

Selective Law Enforcement against Russian NGOs

Pursuing Informal Interests through Formal Means

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MASTER'S THESIS – EUROPEAN AND AMERICAN STUDIES
FACULTY OF HUMANITIES

UNIVERSITY OF OSLO

Spring 2009

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List of Abbreviations¹

ADC	Anti-Discrimination Centre
CDDHR	Center for Development of Democracy and Human Rights
CERP	Centre for Enlightenment and Research Programs
CW	Citizens' Watch
ERC	Environmental Rights Centre
FRS	<i>Federal'naâ registracionnaâ služba</i> (Federal Registration Service) ²
FSB	<i>Federal'naâ služba bezopasnosti</i> (Federal Security Service)
GOST	<i>Gosudarstvennyj standard</i> (State Standard)
GPI	<i>Gosudarstvennaâ požarnaâ inspekcîâ</i> (State Fire Inspectorate)
HRW	Human Rights Watch
HRWF	Human Rights without Frontiers
ICNL	International Center for Not-for-profit Law
NGO	Non-governmental Organization

¹ A short note regarding transliteration: Russian (and Ukrainian) words and phrases, personal names including informants and written sources in Russian language, are transcribed using the ISO 9 (1995) transliteration system for Romanization of Cyrillic letters (identical to the GOST (2002) system). Unlike the alternative systems, words transliterated with this system can be traced back to its exact source as each Cyrillic letter is given a *one-character* equivalent. Readers not familiar with Russian will find the names hard to pronounce correctly, but the provided preciseness for academic reference is uncontested. Russian authors of English texts and names of persons quoted in written sources are both transliterated as in the text referred to.

² Also known as *Rosregistraciâ*.

Acknowledgments

I am grateful to my informants who shared their expertise and personal experiences with me. I have also incurred debt to a range of other human rights workers who shared their field knowledge and guided me through unknown territory. Special thanks to Elena Kobets and ERC Bellona who let me use their premises in St. Petersburg for interviews and correspondence.

Furthermore, I am grateful to the Norwegian Institute of International Affairs (NUPI) for financial support and for providing me with an office among wonderful academics. Especially, I am indebted to Helge Blakkisrud, Heidi Kjærnet and Indra Øverland for letting their academic insights benefit my thesis. Without the assistance of the NUPI library staff I would certainly have been busier these months. I thank my advisor Pål Kolstø at the University of Oslo for all his comments and patience. For editorial support, I am also indebted to Hedda Hakvåg, Jon Bækken and Christopher Pedersen Cook.

Special thanks to Una Hakvåg for persistent support and sound advice.

1. Introduction

*Being secondary to political forces, law in Russia long ago acquired an instrumental character. It was used as a tool of the political leadership, for social engineering, for education, for moral instruction, for legitimisation of policies, for whatever task the rulers might choose – but never for creating a rule of law and not of men.*³

Marina Kurkchyian

Rule of law is more than a principle of governance. According to Lon Fuller, it is a moral good.⁴ Although citizens in rule of law states may consider some regulations burdensome and bureaucratic, the legal system enjoys a relatively high level of respect and trust. The citizens recognize that some tax payers dodge regulations by manipulating existing incentives. Yet, they believe that the law is there first and foremost to protect their rights and regulate society for the common good. That law can be wielded selectively for extra-legal purposes is an uncommon thought in rule of law states.

As Marina Kurkchyian's above statement above tells us, Russians have different experiences with law. In hybrid or authoritarian regimes, law can serve many purposes other than protecting the citizens' legal rights. Although the law also serves this purpose to some degree, the Russian legal system is often manipulated to promote a variety of informal interests – be it personal, economic, or political. I term this phenomenon *selective law enforcement*, my main theoretical concept in this thesis. In short, selective law enforcement is the *selective pursuit of legally imposed punishment for personal or political ends*.

1.1 The Research Question

My empirical field of research is the perceptions of political abuse of law against non-governmental organization in Russia. The empirical research, however, refers closely to my

³ Kurkciyan, Marina (2005): "Researching Legal Culture in Russia: From Asking the Question to Gathering the Evidence" in Banakar and Travers (eds.) (2005): *Theory and Method in Socio-Legal Research*. Oxford: Hart, p. 266.

⁴ Fuller paraphrased in Tamanaha, Brian Z. (2004): *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, p. 95.

more generic, theoretical discussion of selective law enforcement, an underdeveloped concept in existing literature. Because of the lack of an existing theoretical base, my approach is essentially *explorative*. The main research question I seek to explore is:

How did selective law enforcement against Russian human rights organizations unfold from 2006 through 2008?

In the research, I seek to identify the phenomenon's functioning and effect. The research also examines the *purpose* of selective law enforcement at a theoretical level. I do not, however, approach the intentions behind selective law enforcement *empirically*.

Since this thesis is but a first venture into a large field, I will refine the initial concept of selective law enforcement along the way. In other words, I intend to explore the concept's validity while keeping it open for change. Throughout the thesis, the answer to the primary research question is obtained through a dialogue between the initial theoretical model and the empirical research. I aim to achieve insight on the unfolding of selective law enforcement in both its case-specific and theoretical context.

1.2 Operationalization of the Research Question

In the below theoretical model, I underline the necessity of looking into the *interrelations* between the formal and informal parts of selective law enforcement – the need to look at the mechanism as a complex whole. In order to investigate how selective law enforcement has unfolded empirically, however, it proved necessary to operationalize the main question and investigate the formal and informal separately.

To operationalize a concept is “to identify those variables in terms of which the phenomenon represented by the concept can be accurately observed”.⁵ To structure my empirical research of selective law enforcement against Russian human rights organizations, I operate with the following four variables:

⁵ Greenwood, Ernest (1956): "New Directions in Delinquency Research: A Commentary on a Study by Bernard Lander," *Social Service Review*, vol. 30, no. 2, p. 152.

- (1) The legal foundation for selective law enforcement
- (2) The punishment imposed through selective law enforcement
- (3) The *extra-legal criteria* the punished actors perceive to be behind the punishment
- (4) Perceptions regarding the informal rules' *origins* and means of *communication*.

The relevance of the variables is explained in chapter 3.

1.3 The Structure of the Thesis

This first chapter provides first formulates a broad question forming the foundation for an explorative study into selective law enforcement. Second, the chapter operationalizes the research question and identifies some variables structuring the collection of empirical material. Following this general outline of the thesis structure, the chapter contextualizes the research and presents the most important secondary literature that I have utilized in the thesis. In a separate, albeit short second chapter, I discuss some relevant methodological issues. This chapter includes a presentation of the informants and some brief comments on the use of qualitative interviews in academic research.

The third chapter first discusses two relevant lines of thought used to explain interrelations between formal and informal structures. These lines of thought form a loose base on which I form my own theoretical interpretation of selective law enforcement, introduced in the second part of the chapter. It is important to emphasize that this model is a theoretical construct – it does not aim to neatly fit every case of the phenomenon. I do hope, however, that it can provide a useful point of departure for understanding informal influence on legal systems. The model argues that selective law enforcement is characterized by the unique relationship between the informal interests and the formal law enforcement structures, resembling the relationship of a parasite to its host. Furthermore, the process of selective law enforcement can be distinguished by specific traits and purposes. Most importantly, the model seeks to describe how agents can apply formal legal structures to promote private or political interests.

In chapter 4, general theory gives way to more case-specific analysis. This chapter deals with the formal half of selective law enforcement, the Russian legal system. The discussion deals with the first two variables of selective law enforcement and thus investigates what characterizes the legal basis for selective law enforcement and which punishment is imposed selectively. First, I examine the formal regulation of NGOs with a particular focus on the 2006 amendments to NGO legislation. Second, I present some specific legal cases, approached through interviews with Russian NGO staff who have personal experience with the issue at hand. The third section combines the findings from the two previous parts. Here, I present a typology of legal traits typical for selective law enforcement against NGOs, and discuss what kinds of punishment have been imposed. Even though the most severe sanctions were avoided by many of the informants' NGOs, the damage done to the NGO community is considerable not least because of the indirect impact of the legal procedures.

In chapter 5, I discuss the other half of selective law enforcement, being the informal rules and the agency behind them. I approach the material with the intent of discovering perceptions regarding the nature, origins and communication of the informal rules behind legal punishment. All my informants in some way or another depict 'the authorities' as the force behind selective law enforcement. Therefore, I introduce the chapter by presenting the informal pressure that Russian federal authorities place on the NGOs. Second, I redirect focus to my informants' perceptions of informal processes behind the legal prosecution. The informal criteria the informants state as crucial to their legal problems coincide with the governmental rhetoric. Based on this, I discuss how selective law enforcement in the case of Russian NGOs works as a mechanism through which governmental policies are supported by a manipulative use of the legal system. This constitutes the third part of the chapter.

Chapter 6 provides further analysis based on findings from the subsequent chapters. The first part deals with the informants' insistence that the mechanism is a governmental tool of repression. I discuss how governments can potentially benefit from employing selective law enforcement as a means to control society, and how this fits the logic of hybrid regimes mimicking democracy. In the second part, I seek to explain selective law enforcement's performance among the investigated cases, drawing on insight from all four investigated variables. My research indicates that selective law enforcement against Russian NGOs first and foremost has been impeded by the relative inefficiency of the enforcement agencies.

Chapter 7 concludes the thesis by summarizing the key empirical and theoretical findings and suggesting directions for further research.

1.4 Context

1.4.1 Law in Russia's Hybrid Regime

The study of selective law enforcement is a study of how the state and its people relate to law. In case of selective law enforcement, the punished is not punished *because* of the law, but through the application of it. If the victims of selective law enforcement are indeed guilty of violating the law, is the punishment contradicting rule of law?

The concept of rule of law is disputed. Various definitions focus on either form or content, means or ends. Is rule of law a moral good or a principle of governance? The minimum requirement according to all definitions is that the government does not rule in a completely arbitrary manner, but through the use of a formally codified set of rules. This is also known by the term rule *by* law. In a state based on rule by law, “there can be no criminal punishment without a pre-existing law that specified the action as prohibited”.⁶ Within just a concept of law, where it is seen as isolated from moral criteria, any kind of law can in principle be implemented. Rule *by* law is first and foremost “an instrument of governmental action”.⁷

Tamanaha states: “*formal* legality has more in common with the idea of rule by law than the historical [morally defined] rule of law”.⁸ At first glance, therefore, selective law enforcement is founded on a system of rule *by* law – it adapts a purely formalistic view upon law while neglecting principles often associated with rule *of* law. Yet, this is only half the truth, because selective law enforcement is a phenomenon that plays upon the ambivalence and confusion surrounding these concepts. On the one hand, it adopts a formalistic view on

⁶ Tamanaha (2004), p. 119.

⁷ Tamanaha (2004), p. 91. On the instrumental use of law, see also Galligan, Denis J. (2003): “Legal Failure: Law and Social Norms in Post-Communist Europe” in Galligan, Denis J. and Kurkchiyan, Marina (2003): *Law and Informal practices – The Post-Communist Experience*. Oxford: Oxford University Press.

⁸ Tamanaha (2004), p. 96.

law to achieve informal ends. In this way selective law enforcement clearly operates within the logic of rule *by* law. On the other hand, it also implicitly demands the legitimacy associated with rule *of* law. It refers to law as the superior legitimate dictator whose rulings nobody is fit to criticize, thus at least partly legitimizing the selective law enforcement. This dual relationship between law and society is a commonplace phenomenon within hybrid regimes. In this way, the regimes can utilize seemingly democratic institutions for legitimacy, while simultaneously making room for authoritarian repression. This research will demonstrate that selective law enforcement can be a way to promote undemocratic goals within the constraints of formal democracy.

1.4.2 Some Relevant Discourses

The Academic Discourse on Authoritarian Legal Systems

My contribution in the theoretical field finds its *empirical* basis within a specific context, being the formal legal system and the informal interests manipulating it. The presented research relates to the debate on the relationship between law and society in hybrid regimes in general and in Russia in particular. Through my research, I hope to contribute to our knowledge on how law functions in Russia. However, the analytical parts of the thesis interpret the findings in more theoretical terms to underscore its potential value also outside the Russian context.

Regarding the study of legal systems in authoritarian regimes, the collected articles in *Rule by Law*, edited by Tom Ginsburg and Tamir Moustafa, provide an interesting mix of research from various empirical contexts.⁹ For the academic discourse of law and society in Russia, *Ruling Russia* edited by William Alex Pridemore, *Law and Informal Practices* edited by Denis J. Galligan and Marina Kurckchyian and *Russia, Europe and the Rule of Law* edited by Ferdinand Feldbrugge, all provide broad approaches.¹⁰ A recurring contributor to these

⁹ Ginsburg and Moustafa (2008) *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press

¹⁰ Pridemore, William Alex (ed.) (2005): *Ruling Russia – Law, Crime, and Justice in a Changing Society*. Lanham: Rowman and Littlefield Publishers. Galligan, Denis J. and Kurckchyian, Marina (eds.) (2003): *Law and Informal practices - the Post-Communist Experience*. Oxford: Oxford University Press. Feldbrugge, Ferdinand (ed.) (2007): *Russia, Europe, and the Rule of Law*. Leiden: Martinus Nijhoff Publishers.

academic debates is Peter H. Solomon Jr., whose works on the Russian and Soviet legal systems have been published since the 1970s.

