controversy surrounding the application of Russia’s extremism laws to the internet and recent changes highlight both the possibility and limitations of present-day Russian law. On the plus side, a loose combination of politicians, business interests, human rights organizations, and concerned citizens voiced their displeasure over the enforcement of existing extremism laws,

ultimately gaining President Putin's attention. The Supreme Court next stepped in to provide broad legal guidance on how to enforce criminal law and its application to reposts and other activity on the internet. The prosecutor general's office proceeded to cite the Supreme Court's plenum decision in issuing its Instruction, thereby recognizing the plenum decision's legal standing. The prosecutor general further took control and established more centralized supervision of the investigation process in extremism cases. Finally, concrete legislative changes were proposed that will at least begin to soften the blunt edge of Russia's extremism laws.

The impact of these changes on the legal process has already been felt. Sova's Alexander Verkhovsky reports that two cases were dropped in the immediate aftermath of the Supreme Court's plenum decision.²⁸ Yet the limited nature of the guidelines and directives described above leaves numerous questions regarding their future implementation. Is the Supreme Court's issuance of guidance, and not precedent, sufficient to change how investigators and prosecutors examine extremist cases? Alternatively, in light of the legal system's longstanding accusatorial bias, will the procuracy and its newly expanded supervisory authority dominate the investigative process so as to diminish the court's recommendations? Will the Duma continue to wait for commands from

the presidential administration to address sensitive matters? Finally, will President Putin's reforms be enough to change the upward trend in extremism indictments, or will criminal cases simply be replaced by a growing number of administrative violations that continue to intimidate internet users and limit freedom of expression on the internet?

The debate over reposts on the internet suggests that Russian law is not immune to criticism from within the legal system and Russian society. Yet it appears that the Russian state's response is less a matter of bending to public opinion and more a case of reacting to embarrassing examples of a dysfunctional status quo. The absurdity of some of the charges, and the evident disproportionality of the punishments, made the state look foolish and paranoid, not strong and decisive. Therefore, some corrections to Russia's extremist laws were in order. But, as we have seen, the reform process still reflects deep-rooted institutional interests and values. The president's utterances, however brief, are the only words that matter, sending other state institutions scrambling to show their attentiveness to his remarks. The persistence of Russia's traditional political and legal hierarchies gives Putin significant leverage over the legislative process and ensures that the state's concerns remain paramount.

The opinions expressed in this article are those solely of the authors.

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