The Theoretical Discourse on Informality

With regard to the theoretical model of selective law enforcement, my research draws mainly upon Alena Ledeneva's discussions on informal economics and various works of *new institutionalism* dealing with informal institutions. Gretchen Helmke and Steven Levitsky credit Guillermo O'Donnell for initiating the discourse on informal institutions in the 1990s.¹¹ With the third wave of democratization, it became clear that concepts of formal institutions alone are inadequate in explaining various aspects of democratic progress within the post-communist world and elsewhere. Today, how informal structures shape political systems is still a field of research inadequately studied. Nevertheless, several prominent scholars theorize on these issues. In this thesis I refer amongst others to works of Helmke and Levitsky, Keith Darden, Hans-Joachim Lauth and Christopher Stefes.

The Discourse on Russian NGO Legislation

Alfred B. Evans Jr., co editor of the book *Russian Civil Society*, finds that "the coverage of civil society in Russia has been very one-sided during recent years" and that "many Western sources have equated civil society in Russia with human rights organizations, neglecting to mention the activity of many other types of organizations that have a broader base of support".¹² The NGOs Evans refers to have showed a remarkable ability to attract the attention from of press, international organizations and academics alike. Evans also suggests that "the Western coverage of recent legislation on NGOs in Russia has been one-sided and has not considered the experience of all organizations".¹³ I hereby add myself to the list of sinners. I do not, however, confuse my study of selective law enforcement with civil society

¹¹ Helmke and Levitsky (2003). p. 4. The paper they refer to is O'Donnell, Guillermo (1996): "Another Institutionalization: Latin America and Elsewhere" Kellogg Institute Working Paper #222, March, 1996.

¹² Evans, A. (2009): "Comment on civil society" in *Johnson Russia List* #19 - JRL 2009-32. Available at <http://www.cdi.org/russia/johnson/2009-32-19.cfm>, accessed March 30, 2009. For a broader approach to Russian civil society see the edited volume Evans, Alfred B Jr. et al. (2006): *Russian Civil Society – A Critical Assessment*. New York: M.E. Sharpe.

¹³ Evans, A. (2009).

issues. I have no intentions to describe Russian civil society. Instead, my aim is to investigate informal aspects of the Russian legal system.

In chapter 4, I review the new NGO-law of 2006 and the criticism it was subjected to both before and after its implementation. This discourse has been dominated by the NGOs themselves, both in Russia and abroad, and my review therefore builds upon literature that may be politically motivated. This certainly poses serious methodological challenges, but granted the focus of the thesis they are hard to avoid. The debate on Russian NGO legislation is marked by the fact that the foremost Russian experts on judicial issues to a large degree are involved in the conflict themselves. My research also suggests that this double role influences the outcome of the conflict, as the NGOs by virtue of their legal expertise are able to successfully defend themselves in court.

The most thorough project on the legal situation of Russian NGOs was completed in 2008 by the Russian organization AGORA and its partners. The project concluded with the publication of the book *Nepravitel'stvennye: Desâtiletie Vyživaniâ* (Non-governmentals: A Decade of Survival). At the beginning of 2009, *Nepravitel'stvennye* was arguably the main Russian publication on this field.¹⁴ Other and more brief reports typically make an analysis of relevant legislation, document individual cases of illegitimate persecution. The Russian organizations also often make recommendations to Russian political decision-makers in their reports. Human Rights Watch (HRW), the Helsinki Group Moscow (HGM), Human Rights without Frontiers (HRWF), and various Russian joint projects are among the contributors to this documentation process.¹⁵ Reports with a strong focus on the NGO-law of 2006, that also I give a lion's share of the attention, often base their legal interpretation on the American NGO *International Center for Not-for-profit Law's (ICNL)* analysis from the same year. The ICNL's interpretation therefore strongly influenced the discourse on the law, especially in 2006 and 2007, before reports on actual implementation gradually increased in volume.

My review of the reports suggests that there is not much real debate within the NGO community regarding the NGO-law, as the reports for the most part state the same

¹⁴ In footnotes and the literature list referred to as Ahmetgaliev et al. (2008): *Nepravitel'stvennye: Desâtiletie Vyživaniâ*. Kazan: Otečestvo.

¹⁵ For a more comprehensive list, see footnote 83

arguments. Also, they often refer to the same sources. Many statements should therefore be considered more or less as the collective opinion in the community. In my footnotes I often refer to these general statements as “*inter alia*” while a full list of sources applied in the review on the NGO law are listed in footnote 83.

The Internationalized Civil Society

Although admittedly not a vital part of my research, I hope to balance my focus on the NGOs’ stories somewhat by stressing the fact that every conflict has two sides. The Kremlin’s sceptical attitude towards Western-oriented NGOs has not appeared out of thin air. Rather, it is a product of both internal developments in Russia and ongoing global processes. The conflict between the Western-oriented human rights NGOs and the Russian state can largely be explained by the expansion of Western influence into the post-Soviet realm. If a conflict is to be solved, the best approach comes through an understanding of the interests of both sides. The parts in conflicts, however, tend to forget this basic knowledge.

Apart from speeches and statements of the Russian authorities, my discussion on Kremlin policies in chapter 5 refers to several critical analyses of Western financial support of NGOs. I build my interpretation of the international context on the works of amongst others Sarah Henderson, Lisa McIntosh Sundstrom, Kim Reimann and Aleksandra Chauhan.

2. Method and Methodological Issues

In this thesis, I apply primary research data from interview material gathered from April to December 2008 and contextualize the findings through secondary literature. The theoretical model is built on secondary literature as well as the findings of my own research.

The research is qualitative, although I will not completely ignore apparent patterns. I leave for others, however, to verify their existence through a more quantitative approach, and to give a more comprehensive analysis of the overall impact of the phenomenon.

Although statistical correlations in quantitative studies may reveal traces of selective law enforcement, it is primarily a phenomenon in the mind – a game of *intentions* and *perceptions*. I have chosen to investigate the latter aspect, my mode of presentation relating closely to the informants' stories. For gathering quantifiable data such as the number of times each paragraph has been applied, this method would clearly be suboptimal had the goal been to obtain hard facts. Granted the essentially subjective nature of the phenomenon at hand, however, I want to display the informants' perceptions in light of their own interpretation of the formal prosecution.

In chapter 3, I argue that selective law enforcement is a process initiated informally and concluded with formal punishment. In the research, these processes are traced back through the informants' perceptions of the events. Although I sought to triangulate the NGO dominated discourse and the informants' answers with academic references and governmental statements, readers should be aware of possible bias. Given the selection of sources and my qualitative approach to the phenomenon, the research is not based on raw facts exclusively. Rather I display fiction 'based on a true story'. Thus, I adopt Paul Rosenblatt's view as a point of departure: "I can get closer to whatever is 'right' by hearing what people have to say".¹⁶ As Rosenblatt, "I hope to write truth, not *the* truth, but certainly a truth".¹⁷

¹⁶ Rosenblatt, Paul C. (2002): "Interviewing at the Border of Fact and Fiction" in Gubrium, Jaber F. and Holstein, James A. (eds.) (2002): *Handbook of Interview Research: Context & Method*. Thousand Oaks: Sage Publications, p. 894.

¹⁷ Rosenblatt (2002), p. 905. Emphasis in original.

2.1 Selection of Empirical Data

The Informants

My research draws on qualitative semi-structured in-depth interviews with ten Russian NGO representatives working on topics related to human and civil rights. That said, their fields of work vary considerably. Anti-discrimination, environmental rights and freedom of the press are among the topics on the various NGOs' agendas. The case of the European University of St. Petersburg was included because a study program on democratic elections was perceived to be the reason for the prosecution.

Sorted alphabetically by surname, the interviewed informants are:

Tatâna Barandova, PhD-student and former unofficial leader of the protests against the closure of the European University of St. Petersburg (EUSPB); Elena Źemkova, member of the board of the International Association "Memorial" and executive director of its Moscow office; Ūrij DŹibladze, president of the Center for the Development of Democracy and Human Rights (CDDHR); Mariâ Kanevskaâ, head of the Centre for Enlightenment and Research Programs (CERP); Ol'ga Krivonos, lawyer at the Environmental Rights Centre Bellona (ERC Bellona); Stefaniâ Kulaeva, Head of the Anti-Discrimination Centre Memorial (ADC Memorial); Anna Ŗarogradskaâ, head of the Regional Press Institute (RPI); Maksim Timofeev, lawyer at Citizens' Watch (CW); Natal'â Taubina, director of Public Verdict; as well as an NGO leader, president of an interregional NGO, rendered anonymous at the author's discretion.

Most of the informants had personally experienced legal prosecution which they believed was influenced by their non-compliance with informal rules. A few others were included for their expertise on the legal situation of Russian NGOs in general and of human rights NGOs in particular. Note that *nepravitelstvennyye organizacii* (non-governmental organizations) do not constitute a legal category in Russia. Russian legislation operates with the categories *obšestvennye ob"edineniâ* (public associations) and *nekommerčeskie organizacii* (non-commercial organizations) – as well as several subcategories. My use of the term *NGO* encompasses all these legal categories, as does the NGO-law of 2006 and most of the debate regarding Russian NGOs.

This study utilizes a relatively low number of informants, and they represent only a small group of NGOs. It should be emphasized that these people are not typical representatives of Russian civil society. They can, however, be considered a fair sample of Western-oriented, professional, resourceful NGOs from Moscow and St. Petersburg, dealing with topics considered suspicious by authorities. The informants find themselves in the somewhat contradictory position of being *marginalized elites*; they possess considerable financial and mental resources but claim to be more or less cut off from decision-making regarding their vital interests.¹⁸

The majority of the interviews were conducted in the informants' working environments. Furthermore, many of the informants head an organization or one of its local branches, which are relatively small. Although I did ask for personal opinions, granted the setting and the informants' positions within the organizations, I do not expect the answers to deviate significantly from the NGOs official points of view.¹⁹

Why This Selection?

I intentionally focus on the more well-known cases of prosecution in order to gain insight into processes of selective law enforcement in a highly politicized climate. I choose to investigate the conflict at its peak, where the political lines of conflict are crystallized. The cases have drawn significant attention from the international NGO-community, activists, mass media and academics both in Russia and abroad. Therefore, one can assume that there have been considerable efforts to enforce the informal rules and that the NGOs have had a strong interest in defending their organizations against punishment. In short, in a highly politicized climate less is left to chance. As discussed below, the geographical focus on Russia's two main cities magnifies these traits.

The selected group of informants share traits aggressively criticized by the Kremlin. In 1999, all NGOs operating in Russia were obliged to remove "protection of human rights" and

¹⁸ For a discussion on how to identify and classify elite groups, see Odendahl, Teresa and Shaw, Aileen M. (2002): "Interviewing Elites" in Gubrium, Jaber F. and Holstein, James A. (eds.) (2002): *Handbook of Interview Research: Context & Method*. Thousand Oaks: Sage Publications, especially p. 301-303. The group of informants in this study arguably share some traits with *strategic, professional and philanthropic elites* within various classifications.

¹⁹ A possible exception to this rule is the case of the European University of St. Petersburg (EUSBP).

“protection of citizens’ rights” from their organizations’ goals. The government stated that according to the constitution, only the state and professional lawyers were allowed to protect these rights in the Russian Federation.²⁰ Furthermore, the Kremlin has repeatedly criticized NGOs dependent on foreign funding, as will be elaborated below. The informants’ NGOs have a rather international profile, receive foreign funding and often have English web-pages. As will be seen, the Kremlin depicts them as bridgeheads for expanding Western interests, while the NGOs see themselves as frontline defenders against governmental repression of the freedom of association.

In this environment, selective law enforcement exists in its most identifiable form. I regard this to be advantageous, as the research is an initial study of the phenomenon and aim to develop a generic theoretical model of its structure. Furthermore, the informants are outspoken and have more or less chosen to make their cases public, speaking openly of sensitive issues in the midst of growing authoritarianism. As they did not demand anonymity, the research becomes easier to test and verify.

The NGOs’ Geographical Location

Since the informants’ NGOs are all located in Moscow and St. Petersburg, the findings are not necessarily valid for other parts of Russia. The geographical focus is primarily chosen for practical reasons as most Western-oriented Russian NGOs are located in these two cities. When interpreting the implications of the findings for other parts of Russia, one should consider the following:

Firstly, the NGOs are probably better protected in these two cities than elsewhere. They can support each other more easily; more skilled lawyers reside here and it is easier to attract international attention. Several informants and observers emphasize that NGOs in the periphery have more problems in defending themselves against legal prosecution than the ones in the main cities.²¹ At the same time, the power vertical of the Kremlin is less stretched in these cities than in the Russian periphery. I assume that the informal interests of the local leadership and/or business elite have less influence where the federal leadership’s presence is

²⁰ Ahmetgaliev et al. (2008), p. 16.

²¹ Interview with Taubina, Žemkova and Džibladze, all December, 2008.

strong. This is self-evident in the capital. With regard to St. Petersburg, the city is not only the second largest in Russia both in terms of population and political significance, but also the city of origin for most of the political leadership in Russia today. In short, the two major cities of Russia are where both the NGOs and the federal leadership have their strongest bases.

The Timeframe

My choice to investigate the selective law enforcement's unfolding from 2006 through 2008 is not coincidental. The period carries great significance for Russian NGOs with regard to their legal environment. Džibladze identifies chronologically differentiated periods when different state agencies have taken care of the official punishment of NGOs. Before 2005, the main responsibility for "harassment and selective prosecution" belonged to the tax authorities, he states. The FSB, Russia's security service, also played an important role in the background, but were seldom directly involved in the formal procedures.²² With the implementation of a new NGO-law in 2006, the landscape changed. The Federal Registration Service (FRS), a state agency established in 2005 and responsible for implementing much of the NGO legislation, now played the leading role in regulating NGO activity.

The deadline for data collection was set at the end of 2008.²³ Not only was this date set due to the project's deadline, but the year also marked a significant change in the legal environment of the Russian NGOs. The summer of 2008, only a few months after the presidential power was handed over to Dmitrij Medvedev, the FRS' duties regarding NGOs, together with much of the personnel, were transferred to the NGO-department of the Ministry of Justice. Subsequently, the NGOs experienced a period of "some kind of liberalisation".²⁴ Time will show if this was just an interim period before the conflict again

²² Interview with Džibladze, December, 2008.

²³ Due to a protracted court-process, the case of the Regional Press Institute in St. Petersburg was followed beyond this date.

²⁴ The phrase stems from interview with Barandova, July, 2008.

begins to gather momentum. Towards the end of 2008 there were some “individual cases of crackdown”, states one of the informants, but no systematic persecution like earlier.²⁵

2.2 Using Interviews in Academic Research

My primary tool to get fresh insight into processes of selective law enforcement was in-depth-interviews with experts on – and representatives of – the NGO-community in Russia. Given the nature of the third and fourth variable and the importance of perceptions in this regard, it was critical to get as close to first-hand experience of selective law enforcement as possible. Answers regarding perceptions of informal processes can only be discovered by listening to the personal interpretations of the involved.

Interviews can provide a source to new and unpublished information; the acquired material is by its very nature highly subjective but therefore also unique. Through interviews researchers do not only gain access to the informants’ knowledge, but also to their “interior experiences”.²⁶ This creates exclusive possibilities for investigating informal phenomena such as selective law enforcement. For selective law enforcement’s functioning with regard to deterrence, I will argue that the *perceptions* of the punished are crucial.

One of the main challenges of academic research in general, and of qualitative interviews in particular, is to deal with the degree to which the researcher’s interpretation influences the outcome. As John Johnson puts it: “Children don’t learn what their parents tell them, but what they are prepared and ready to hear. The same holds for in-depth interviewers: They don’t necessarily ‘hear’ what their informants tell them, but only what their own intellectual and ethical development has prepared them to hear”.²⁷ In an interpretive research approach, researchers acknowledge how subjectivity shapes the research project.

²⁵ Interview with Džibladze, December, 2008.

²⁶ Robert Weiss quoted in Gubrium, Jaber F. and Holstein, James A. (2002): “From the Individual Interview to the Interview Society” in Gubrium, Jaber F. and Holstein, James A. (eds.) (2002): *Handbook of Interview Research: Context & Method*. Thousand Oaks: Sage Publications, p. 8-9.

²⁷ Johnson, John M. (2002): “In-depth Interviewing” in Gubrium, Jaber F. and Holstein, James A. (eds.) (2002): *Handbook of Interview Research: Context & Method*. Thousand Oaks: Sage Publications, p. 106.

The debate on how the researcher should relate to the interviewee is marked by stark contrasts. Norman Denzin pleads for interviews “where the research interviewer not only *self-consciously empathizes* with the informants as individuals, but *self-consciously sympathizes* with the political or community goals of those informants *as a category or collective*”.²⁸ John Lofland, representing an opposite view, regards Denzin’s statement as promotion of “fettered research”.²⁹ I take a humble stand in the middle. I neither deny nor fight my sympathy for the promotion of human rights and democracy, and the influence of my own values on the research should not be ignored. At the same time, I maintain focus on findings I believe are of larger interest than my own feelings, sympathies or antipathies.

²⁸ Denzin quoted in Johnson (2002), p. 116. Emphasis in original.

²⁹ Lofland quoted in Johnson (2002), p. 116.

3. Theoretical Framework

To grasp the theoretical concept of selective law enforcement, a simple semantic analysis provides a good start. Simply put, selective law enforcement consists of selectivity, law enforcement, and the interaction between the two. I operate with a division between formality and informality based on whether the interests, rules, punishment or other elements are *officially codified or not*. In selective law enforcement, selectivity constitutes the informal component and law enforcement the formal. A rule is informal if it does not refer to legal documents. Punishment is informal if it is not sanctioned by a legally constituted power. A governmental inspection of an NGO is provided for in official regulatory documents, and is thus formal. If the inspection is initiated for reasons not formally codified however, the *selection* is informal or based on informal criteria. As elaborated below, this is always the case in selective law enforcement as I define it. Nevertheless, the inspection itself remains formal.

Informal rules can be enforced in many ways. If someone crosses the mafia in certain Hollywood movies, they might end up ‘sleeping with the fishes’. To be drowned for breaking the mafia code of silence is definitely an example of enforcement of informal rules, but not of selective law enforcement – at least not in the meaning discussed here. This is because selective law enforcement is a hybrid phenomenon, consisting of both formal and informal components. In the mafia example, the informal rules are enforced, but outside official channels. Here I exclusively discuss how informal rules are enforced through legal channels.

Initially, I will discuss two different approaches to informality and its relationship with formal institutions. First, I present and discuss theory on informal institutions developed by Hans-William Lauth, Gretchen Helmke and Steven Levitsky.³⁰ Second, I will turn to Alena Ledeneva’s studies on informal practices in the Russian economy, transferring some of her concepts in informal economy to my own topic of interest.

³⁰ Helmke, Gretchen and Levitsky, Steven (2003): “Informal Institutions and Comparative Politics: A Research Agenda”. Working Paper #307. Available at <http://nd.edu/~kellogg/publications/workingpapers/WPS/307.pdf>. Last downloaded March 30, 2009. Lauth, Hans-Joachim (2000): “Informal Institutions and Democracy” in *Democratisation*, vol. 7 (2007), no. 4, p. 21-50. Lauth, Hans-Joachim (2004): “Informal Institutions and Political Transformation: Theoretical and Methodological Reflections”. Paper presented at the *ECPR Joint Sessions*, Uppsala.

Finally I present a concept of selective law enforcement that could be seen as an extension of these two sets of thoughts, adding supplementary comments and viewpoints. I argue that certain traits must be present for the practice of selective law enforcement to function and/or be institutionalized. I also argue that selective law enforcement has a specific purpose.

3.1 A Discussion on Interrelations

3.1.1 Selective Enforcement as Institutional Relations

As a point of departure in grasping selective law enforcement theoretically, many of Hans-Joachim Lauth's thoughts seem useful. Lauth's emphasis is on informal institutions and their relation to democratic development in transition systems. He starts his definitional expedition with defining informal institutions as "institutions which are not formally codified".³¹ For an informal phenomenon to qualify as an institution, Lauth identifies some characteristics of systematization:

Even if an actor does not wish to accept them, he or she obeys by them [sic], as in accordance with rational calculation, the costs involved in rejecting them can only be offset when real behavioural alternatives are available [...] Despite their unofficial nature, informal institutions can be precisely understood and described at the analytical level, as they manifest their own functioning logics and rules of identity, which distinguishes them from others.

[...] The definition of 'functioning logic' or 'rule of identity' is based on the idea that the following criteria are present in a specific form and inner connexion: First they have to be recognized by certain symbols or elements, that indicate their existence. Second, they are given specific forms of interconnection or interaction. Third, each institution is linked with a special purpose, which allows its functional description.³²

To secure obedience, informal institutions "are linked to sanctions".³³ This differentiates them in Lauth's typology from cultural patterns and informal politics not expressed through

³¹ Lauth (2004), p. 5.

³² Lauth (2004), p. 6-7, and footnote 1, p. 7.

³³ Lauth (2004), p. 8.

institutions.³⁴ Lauth conceptualizes *political institutions* as a distinct category, stating that they "derive their status as political institutions from their reference to binding decisions, themselves guaranteed by the legally constituted power".³⁵ Lauth divides relationships between formal and informal institutions into three categories; the *complementary type*, where the institutions support each other, the *substitutive type*, when the informal does what the formal fails to do, and the *conflictive type*, "when the two systems of rules are incompatible".³⁶

A Typology of Interrelations

Democratic legal systems formally build on principles of rule of law, typically formulated in the constitutions and in democratic conventions. The notion of selective law enforcement is in direct opposition to the principles of rule of law.³⁷ In Lauth's terminology, it interferes with the formal institution's "functioning logic".³⁸ To deal with interrelations in cases where the sets of rules are incompatible, Lauth introduces the notion of *parasitic institutions*. These exist at the expense of formal institutions by "partially occupying or penetrating them".³⁹ Selective law enforcement typically undermines the principles of rule of law by digging exceptional channels for the introduction of personally or politically motivated legality. This leads to a lack of trust in the democratic institution and as a consequence undermines the institution itself, as it is based on trust and common acceptance.

Gretchen Helmke and Steven Levitsky present a typology of relations between formal and informal institutions based on Lauth's division. The first dimension in Helmke and Levitsky's typology is the effectiveness of formal institutions. The second dimension is whether the goals of formal and informal institutions are in conflict or harmony. Based on

³⁴ Ibid.

³⁵ Lauth (2000), p. 25. Emphasis added. Almost identically expressed in Lauth (2004), p.9

³⁶ Lauth originally states his typology to be valid for *democracies*. Lauth (2000), p. 25 and Lauth (2004), p. 9.

³⁷ For a discussion on the term rule of law and its components, see Belton, Rachel Kleinfeld (2005): "Competing Definitions of the Rule of Law – Implications for Practitioners" in *Rule of Law Series* 55, 2005. Carnegie Endowment for International Peace. For a more comprehensive study see Tamanaha (2004).

³⁸ Lauth (2004), p. 9.

³⁹ Lauth (2000), p. 26, and Lauth (2004), p. 10.

these two dimensions, Helmke and Levitsky identify four kinds of informal institutions: complementing, accommodating, substitutive, and competing (table 1).

	Effective formal inst.	Ineffective formal inst.
Compatible goals	<i>Complementary</i>	<i>Substitutive</i>
Conflicting goals	<i>Accommodating</i>	<i>Competing</i>

Table 1: Typology of informal institutions in Helmke and Levitsky (2003)

I will for now accept the premise that selectivity in law enforcement indeed constitutes an informal institution, although I will operate with another terminology below. The phenomenon undermines the legal system's intentions to be a democratic institution. In this way it seems parasitic, exploiting and "partly occupying" the legal system.⁴⁰ Moreover, its very existence is based on weak formal regulation and the rule of law malfunctioning. This is a central point in Ledeneva (see below) as well as the backbone of my own research. With regard to the above typology, this will indicate selectivity to be a competing informal institution, as it is in conflict with the formal democratic goals of the legal institutions and dependent on their weakness.

Yet, while selectivity is negotiated informally, law enforcement follows legal procedures and is thus dependent on the formal institutions' effectiveness to hand out legal punishment. Due to its dependence on a legal framework of sanctioning, the institution of informal selection can never be more effective than the law enforcement agencies' ability to enforce the selection through punishment. These complex relations with formal institutions are not as paradoxical as they might seem, though they do reveal some shortcomings in Helmke and Levitsky's typology as selective law enforcement hardly fits in. Informal selectivity in law enforcement relates closely to at least two formal institutions. On the one hand it depends on the *malfunctioning* of rule of law the principle of legal egalitarianism.⁴¹ On the other hand it is also dependent on the *effectiveness* of law enforcement, that is. the ability to meet non-

⁴⁰ Lauth (2000), p. 26 and Lauth (2004), p. 10

⁴¹ Also known as the principle of equality before the law.

compliance with relevant sanctions. In conceptualizing selective law enforcement, we have to take its dual nature into account.

The dual nature in the relationship between formal and informal elements validates the use of Lauth's metaphor of a parasite. Selectivity in law enforcement is parasitic in its relationship to the formal legal system, since it weakens it but at the same time depends upon it entirely. Because the informal parasite has no sanctioning possibility of its own, it attaches itself to the formal institutions' monopoly on violence.

3.1.2 Selective Law Enforcement as Informal Practice

Alena Ledeneva's work is concerned with informal phenomena in the Russian economy.⁴² As will be argued, however, her research can also provide valuable insight into the dynamics of politically motivated selective law enforcement.

Ledeneva distinguishes between *institutions* and *practices*, where institutions provide the rules of the game and practices are the players' strategies within them.⁴³ Developed to fit her empirical studies, Ledeneva's main theoretical tool to explain informal phenomena is *informal practice*, which she defines as the "outcome of players' creative handling of formal rules and informal norms".⁴⁴ Thus, she discusses the interrelations between the formal and informal foundations of these practices. Informal practices are all about how to avoid the damaging effects of weak formal institutional framework, while making the best of the possibilities this weakness creates.⁴⁵ Ledeneva investigates those informal practices that "infringe on, penetrate, and exploit formal organizations" – practices that parallel Lauth's definition of parasitic institution.⁴⁶ For Ledeneva, informal practices are equally rooted in

⁴² Ledeneva, Alena (1997): *Soviet's Economy of Favours*. Cambridge: Cambridge University Press, Ledeneva, Alena (2001): *Unwritten rules: how Russia really works*. London: Centre for European Reform, Ledeneva, Alena (2006): *How Russia Really Works: The Informal Practices That Shaped Post-Soviet Politics and Business*. New York: Cornell University Press.

⁴³ Ledeneva (2006), p. 20. Emphasis in original.

⁴⁴ Ledeneva (2006), p. 20.

⁴⁵ Ledeneva (2006), p. 20.

⁴⁶ Ledeneva (2006), p. 3.

informal norms and formal rules, and function as bridges between the two as they “both compensate for defects in the formal order while simultaneously undermine it”.⁴⁷

Ledeneva’s approach differs from Lauth, Helmke and Levitsky. First, Ledeneva’s focus is on the outcome of her own empirical investigations and not based on any broader typology like Helmke and Levitsky above. Second, she focuses on strategies, not on the rules themselves. I will, however, look at what role the formal and informal rules play in Ledeneva’s model, develop these insights, and apply them to my own area of research.

In Ledeneva’s model, laws, or the lack of them, play an important role. Few countries have developed more legislation in shorter time than post-communist Russia. After the collapse of the Soviet Union, Russians found themselves in a legal vacuum at the beginning of the 1990s. From that time onwards, however, decrees and resolutions poured into the legal system at an impressive rate. The number of administrative regulations and standards was estimated at 25,000 already at the beginning of Vladimir Putin’s presidency.⁴⁸ Ledeneva identifies the “legislation designed to improve the political and economic order in Russia, and the loopholes in its formulation and enforcement” as one of two “fundamental sets of factors to explain why informal practices are so prevalent in Russia”.⁴⁹ The weak legislation provides a basis for pervasive non-compliance and thus the phenomenon of *suspended punishment*:

*The incoherence of formal rules compels almost all Russians, willingly or unwillingly, to violate them and to play by rules introduced and negotiated outside formal institutions [...] Because of the pervasiveness of rule violation, punishment is bound to occur selectively on the basis of criteria developed outside the legal domain. While everybody is under the threat of punishment, the actual punishment is ‘suspended’ but can be enforced at any time.*⁵⁰

These phrases are central to my understanding of selective law enforcement. By providing laws according to which everyone can be found guilty, legislation opens the door to informal

⁴⁷ Ledeneva (2006), p. 11.

⁴⁸ Ledeneva (2006), p. 24.

⁴⁹ Ledeneva holds the other set of factors “related to the nature of informal norms as well as legacies of the past that continue to shape today’s practices”. Ledeneva (2006), p. 23.

⁵⁰ It should be noted that the model is not presented in its original context. Ledeneva deals mainly with corruption patterns and strategies for coping with poor economic regulation. See Ledeneva (2006), p. 13.

manipulation. When everyone is liable for punishment, it “becomes a resource in short supply”.⁵¹ Its actual implementation and enforcement are left to negotiations on the informal market.⁵² In this way, non-compliance with informal rules can be punished by enforcing written ones, and it becomes necessary to comply with informal rules to avoid formal punishment.⁵³ Herein lays a key to my theoretical understanding of selective law enforcement.

Informal practices exist in every society, but the chasm they have to bridge naturally varies with the distance between formal rules and informal norms. In Ledeneva’s words: “informal practices predominate (or even become indispensable) where formal rules and informal norms are not synchronized”.⁵⁴ In Russian legal culture, formal legality (*zakonnost’*) has never been considered equal to moral justice (*spravedlivost’*).⁵⁵ The response to this “structural pressure” is a widespread use of informal practices in Russian society.⁵⁶

For the subjects to adapt to a second set of rules, however, there has to be a certain common recognition of the informal rules relevant for the subjects’ activities.⁵⁷ Punishment will not work as a deterrent without some perception of what rules that have been violated. This certainly demands a degree of institutionalization of the perception of informal rules, their communication and their enforcement.⁵⁸

If there is no recognition of the link between non-compliance and punishment, the mechanism will not work as a deterrent. To use Lauth’s terminology, we can say that the

⁵¹ Ibid.

⁵² Ledeneva (2006), p. 13.

⁵³ Ledeneva (2006), p. 13.

⁵⁴ Ledeneva (2006), p. 22.

⁵⁵ See Butler, William E. (2003): “*Jus and Lex in Russian Law: A Discussion Agenda*” in Galligan, Denis J. and Kurkchiyan, Marina (eds.) (2003): *Law and Informal practices – The Post-Communist Experience*. Oxford: Oxford University Press, especially p. 49. See also Ledeneva (2006), p. 26-27.

⁵⁶ Ledeneva (2006), p.7 and 22.

⁵⁷ By the term *subjects*, here and in similar phrases, I refer to individuals or organizations whose activities a rule, formal or informal, is intended to regulate. By *recognition*, I bear in mind the awareness of something’s existence, not a result of a normative evaluation.

⁵⁸ It should be noted that this argument originates with me and in fact contradicts Ledeneva’s concept of *unwritten* rules. See among others Ledeneva (2006), p. 14-17.

mechanism is based on a *threat perception*: “Such a type of influence founded on force does not manifest itself through the use of force alone, whichever way this may be communicated. What is required is the development of an identifiable form of interaction [...] which involves fixed roles and its own functioning logic”.⁵⁹ The perennial threat of punishment in Russian business is what Ledeneva call suspended punishment above. In my empirical studies presented below, the enforcement agencies have already prosecuted some alleged violations by the NGOs. Following Ledeneva’s model and our informants’ perceptions of selective law enforcement, these subjects of prosecution have not taken the informal rules into proper consideration and willingly or unwillingly violated them.

Included in Ledeneva’s listing of the most prominent informal practices is *kompromat*. *Kompromat* is by Akos Szilagyí defined as “the publication (or blackmail with the threat of publication) [of various compromising material] that can destroy or neutralize political opponents or business competitors”.⁶⁰ In our case, the exposure, or (threat of exposure) of legal infringements can be used to enforce the informal rules.

Selective law enforcement differs somewhat from *kompromat*, however. In the case of *kompromat* the material can either prove or hint towards non-compliance with common norms (incompetence, sexual deviance, ideological deviance) or formal rules (economic or other).⁶¹ If no such material is found, it can be fabricated. While *kompromat* can include any kind of compromising material, selective law enforcement depends on *legally relevant* material. This is of course linked to selective law enforcement being a phenomenon that exclusively applies legal processes to achieve informal ends. Formal punishment *can* be a consequence of *kompromat*, but it is not required.⁶²

⁵⁹ Lauth (2004), p. 16.

⁶⁰ Szilagyí quoted in Ledeneva (2006), p. 58-59.

⁶¹ For a typology of *kompromat*, see Ledeneva (2006), p. 60.

⁶² For further discussion on the phenomenon of *kompromat*, see Ledeneva (2006), p. 58-90

In a survey done by the Levada Centre, 92% of Russians believe that law enforcement is selective.⁶³ In Transparency International's index on perception of corruption by public officials and politicians in 2008, Russia scored 2.1 on a scale from 10 (highly clean) to 0 (highly corrupt).⁶⁴ This is notably the same rating as on a corresponding list based on interviews from the late 1990s.⁶⁵ Given that Russian citizens are aware of the fundamental shortcomings of rule of law, I expect them to base their actions on this knowledge, according to rational choice assumptions.

3.2 Selective Law Enforcement – A Theoretical Model

3.2.1 Selective Law Enforcement as a Complex Institution

In biology, parasites cannot be understood without a firm knowledge of the host, but even knowledge of both parasite and host is insufficient to understand their relationship, which is arguably what is most interesting. Similarly, the phenomenon of selective enforcement cannot be understood properly without looking at the coexistence and reciprocity of legal institutions and informal practices. The theoretical perspectives of Lauth, Ledeneva and others provide some valuable theoretical insights on how to understand selective law enforcement, but here a more specific description is needed.

As explained above, Lauth, Helmke, and Levitsky keep formal and informal institutions clearly differentiated conceptually. At the same time Lauth states that informal institutions relate to formal institutions and “are linked to sanctions”.⁶⁶ Christopher H. Stefes views an

⁶³ Levada Centre survey cited in Ledeneva (2006), p. 187. The year of this survey is not specified. Another unspecified reference states the percentage to be 91%. Kahn, Jeffrey (2006): “The Search for the Rule of Law in Russia” in *Georgetown Journal of International Law*, winter 2006, footnote 3.

⁶⁴ Transparency International (2008): *Corruption Perceptions Index 2008*. Available at http://www.transparency.org/policy_research/surveys_indices/cpi/2008, accessed March 30, 2009

⁶⁵ Transparency International (2000): *TI Corruption Perception Index 2000*. Available at http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi_1/2000, accessed March 30, 2009

⁶⁶ Lauth (2004), p. 8.

institution as “a *set* of formal *and* informal rules and norms”.⁶⁷ This opens for a more complex definition of institution that may fit our topic better than Lauth’s. Rather than being two or more institutions linked together by patterns of expectations and practice, the phenomenon of selective enforcement can be considered an institution in itself. As the argument goes, there is more to the concept than parallel formal and informal institutions. It is the unique *interrelations* between these parts that constitute the phenomenon’s “functioning logic”.⁶⁸ Therefore, the whole is to be considered more than the sum of its components and should be addressed accordingly.

A third alternative would be to do as Ledeneva and focus on selective enforcement as informal practice and thus reject its existence as an institution. In this line of thought, it can be argued that the phenomenon does not constitute the “rules of the game” but rather actors’ strategies to manipulate the rules in their own interest.⁶⁹ Still, when this practice evolves into patterns, it is not so much about “improvisation” or “creative handling”, as Ledeneva defines it – but rather about going with the flow. At one point, practices form a pattern that reproduces itself, thus creating predictability and structuring social interaction – precisely what we would identify as an institution. Ledeneva’s sharp division between strategies and institutions does not necessarily make sense in all contexts. In the case of selective law enforcement, I treat the practice as an institution.

For the purpose of conceptualizing selective law enforcement, I therefore find the second of the discussed alternatives as a reasonable point of departure. I operate with selective law enforcement as a complex institution, building on Stefes’ definition of an institution as “a set of formal and informal rules and norms that ‘structure the relationship between individuals in various units’”.⁷⁰

⁶⁷ Stefes, Christoph H. (2006): *Understanding Post-Soviet Transition –Corruption, Collusion and Clientilism*. Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, p. 16. Emphasis added.

⁶⁸ Lauth (2004), p. 6-7.

⁶⁹ See Ledeneva (2006), p. 20.

⁷⁰ Stefes (2006), p. 16. The internal quote from Hall, P. A. (1986): *Governing the Economy: The Politics of State Intervention in Britain and France*. New York: Oxford University Press, p. 19.

3.2.2 The Functioning Logic of Selective Law Enforcement

The mechanism of selective law enforcement is an institutionalized practice, a practice that has developed into an institution. Selective law enforcement is not just individual cases of manipulating the legal system. Rather, it but takes place systematically and according to certain patterns. Selective law enforcement has a purpose and involves beneficiaries and losers.

Considerable power is needed to access the formal enforcement apparatus at higher levels. Selective law enforcement is a top-down mechanism that underpins the informal interests of those yielding such power. At the other end of the table, whoever crosses these interests risks being punished for their opposition, making it a less attractive option. The mechanism is also undermining rule of law itself, not only in the actual cases of selective law enforcement, but also through undermining the popular trust in legal systems already struggling for legitimacy. This kind of selectivity goes against the very basics of rule of law.

Most importantly, selective law enforcement is a mechanism for enforcing informal rules, in a broad meaning of the word. By enforcement, I mean supporting the rules by punishing non-compliance with them. In other words, enforcement is the link between rules and punishment.

Informal Penetration into the Formal Enforcement Structure

In the above 'sleeping with the fishes' example, the mafia structure enforces an informal rule through an informal channel. The punishment is also informal. Correspondingly, we can imagine a criminal being arrested by the police and sentenced to jail. In these two examples the enforcement structures are clearly separated (Fig1).

When selective law enforcement takes place, however, the division between the two enforcement structures is less clear. In other words, the informal interests challenge the formal prerogative to decide what is punishable within the state. This can only happen if the formal structure is weak, as a strong formal structure is by definition exactly that – formal.⁷¹ In the

⁷¹This is a theoretical simplification. In legal practice, judgement is not separated from societal norms. On the contrary, the judges are expected to make use of 'good judgement' in their interpretations of formal regulations. This varies between

mechanism of selective law enforcement, informal rules penetrate the formal enforcement structure and make use of its formal sanctioning apparatus (Fig2).

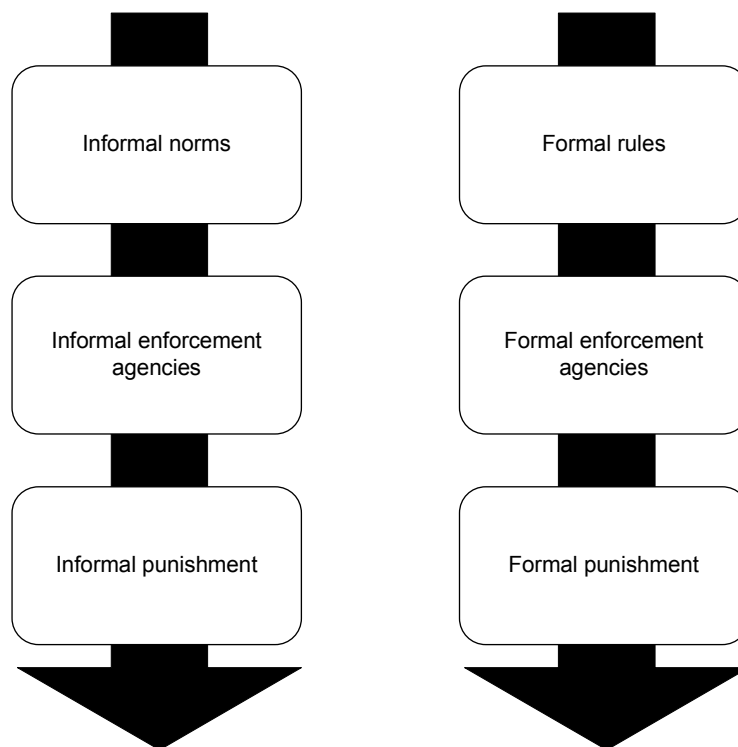


Figure 1: Division between formal and informal enforcement structures

The phenomenon can also be explained in another way: in terms of interrelations between its formal and informal components, a specimen of selective law enforcement could be clearly identified chronologically with a head, a body, and a tail. The process is initiated informally and followed by a period of formal procedures with possible, and probable, informal manipulation. Finally, since the informal rules are enforced by employing the formal enforcement structure to impose legal punishment, the outcome is always formal. That selective enforcement has an informal head, however, does not imply that the formal rules are unimportant as a subject of discussion. As seen in Ledeneva, incoherent formal rules can provide a backdrop for informal practices.

As discussed below, the informal parasite is entirely dependent on the legal system. Selective law enforcement is characterized by its informal components' dual relationship with formal institutions. In order to successfully pursue informal interests, selective law enforcement is on the one hand dependent on the weakness of rule of law – and is itself undermining it. On the other hand, the mechanism is equally dependent on the effectiveness of law enforcement.

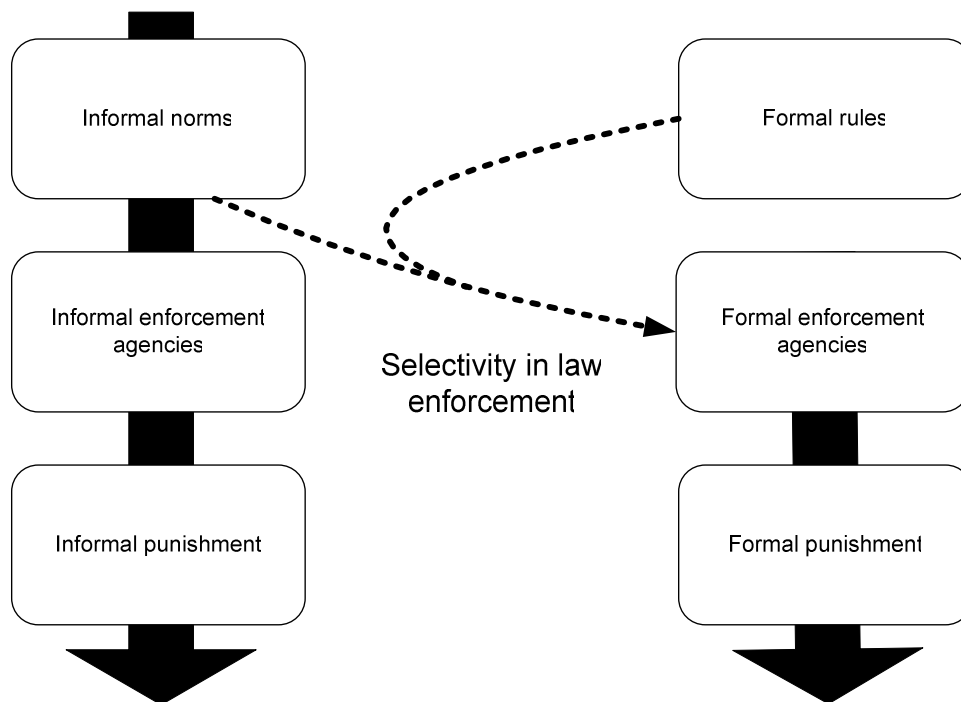


Figure 2: Informal penetration of the formal enforcement structure

When the informal penetrates the formal enforcement structures, questions regarding legality become hard to determine. The practice of handing out official sanctions to punish violations of informal rules clearly contradicts the principles of rule of law, transparency and democracy. Yet, from a formalistic point of view, what could be more legal than punishment imposed by the legal system and formally based on legislation created by the highest authorized and elected organ of power? Within a formalistic conceptualization, an environmental activist jailed for extremism is just that - an extremist, as defined by the superior authority of the state.

Selectivity in Law Enforcement

In a sense, law is enforced selectively in all societies, not least due to limitations in resources and/or information. The law's main practical role is arguably not to punish everyone guilty of non-compliance, but rather to discipline the population by operating both as a norm-bearer, and as the legal basis of potential, yet often unrealized, sanctions. By exercising physical and moral authority, the legal system is intended to discipline the body and more ambitiously - the mind.

To set examples in order to discipline others is of course common legal practice in every state, and the legitimacy of the practice is grounded in a supposedly *unbiased selection* of non-compliers to punish. In other words, there exists an official policy to regulate the selection. A typical criterion regulating selection is the *degree* of the violation, that is the violation's *graveness*. Another vital criterion determining whom to punish relates to the access to resources and information. If the infringement is considered minor and the case is difficult to solve by investigation, the case will normally lose priority. When there is no penetration of informal rules into the formal enforcement structure, the balance between the goals and resources should be according to a formal policy which regulates the agency's expenditures.

Completely arbitrary prosecution may be considered another kind of law enforcement. Arbitrary prosecution, being prosecution without any underlying principle or logic, is by definition unbiased as it is completely random. Therefore, it creates an unpredictable legal environment. I choose to keep arbitrary law enforcement conceptually separated from selective law enforcement. For law enforcement to qualify as selective, I hold *selection* as a premise. This selection can be determined by formal or informal criteria, but it can by definition not be arbitrary in itself.

It is when *extra-legal criteria* penetrate the legal environment, and the process of selection is non-transparent, that selective law enforcement appears in the form this thesis shows interest in. Penetration by extra-legal criteria implies that the basis for selectivity is negotiated outside official channels, and is not regulated in any official document. As mentioned, I look for selective pursuit of legally imposed punishment for personal or (informal) political ends. For a manipulator with sufficient power resources, the law does not have to be an obstacle to avoid. Rather, it could be a weapon to strike down enemies. In theory, the door is open for

anyone who can influence the law enforcement agencies, as long as the laws are incoherent and the democratic institutions malfunctioning. When the decision-making process is open to informal influence, everyone with relevant resources could participate in negotiations.

Informal influence notwithstanding, negotiations must relate closely to the formal institutions responsible for imposing formal punishment. The goal of the negotiators will ultimately be to influence these agencies. Informal influence cannot be fully reserved for anyone, but the best cards in this game certainly belong to the executive authorities.⁷²

Deterrence Is of the Essence

In 2008 Richard Macrory identified some guiding normative principles with regard to what the aims of sanctioning should be: While some of the principles are meant to ensure rule of law, at least two of them are valid also with regard to the self-interests of rule *by law* regimes. A sanction should: (1) “aim to change the behaviour of the offender”; (2) “aim to deter future non-compliance” by other subjects of legislation.⁷³ I assume these principles of sanctioning will be equally valid for the enforcement of informal rules as for written ones. The credibility and long-term vitality of selective enforcement as a functioning tool of social engineering is certainly dependent on effective punishment, meaning effective deterrence against further non-compliance.

Deterrence is a vital goal of enforcement, regardless of whether the rules to be enforced are formal or informal or whether the legal system is based on rule of law or not. Both Lauth’s *threat perception* and Ledeneva’s *suspended punishment* are mechanisms of deterrence. A punishment can sometimes physically bar the punished from further non-compliance. This is however a costly and inefficient way of enforcing rules, be it formal or informal. Regardless of whether the task is fighting crime or enforcing regulatory regimes, the deterring effect of the punishment is of vital importance. What Ledeneva wrote about suspended punishment in the Soviet era remains true for all kinds of regulatory measures: the goal is “to keep everyone

⁷² See Ginsburg, Tom (2008): “Administrative Law and the Judicial Control of Agents in Authoritarian Regimes” in Ginsburg and Moustafa (2008) *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, especially p. 61.

⁷³ Macrory, Richard (2008): *Regulation, Enforcement and Governance in Environmental Law*. London: Cameron May, p. 40 and 64 - 67.

under self-control”.⁷⁴ This way of enforcing compliance to informal rules is cost efficient with regard to both moral and physical resources. As Steven Lukes points out: “power is at its most effective when least observable”.⁷⁵

Deterrence in Selective Law Enforcement

Deterrence, being a vital goal of punishment in modern societies, is dependent on expectations regarding non-compliance and punishment. The enforcers are expected to establish a firm connection between non-compliance and punishment in the minds of their subjects. It is not sufficient to hand out sanctions if the subjects are not aware of why they are punished. The reason for punishment needs to be communicated. If the informal rules have not been communicated properly, the subjects of punishment cannot be expected to change behaviour according to the punisher’s informal interests.

In formal legal systems, the reasons for punishment are usually formulated by the court. In well-functioning legal systems, this will usually be a satisfactory explanation and the punished will therefore usually link her punishment to a formal rule. Importantly, the same would be true for the other subjects of legislation (see Macrory above). In the case of selective law enforcement, however, the boundaries between the informal and formal enforcement structures are blurred. Since non-compliance with either informal rules *or* formal laws can lead to punishment, the intentions behind the punishment are not always clear for the punished or the observers. This poses a challenge for all informal interest wanting to make use of the formal enforcement structure. As the formal procedures are *pro forma*, the informal rules that form the *real* basis for punishment must be communicated. Furthermore, the message has to be strong enough to override the courts’ formal arguments for prosecution. Without a common recognition of the *real* reasons for punishment, the enforcers will not reach their goal of deterrence.

The need for communication can be explained through a hypothetical example: If one out of five human rights organizations are fined for breaking state standards on fire security, while only one out of ten other organizations are subject to similar sanctions, there may be three

⁷⁴ Ledeneva (1997), p. 78.

⁷⁵ Lukes, Steven (2005), *Power – A Radical View* (second edition). Basingstoke: Palgrave Macmillan Houndmills, p. 1.

reasons. First, human rights organizations may pay less attention to fire security than other organizations. Second, they might share characteristics legitimizing demands for higher security standards, such as being in possession of unique archive material or arranging seminars particularly crowded with people. Third, they might share one or more *extra-legal criteria* for formal punishment.⁷⁶

The punished's own interpretation of the punishment is of the essence. If the NGOs believe that poor fire security is the only reason for their punishment, they will probably pay their fines and consider future improvements along this line. In the minds of the punished there will not be any incentives to change the *modus operandi* of the organization. In the opposite case, the punished believe that informal interest is behind their punishment, and that the inspection is just a pretext. In this case they will consider what other criteria might have triggered their punishment and make their further actions based on this interpretation.

Conclusively, in order to explore how selective law enforcement has unfolded in a case-specific context, the researcher needs to engage with only questions regarding the formal structure, but also with the perceptions of the punished. Knowledge about the latter can in a way describe the phenomenon's unfolding more precisely than would a study of *intentions*.

⁷⁶ I thus rule out the random factor.

4. NGOs and the Formal Enforcement Structure in Russia

In the period between 2006 and the summer of 2008, the formal enforcement structure responsible for regulating Russian NGOs had particular characteristics unique for that period. This was not least due to the new amendments to the NGO legislation and the extended powers they granted the FRS with regard to monitoring and enforcing regulatory demands. In 2008 the enforcement structure was changed again, when the NGO department of the FRS was dismantled. Its responsibilities and much of the personnel were transferred to the Russian Ministry of Justice.

In this chapter I first examine the formal enforcement structure involved with regulating NGOs in Russia. I discuss the new NGO-law and the traits that made it an attractive piece of legislation in matters of selective law enforcement. I also examine existing reports on its selective implementation. Second, I turn to the informants, presenting the legal basis behind the prosecution of their NGOs, before looking at the imposed punishment. In the third part of the chapter, I present a typology of typical traits of incoherence and discuss various forms of punishment related to selective law enforcement.

4.1 Formal Regulation of NGOs Activities 2006-2008

4.1.1 The NGO-Law of 2006

Observers report that legislation directly relevant for NGOs is wielded selectively. This includes NGO legislation, tax legislation, regulations on fire security and sanitary conditions, building and labour code, anti-extremist legislation and software piracy legislation. The legal charges raised against my informants' NGOs were based on the former three of the above bodies of legislation, in addition to one case of harassment based on visa-regulations and one court case concerning the contracts regulating the use of an NGO's premises. The most important legal foundation for selective law enforcement against Russian NGOs in this period was provided by the amendments to NGO legislation signed and implemented in 2006. The following review of the NGO-law does not only serve the function of

contextualizing the informants' experiences – it also provides a useful case-study in investigating what may characterize legislation applied in selective law enforcement in general.

Russian NGO legislation most importantly consists of the “Law on Non-Commercial Organizations”, the “Law on Public Associations”, and subsequent amendments to these two. Especially the amendments of 2006 – formally a bill “On Introducing Amendments to Certain Legislative Acts of the Russian Federation” signed by president Putin in January 2006 and implemented in April the same year – have become an important tool in selective law enforcement.⁷⁷ In the reviewed discourse, this document has been named “the NGO-law” for short, a popular term I also adapt in this thesis.

In the investigated period, the law was a frequent topic of debate within the NGO community. Critical analyses of the NGO-law, for instance the influential interpretation of the International Center for Not-for-profit Law (ICNL), hold that it contradicts existing regulation, including the European Convention on Human Rights (ECHR) and the Constitution of the Russian Federation.⁷⁸ Furthermore, they characterize the law as poorly formulated and unclear from a judicial point of view. The critics also point to what they deem extremely burdensome administrative demands.⁷⁹ The latter two traits will be elaborated below.

Some critics, including my informant and co author of *Nepravetel'stvennye*, held the new law to be a Kremlin doomsday device for the NGO-community disloyal to the authorities.⁸⁰

⁷⁷ Federalnij Zakon ot 10 janvara 2006 g. N 18-F3: “*O vnesenii izmenenii v nekotorye zakonodatelnye akty Rossijskoi Federatsii*”. Available at http://www.duma.gov.ru/search/kmpage/80200029/docs/zakon/temp_2.html, accessed May 21, 2008.

⁷⁸ According to the Labour convention signed by Russia, “the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof”, part, article2, paragraph3 in the International Labour Organization (1948): *C87 Freedom of Association and Protection to the Right to Organise*. Available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>, accessed April 1, 2009. The constitution also guarantees the right of association. See Constitution of the Russian Federation, the (1993) article 30. See *inter alia* ICNL (2006) and Kamhi, Alison (2006): “The Russian NGO-law: Potential Conflicts with International, National, and Foreign Legislation” in *The International Journal of Not-for-Profit Law*. 2006, issue 1. Available at http://www.icnl.org/knowledge/ijnl/vol9iss1/art_6.htm#_edn1, accessed April 29, 2008, and Ahmetgaliev, p. 109.

⁷⁹ Later this was even admitted by president Putin himself. Âna Serova (2007): “Glavnyj skazal 'polegče” in *Novaâ Gazeta*, March 29, 2007. Available at <http://www.novaygazeta.ru/data/2007/22/16.html>. Accessed April 8, 2009.

⁸⁰ Interview with Kanevskaâ, April, 2008.

The need to regulate the Russian civil society was real, but some feared the adopted medicine threatened to kill the patient. Later it became clear that the law did not eliminate civil society with a stroke of the pen. Studies of its implementation soon determined, however, that the law was manipulated for extra-legal purposes on several occasions.⁸¹

Existing analyses of the NGO-law can shed some light on what characterizes a law some view as tailored especially for selective law enforcement. According to my discussion of Ledeneva's theory above, the law should constitute (a part of) a legal framework according to which everyone can be found guilty in some way or another. Existing reports have already argued that the NGO-law *did* provide a fundamental basis for selective law enforcement in the period of interest.⁸² I here aim to reveal which traits of this legislation make it so attractive for purposes of selective law enforcement.

A Triangular Legal Trap

I base this brief review of the 2006 amendments in NGO legislation on a range of reports published by both Russian and international NGOs as well as independent scholars.⁸³ I focus

⁸¹ See footnote 83 below.

⁸² See footnote 83 below.

⁸³ The below review of the law, its selective implementation, and the surrounding discussion – is based, in addition to the legal document itself (supra footnote 77), on reports and analyses by ICNL (International Center of Not-for-Profit Law) (2006b): *Analysis of Law #18 –FZ “On Introducing Amendments to Certain Legislative Acts of the Russian Federation* Available at http://www.icnl.org/knowledge/news/2006/01-19_Russia_NGO_Law_Analysis.pdf, accessed March 30, 2009. Schmidt, Diana (2006): “Russia’s NGO legislation: New (and Old) Developments” in Neumann et al. (eds.): *Russian Analytical Digest. 3-2006*. Available at <http://www.isn.ethz.ch/news/rad/details.cfm?lng=en&id=19048> (follow link). Machleder, Josh (2006): *Contextual and Legislative Analysis of the Russian Law on NGOs*. Available at http://www.indem.ru/en/publicat/russian_ngo_law_03252006.pdf, accessed March 30, 2009, Vinogradov, Dmitry (2006): “Authorities Begin Implementing New NGO-law” in Neumann et al. (eds.): *Russian Analytical Digest. 3-2006*. Dzhibladze et al. (2007), USCIRF (US Commission on International Religious Freedom/Kommissiâ SŠA po meždunarodnoj veroispovedaniâ)(2007): *Vyzov graždanskomu obšestvu: popravki k Zakonu RF “O nekommerčeskikh organizaciâh”*. Available at http://www.uscirf.gov/images/stories/pdf/russia_ngo_report_final_march5_ru-formatted%20for%20web.pdf, accessed April 15, 2009. Gnezdilova, Olga (2007): *New Russian Legislation – Non-Governmental Organizations and the Federal Registration Service: Five Problems of Interaction*. United Group for Freedom of Association. Available at www.ngo.hrworld.ru/download/library/fa_2007_report_eng_forprint2.doc, accessed February 12, 2009. (Also available in Russian as Gnezdilova, Ol'ga (2007) *Novoe zakonatel'stvo: NKO i federal'naâ registracionnaâ služba – 5 problem vzaimpejstviâ*. Available at <http://www.irhrg.ru/files/1.doc>, accessed February 12, 2009) and Gnezdilova, Ol'ga (2008): *Svoboda Sozdanâ ob"edinenij. Doklad za 2007 god*. Moskovskaâ Hel'sinskskaâ Gruppy. Available at <http://www.mhg.ru/files/008/svob.pdf>, accessed February 12, 2009, MHG and HRWF (Moscow Helsinki Group and Human Rights without Frontiers)(2008): *Control and Punishment: Human Rights Implications of Russian Legislation on NGOs*. Available at <http://hrwf.net/uploads/200802%20Russia%20NGO%20law%20report.pdf>, Accessed April 15, 2009. HRW (Human Right Watch) (2008): *Choking on Bureaucracy –State Curbs on Independent Civil Society Activism*. Available at <http://www.hrw.org/reports/2008/russia0208/russia0208webwcover.pdf>, accessed April 15, 2009. CDDHR (Centre for the Development of Democracy and Human Rights) (2008): *Freedom of Association and the Situation of NGOs in Russia*. Available at <http://www.mhg.ru/files/008/10eng.doc>, accessed April 16, 2009. and Ahmetgaliev et al. (2008), Bækken, Håvard (unpub.2008): *The NGO-law and the Mechanism of Suspended Punishment: Fertilizing a Permanent*

on three traits which I deem highly relevant in relation to the question of what characterizes the legal basis for selective law enforcement. These characteristics also play a large part in the examined secondary literature. They are: (1) the NGO-law's administrative demands; (2) its potential for harsh sanctions; and (3) its vague formulations and the discretion it gives to officials interpreting them. Put together, these traits can theoretically constitute a triangular legal trap by which any NGO can be found guilty of some infringements.⁸⁴

With regard to the administrative demands, the most problematic provisions concern paperwork upon registration, annual reporting and coping with various inspections.⁸⁵ The formal requirements to documentation for the NGOs are so demanding – both due to their complexity and the sheer amount of paperwork – that the NGOs need professional expertise in cases where the law is interpreted strictly.⁸⁶ Not only does this lead to frustration within the NGOs, but it also involves significant costs. The average expenditures on bureaucracy for NGOs in 2007 were estimated around 40% higher than that of a comparable commercial enterprise.⁸⁷

Not only are the requirements difficult to cope with for organizations, but they are also impossible to enforce for the authorities. The amendments require NGOs to deliver annual reports on their work and financial expenditures. In 2007 only 20% of these reports were delivered on time. In 2008 the number increased to 25%.⁸⁸ In other words, the law is met with massive non-compliance. As a consequence, the FRS must either make some form of

Crisis of Civil Society? Unpublished term paper, University of Oslo in addition to various interviews and mass media coverage of the discourse. Explicit references in footnotes.

⁸⁴ See Bækken (unpub2008).

⁸⁵ For more on these inspections, see Ahmetgaliev et al (2008), p. 81 and further.

⁸⁶ Inter alia MGH/HRWF (2008), p. 18-19.

⁸⁷ Based on Moscow-numbers, where the expenditure was estimated around 20.000 roubles in 2007. The process was also found far more time-consuming. *Novaâ Gazeta* March 29, 2007. Available at <http://www.novayagazeta.ru/data/2007/22/16.html>, accessed April 17, 2008. See also CDDHR (2008), p. 2.

⁸⁸ Ahmetgaliev et al (2008), p. 31 and 35.

selection or refrain from enforcing the bureaucratic demands at all. Even an FRS official admits it was impossible to read all the delivered material anyway.⁸⁹

Granted the harsh demand for details associated with administrative responsibilities, one also expects everyone to make mistakes at some point. As one NGO leader commented: “It is impossible to prepare a ton of papers for the FRS without making mistakes [...] the mistakes found will provide the basis for liquidating the groups through the courts, on a completely legal basis”.⁹⁰ The law grants the FRS the rights to reject registration on the vague grounds that the NGO “fails to execute its documents properly”.⁹¹ Soon after the law was implemented, it became clear that the FRS in some cases had refused registration on the grounds of minor errors and typos – and allegedly even when they did not exist.⁹²

The critics of the NGO-law also consider the punishment for such minor infringements to be too harsh. First, NGOs can be denied registration on these grounds. It is possible for NGOs to operate without being registered with the authorities, but their rights are then considerably restricted.⁹³ In addition, for registered NGOs, one minor infringement can lead to a formal warning. If it is repeated, the FRS can seek to exclude the NGO from the register.⁹⁴ The law is even harsher with regard to foreign NGOs with branches in Russia; these can supposedly be excluded for one single minor infringement without a formal warning in advance.⁹⁵

The interpretation of the NGO-law’s provisions for exclusion has however been challenged. According to Ahmetgaliev et al., the main FRS interpretation of infringement (*narušenie*) is not consistent with Russian law. Ahmetgaliev et al. argue that many of these infringements should be considered inadequacies (*nedostatki*), a different legal term associated with less

⁸⁹ Chauhan, Aleksandra (2007): “Collective Action Dilemma: State, NGOs and Foreign Agitators in Russia”. *Paper presented at the annual meeting of the Midwest Political Science Association (MPSA)*, Chicago, p. 25. Available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/9/7/5/0/p197508_index.html, accessed February 26, 2009.

⁹⁰ Svetlana Gannushkina quoted in Vinogradov (2006), p. 13.

⁹¹ Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ

⁹² Dzhibladze et al (2007), p. 9, Gnezdilova (2007), p. 12.

⁹³ See Gnezdilova (2007), p. 24-29, especially footnote 56, p. 24.

⁹⁴ That is the Unified State Register for Legal Entities.

⁹⁵ ICNL (2006), p. 7 and 11. See Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ. Article 2 (6).

severe punishment. They also report that the official legal interpretation of this definitional issue varies.⁹⁶ Within their regulatory mandate, the FRS can also hand out official sanctions in the form of relatively small fines, placing the NGOs in a difficult position, as they are legally obliged to spend all their money in accordance with their official goals and thus not allowed to spend them on fines.⁹⁷

In addition to the sanctions that can be imposed through exposing non-compliance with administrative demands, administrative procedures can be considered punishment in themselves. As noted, annual reporting and inspections are associated with formidable amounts of work for some NGOs. An economic analysis estimated that based on 2006-budgets, the FRS would either have to inspect every NGO once every 80 years, *or* spend 41 times less time on each inspection, *or* select some organizations for closer inspection while ignoring the rest.⁹⁸ The FRS went for the third alternative, and the selection process is therefore crucial. The agency stated that the guidelines for this selection had been created by a special group of experts from civil society and the Public Chamber. According to the authors of *Nepravitel'stvennye*, however, this does not correspond with reality.⁹⁹ The selective distribution of administrative burdens can therefore play an important part in a mechanism of selective law enforcement. Even without formal non-compliance, the law can be used as a tool for signalling and enforcing informal rules. This will be discussed below as *procedural sanctions* and *additional pressure for compliance*.

The third trait of the NGO-law that will be addressed here is the abundance of vague formulations and paragraphs in which wide discretion is granted the FRS without demands for further explanation or justification.¹⁰⁰ As will be seen, one such discretionary provision is especially important in the prosecution of my informants' NGOs, namely the FRS

⁹⁶ Ahmetgaliev et al (2008), p. 102–103.

⁹⁷ Gnezdilova (2007), p. 17.

⁹⁸ The FRS at the time spent in average 374 working hours on one inspection. Laboratoriej institucional'nogo analiza èkonomièeskikh reform Gosudarstvennogo universiteta et al. (2007): Èkonomièeskie posledstviâ novogo zakonodatel'stva o nekommerèeskikh organizaciâh, p. 30. Available at http://www.csr.ru/_upload/editor_files/file0026.pdf, accessed May 2, 2008.

⁹⁹ Ahmetgaliev et al (2008), p. 83-84.

¹⁰⁰ *Inter alia* MGH/HRWF (2008), p. 13.

prerogative to initiate court cases against an organization which it deems not promoting its stated goals or not working in accordance with its legal status.¹⁰¹ The regulations specifying the grounds on which the FRS can make this decision are poor or all but non-existing.¹⁰² An example of a problematic definitional issue which the NGO encounter on an everyday basis, regards the nature of ‘meetings’. According to the NGO-law of 2006 NGOs must now provide the FRS information about all their meetings, but the law does not provide a clear definition on what constitutes a meeting. As one informant asked me rhetorically: “should we consider *this* a meeting?”¹⁰³ The ICNL also reports on several other problems with regard to lacking legal definitions.¹⁰⁴

In particular two paragraphs, formally protecting the vital interest of the state and its people, contain self-evident vagueness and can presumably be wielded for many purposes. The formulation that gives the FRS discretion to bring NGOs to court if it is found to be threatening “the sovereignty, political independence, territorial integrity, national unity and unique character, cultural heritage and national interests of the Russian Federation”, is probably most well-known.¹⁰⁵ In one of the more famous court rulings based on the new NGO-law, a Russian NGO was liquidated, that is dissolved through the process of *likvidaciâ*, for amongst other reasons “undermining spiritual public values” and threatening the “sovereignty and territorial integrity of the Russian Federation due to a reduction in the population“. The convicted NGO worked to protect the rights of sexual minorities in the region.¹⁰⁶ The FRS can also deny registration on the grounds that the NGO “offends the morality, national or religious feelings of citizens”.¹⁰⁷ In addition to these specific paragraphs, the law criminalizes NGOs that have extremists as “founders, members or

¹⁰¹ Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ. Article 2 (8).

¹⁰² Inter alia MGH/HRWF (2008), p. 21, and ICNL (2006).

¹⁰³ Interview with Timofeev, April, 2008.

¹⁰⁴ ICNL (2006).

¹⁰⁵ *Ugrozu suverenitetu političeskoj nezavisimosti, territorialnoj neprikosnovennosti, nacional’nomu edinstvu i samobytnosti, kulturnomu nasledijû i nacionalnym interesam Rossijskoj Federacii*. Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ. Article 3 (4-7-4) and elsewhere.

¹⁰⁶ Inter alia HRW (2008), p. 34.

¹⁰⁷ *Oskorblâet npravstvennost’, nacional’nye i religioznye čuvstva graždân*. Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ. Article 2 (6-6).

participants” of their organization, referring to a much criticized definition on extremism.¹⁰⁸ The same is the case of “foreign nationals deemed ‘undesirable’, referring to a decision left to the authorities’ discretion.¹⁰⁹

Not all relevant demands fit the above presented characteristics. For example, an NGO is not allowed to have someone suspected of money laundering as a “founder, member or participant” of their organization.¹¹⁰ The paragraph thus undermines the principle presumption of innocence, as it opens for criminalizing organizations based on mere suspicions. Furthermore, since NGOs are not allowed to access the list of suspected money launderers, it is in effect impossible for an NGO to make sure to comply with the demand.¹¹¹

Reports on Selective Implementation

Given its vagueness, most observers agreed that the NGO-law relied much upon interpretation. Consequently, the following years were marked by attempts to monitor and document its implementation. Observers attempted to measure selective law enforcement through both quantitative and qualitative research. Especially in earlier reports on the law’s implementation, observers made some attempts to measure the overall impact on civil society, although scant available material made this difficult.¹¹² Although several of the presented cases were striking examples that the law sometimes was used politically, it proved difficult to determine the extent to which the FRS was guided by ulterior motives. The lack of firm quantitative data reflected the dubious governmental sources and the murkiness surrounding these issues in general. NGOs often cited quantitative ‘facts’, sometimes referring to official sources, but also these relied upon fluctuating data. Even such basic knowledge as the total number of NGOs varies by hundreds of thousands(!).¹¹³

¹⁰⁸ *Inter alia* MGH/HRWF (2008), p. 6.

¹⁰⁹ ICNL (2006), p. 15. Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ. Article 3 (5).

¹¹⁰ Federal’nyj zakon ot 10 âнварâ 2006g. No18-FZ. Article 3 (5).

¹¹¹ See ICNL (2006), p. 15 and Machleder (2006), p. 27.

¹¹² See *inter alia* Gnezdilova (2007), p. 22.

¹¹³ In 2007, the Federal State Statistics Service counted the number of NGOs to be 673,019, while the FRS stated a number of 243,130. Correspondence with the statistical research centre *Levada Centre* (www.levada.ru) by email the autumn 2008.

The basis for quantitative estimates improved after the FRS in 2008 published their own material for 2007 on various forms of activities, including inspections, denials of registration, cases sent to court, and more.¹¹⁴ Yet, due to the issue's complexity, these numbers in themselves provided no real insight into the law's impact. Firstly, a vast number of formal court proceedings were held against non-existing organizations in order to remove them from the official register. Ahmetgaliev et al. refer to a Moscow judge who in [about] a thousand cases of such procedures could remember only four where representatives from the NGOs actually met in court.¹¹⁵ Without doubt, many Russian NGOs had ceased to exist, only present on paper before their official removal. Since nobody knew their numbers, however, the amount of actively operating NGOs also remained unknown.

The subjective nature of selective law enforcement also complicates attempts at its measurement. It is by not feasible to objectively determine how many cases of formal punishment are legitimate and how many are linked to law enforcers' abuse of power. As reflected in the low number of cases sufficiently scrutinized by human rights organizations, the individual prosecutions are marked by extensive complexity and subjectivity. Again, a manipulative use of legislation was documented, but the extent of this practice remained unknown. To my knowledge, no large-N statistical correlation between law enforcement and extra-legal criteria has been proven. In addition, the reports often fail to underscore the subjective nature of the phenomenon under investigation, and this arguably undermines the academic value they aspire to.

Regarding reporting on micro-level, the NGOs' work proves more successful. The cases brought forward clearly displayed how some NGOs suffered severely from the implementation of the new legislation. The cases, however, were often recycled. Especially the illegitimate legal prosecution of the same dozen human rights organizations were repeated time and again.¹¹⁶ In sum, although Ahmetgaliev et al. provided an important

¹¹⁴ According to these numbers, there were around 230,000 NGOs registered in Russia at the outset of 2008. For details, see Rosregistraciâ (2008): *Svedeniia o deiatelnosti territorialnykh organov Rosregistratsii v sfere registratsiia i kontroliia nekommercheskikh organizatsii po sostoianiiu na 01.01.2008g.* Available at http://www.rosregistr.ru/docs/reg_nko_2007.xls, accessed February 2, 2009

¹¹⁵ Ahmetgaliev (2008), p. 12.

¹¹⁶ Representatives from some of these NGOs are included in the below list of informants

stepping stone in 2008, systematic research into illegitimate punishment against Russian NGOs has so far not been completed.

A Turn in the Debate

The reports on implementation of the new law took on another nuance when it gradually became clear that leading human rights organizations in fact often won in court, and that the number of closed active NGOs was not as high as many feared it would be. As a consequence, the more recent reports differ slightly from the earlier in terms of focus, gradually shifting from direct legal sanctions towards the harsh climate for NGOs in general. Still, the stories are often told through the experiences of human rights organizations. While the reports emphasize the heavy impact on less resourceful NGOs, the case-studies and quoted statements typically derive from the human rights community.

The April 2008 report from CDDHR is typical for the new wave of interpretation. The report acknowledges that “the NGO-law has not resulted in the wholesale closure of a large number of NGOs”. The report worries, however, that observers “sorely underestimate” the indirect consequences of the legal situation.¹¹⁷ The report of the Moscow Helsinki Group (MGH) and Human Rights without Frontiers (HRWF) concludes in a similar way:

While not all problematic provisions have been applied so far, the law has proven to be open to arbitrary and selective implementation, and it has been used to impede, restrict and punish legitimate NGOs activities. It has seriously constrained the day-to-day work of NGOs throughout the country and contributed to growing insecurity and vulnerability of NGOs.¹¹⁸

These insights are essential for understanding today’s situation. The broad and sometimes hidden impact of law enforcement is further elaborated below.

4.1.2 A Note on the Role of Courts

In hybrid or authoritarian regimes, the political leadership possess an extensive arsenal to ensure the loyalty of the bureaucracy, including the enforcement agencies responsible for

¹¹⁷ CDDHR (2008), p. 2-3.

¹¹⁸ MGH and HRWF (2008), p. 5.

regulating NGOs' activities.¹¹⁹ The enforcement agencies possess, by virtue of their regulatory prerogatives, extensive powers of sanctioning even when operating outside the court system.¹²⁰ Thus, the political executives possess a rather direct channel to punish NGOs. Nonetheless, the agencies must involve the courts when the most severe sanctions are imposed, including processes of *likvidaciâ* and exclusion for the state register. Furthermore, the NGO-law respects the NGOs' rights to appeal most FRS decisions to court, including formal warning letters and other administrative sanctions. Therefore, courts do play an important role in the enforcement structure relevant to this thesis. As will be seen, their performance proved highly relevant for the outcome of selective law enforcement in the investigated cases.

The political and economical independence of the current Russian courts is disputed. Peter H. Solomon is among the many who acknowledge Putin's effort to improve the performance of the legal system. The judicial branch has undergone several large-scale reforms to increase its independence, or at least to reduce low level corruption and inefficiency. The Russian government has poured considerable resources into the legal system and the salaries for judges have increased substantially.¹²¹ On the other hand, one might question if the reforms are intended to make courts and judges politically independent on all issues. In addition, old habits are known to die slowly.¹²²

Acquittal rates are generally low in Russia, especially in cases involving the state. Solomon links this partly to Soviet legacy – the old structure of the law enforcement system and the professional identities it supported. In the old formal enforcement structure, suspicions of violations should in theory not be taken to court before the evidence proved firm. In other words, 'accusational bias' was a way to lend judicial power to the executive branch of

¹¹⁹ See Ginsburg, Tom (2008).

¹²⁰ In line with the Russian "Code on Administrative Violations". See MGH/HRWF (2008), p. 27.

¹²¹ Solomon, Peter H. Jr. (2008a): "Assessing the Courts in Russia: Parameters of Progress under Putin" in *Demokratizatsiya* (winter 2008), p. 3-4.

¹²² See Solomon, Peter H. Jr. (2008b): "Judicial power in Authoritarian States: The Russian Experience" in Ginsburg and Moustafa (2008) *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, especially p. 263, 276 and 280-282.

power.¹²³ According to Olga Schwartz, many Russian judges still identify with the law enforcement structure and its responsibility to fight crime and oppose the defence counsel.¹²⁴ Sergei Tsirkun, a Moscow prosecutor, never lost a case in ten years: “A judge is not going to pass an acquittal unless he is absolutely 100 percent confident that someone is innocent. If he has the slightest suspicion that someone might be guilty, he will find them guilty even if he has to ignore problems with the evidence”.¹²⁵

Martin Shapiro explains the balance between independence and political bias by means of game theory. For courts striving to become legitimate within authoritarian regimes, Shapiro argues, it is necessary to obtain a balance between genuine independence and alignment with political tendencies. On the one hand, it is vital for the courts to act relatively independently to secure legitimacy with the population and relevant actors. On the other hand, the courts can not challenge the authorities to the extent that the regime “openly ignores or controls them”, as they then would lose said legitimacy. If they manage to uphold that balance, they will maintain some legitimacy which will also legitimize the regime itself.¹²⁶ As the regime benefits from the legitimacy the courts lend them, it will be reluctant to interfere with the work unless the situation is considered particularly important.

If we accept Shapiro’s abstraction, his theoretical remarks do fit the factual situation of courts in contemporary Russia. As Solomon concludes: At the fall of 2006, Russian courts were “sufficiently independent to act impartially in most cases.” At the same time, he also emphasizes that “especially through the operation of informal institutions, judges do sometimes experience pressure and come to conform to the wishes of powerful persons.”¹²⁷

¹²³ See Solomon, Peter H. Jr. (2005): “The Criminal Procedure Code of 2001” in Pridemore (ed.) (2005): *Ruling Russia – Law, Crime, and Justice in a Changing Society*. Lanham: Rowman and Littlefield Publishers, especially p. 89-91.

¹²⁴ Schwartz, Olga (2005): “The Creation of an Independent Judiciary and the Changing Nature of Courts and the Courtroom” in Pridemore (ed.) (2005): *Ruling Russia – Law, Crime, and Justice in a Changing Society*. Lanham: Rowman and Littlefield Publishers, especially p. 74-75.

¹²⁵ Tsirkun quoted by Finn, Peter (2005): “Fear Rules in Russia’s Courtrooms” in *Washington Post Foreign Service*, February 27, 2005. Available at <http://www.washingtonpost.com/ac2/wp-dyn/A56441-2005Feb26?language=printer>, last downloaded March 30, 2009

¹²⁶ Shapiro, Martin (2008): “Courts in authoritarian regimes” in Gindburg and Moustafa (2008) in *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, p. 334.

¹²⁷ Solomon (2008b), p. 280.

4.2 Formal Prosecution of the Informants' NGOs

4.2.1 The Legal Foundation

In the prosecution of my informants NGOs, there are evident similarities in the legal foundation for prosecution. With due respect for the complexity of legal cases, most of the charges can be framed within two specific bodies of legislation, namely NGO and tax legislation. In about half of the legal cases against my informants, the prosecution was based on a combination of the two. As mentioned, Džibladze holds that this combination was indeed the most typical tool in selective prosecution of NGOs between the new law's implementation in 2006 and the reforms within the state apparatus in 2008.¹²⁸

*Prosecution Based on NGO legislation*¹²⁹

Not surprisingly, the charges against the informants' NGOs often referred to violations of NGO legislation.

When NGOs register with the authorities, they must register within subcategories regarding both the general character and the geographical impact of their work. Citizens' Watch (CW) and the Centre for Enlightenment and Research Programs (CERP) were both accused of operating beyond their mandate as regional organizations. Maksim Timofeev and Mariâ Kanevskaâ are lawyers and represent respectively CW and CERP.¹³⁰ Both state that the FRS in these cases interpreted the law erroneously. According to the FRS' interpretation, CW should have been registered as an international organization for attending workshops abroad, claims Timofeev.¹³¹

¹²⁸ Interview with Džibladze, December, 2008.

¹²⁹ I do not apply the term *prosecution* in its strict judicial sense. By prosecution I refer to all formally codified measures the state's regulatory bodies apply to *deliberately hinder* the full functioning of NGOs.

¹³⁰ Interview with Kanevskaâ and Timofeev, both in April, 2008.

¹³¹ Interview with Timofeev, April, 2008.

In the case of Citizens' Watch, the inspection first resulted in a formal warning, which the NGO later appealed to court.¹³² In the case of CERP, the charges added up to accusations that the NGO's activities did not fit its formally stated purpose. More specifically, the FRS questioned if CERP's workshop activities with police officers regarding immigrants' rights could be defined as enlightenment, as was CERP's officially stated purpose, and not education, which is a separate legal definition.¹³³ Also Memorial's Moscow office had some problems regarding the nature of their work, facing complaints that their practice of providing free legal assistance was not in accordance with the legal definition of charity. In Russian NGO legislation, charitable organizations constitute a separate legal category with specific rights and duties.¹³⁴

The FRS also charged CERP for violating one of the vaguest formulations in the NGO-law. The above mentioned project suggested a view that the police was not sufficiently aware of migrants' rights. This statement was by the FRS interpreted as undermining the credibility of the Russian police and hence the Russian state's interests.¹³⁵

I expect the informants to downplay allegations of minor administrative infringements in their specific cases, not least because the legitimacy of the charges may be harder to contest. The Environmental Rights Centre Bellona (ERC Bellona), however, has published the exact complaints the FRS had against their organization on its website. These include two accusations of administrative infringements. The first accusation stated irregularities regarding a document signed by a member of the board – allegedly not authorized. In the second, the FRS claimed ERC Bellona had failed to report the “purpose of expenditure of the monetary assets” on one occasion.¹³⁶ According to the law, all of the NGOs expenditures

¹³² Interview with Timofeev, April, 2008.

¹³³ Interview with Kanevskaâ, April, 2008.

¹³⁴ Charitable organizations constitute a separate legal category with specific rights and duties. See Ahmetgaliev (2008), p 13-14.

¹³⁵ Interview with Kanevskaâ, April, 2008.

¹³⁶ Rosregistraciâ (2007): *Act (Certificate of Audit)*. August 24, 2007. Translated by Bellona. Available at: http://www.bellona.org/filearchive/fil_act2007.pdf, accessed April 17, 2009.

must be explicitly linked to a purpose. It should be noted that these two charges resulted from a total of 381 pages of material delivered for inspection.¹³⁷

In sum, many charges based on Russian NGO legislation seem, at least as the informants interpret them, to be based on loosely defined ‘rubber’ paragraphs; paragraphs that could be stretched to encompass anyone at the discretion of the FRS. Charges based on accusations of working outside the boundaries of registered legal categories or officially stated purposes were recurring. In the case of CERP, also the state’s vital interests were formally considered threatened. Kanevskaâ is frustrated regarding the catch-all nature of the law: “Based on this paragraph, everyone can be closed down”.¹³⁸ The only investigated charges based on purely administrative infringements of NGO legislation were filed in the formal warning imposed on ERC Bellona. Not only were the charges based on scrutinizing a large amount of documentation, but the official warning was also rejected in court.

Prosecution Based on Taxation Issues

As the FRS got extended powers of monitoring through the NGO-law of 2006, the tax agencies’ activities did not decrease proportionately. On the contrary – the increased monitoring power of the FRS often resulted in the tax authorities subsequently being notified of possible infringements.¹³⁹ An AGORA-report claims to have documented that the FRS has actively coordinated their efforts with other governmental agencies to crack down on selected NGOs simultaneously.¹⁴⁰

CW and ERC Bellona both received financial support from the Consulate General of Great Britain in St. Petersburg and the Dutch government’s MATRA program. Within the agreements between the donors and the NGOs, there were clauses about mentioning their donors’ names whenever, in the case of the Consulate, the supported project was mentioned in “the mass media, as well as in materials created in the course of the implementation of the programme” or, in the case of MATRA, “when holding any activities in the framework of

¹³⁷ Rosregistraciâ (2007).

¹³⁸ Interview with Kanevskaâ, April, 2008.

¹³⁹ Interview with Džibladze, December, 2008.

¹⁴⁰ A 2007 AGORA-report referred to in MGH/HRWF (2008), p. 23.

the project”.¹⁴¹ The FRS therefore claimed that both NGOs had been evading advertising tax and filed its accusations in certificates of audit (a document reporting on the outcome of inspections). CW and ERC Bellona thus faced almost identical charges of “gross violation of the rules of revenue and tax base accounting”, with reference to the Internal Revenue Code.¹⁴²

In the case of Memorial, their Moscow staff fought against charges from both the FRS and the tax authorities. Memorial hands out free information on a regular basis, including printed books. According to the tax agencies, the NGO should pay taxes on these books as long as they can not prove that they were gifts. The tax officials demanded that such a proof had to include the full names, signatures and personal information about the receivers. In addition the receivers should be prepared to witness in court about receiving the books for free. For a non-profit organization it would be extremely difficult to cope with these extra burdens.¹⁴³

Summarized, it seems that taxation issues played a significant role in filing cases and issuing fines against non-governmental organizations in Russia in the period I have investigated. Charges based on tax legislation often occurred in combination with other legal procedures, typically founded on NGO legislation. Another recurring trait is that non-profit NGOs are accused of avoiding taxes they should have paid had they been commercial. According to Natal’â Taubina, leader of the NGO Public Verdict, it is typical for Russian tax authorities to lack competence on legislation regarding non-profit activities.¹⁴⁴ The courts’ final rulings support this statement – in all the cases based on taxation legislation, the charges were rejected in court.

Legal Basis for Prosecution Originating in Other Legislation

The informants’ NGOs also faced varying legal problems based on other legislation than NGO and tax regulations.

¹⁴¹ Rosregistraciâ (2007).

¹⁴² Rosregistraciâ (2007). Interview with Timofeev, April, 2008.

¹⁴³ Interview with Žemkova, December, 2008.

¹⁴⁴ Interview with Taubina, December, 2008.

In the case of the European University of St. Petersburg (EUSPB), fire security regulation served as pretext for the NGO's legal problems. In order to attain and keep its educational licenses, the private university formally has to respect extra strict demands for fire security. The university has therefore been regularly controlled by the State Fire Inspection (GPI) for years. In early 2008 the university was suddenly forced to cease its operation. Neither the building's standards nor the law had changed, although the financial situation of the state agency had improved. Barandova deems the sudden enforcement of the fire security demands to be politically motivated, coming up some weeks before the presidential elections in March.¹⁴⁵ The GPI arranged for a temporarily close-down of the university and among other demands instructed the university to widen its corridors. This would, however, not have been allowed within the legislation regulating old heritage buildings in the historical centre of St. Petersburg. If not given exceptions in one way or another, the university would either have had to move to another building, or close permanently.¹⁴⁶ Some time after the presidential elections, however, the authorities and the university came to an agreement, and the university could continue its activities.¹⁴⁷

Stefaniâ Kulaeva, long-time active in the Memorial movement and at the time of the interview heading its anti-discrimination centre in St. Petersburg (ADC Memorial), states in the interview to have experienced problems with the Migration Service. A visiting officer claimed that Memorial's German volunteers had incorrect documents for their stay in Russia. These accusations implicitly link to the NGO-law, which forbids NGOs to have foreign nationals in conflict with Russian legislation as "participants" in their work.¹⁴⁸ This episode never resulted in any written documents, but it exemplifies how state officials exploit their formal mandate as law enforcers by wielding it selectively:

¹⁴⁵ Interview with Barandova, July, 2008.

¹⁴⁶ Furthermore, the educational license in Russia is granted for the building and not for the organization. Thus, the education could not be moved to another building without achieving another education licence. Ballo, Jannike Gottschalk (2008): "Stenger russisk eliteuniversitet" in *Morgenbladet*, February 29, 2008.

¹⁴⁷ Interview with Barandova, July, 2008.

¹⁴⁸ Federalnij Zakon ot 10 janvara 2006 g. N 18-F3, Article 3 (5). See also ICNL (2006), p. 14.

The officer asked me about our voluntaries from Germany, and I named them by memory. He kept a list that he hid from my sight with his hand. Referring to this list, he stated that I had left two names out. It turned out that the names were written two times on his list, and that I'd already mentioned them. Then he claimed we had issued wrong visa for our volunteers – they should have been 'humanitarian aid'-visas. I told him that I had never heard of such an instruction. He responded: "ok, you're right, but I'm the one in charge here".¹⁴⁹

The Memorial office in St. Petersburg had also faced fire inspections, but Kulaeva did not find them selectively imposed. Instead she expressed support for the increased state control on fire security in general.¹⁵⁰

The case of the Regional Press Institute (RPI) is unique among my informants with regard to its legal foundation. The St. Petersburg housing committee filed a claim against the PRI, stating that the NGO had not paid rents for parts of their premises. The committee also claimed the contracts regulating the use of premises were not properly registered and thus invalid. The contract they referred to, however, had been updated by the parties earlier and a copy sent to the housing committee, according to Anna Šarogradskaa, the director of the institute. Šarogradskaa also stressed that the rooms had long been occupied by another organization which had paid the rent all along, something they could prove. The NGO's director has repeatedly stated the charges to be politically motivated.¹⁵¹

4.2.2 Formal Sanctions in the Cases against the Informants

The cases I have investigated also provide some interesting material regarding the effectiveness of selective law enforcement. Perhaps most striking is the degree of informants' success in courts. As will be elaborated below, the NGOs perceive themselves to be targets of political persecution and their work has been denigrated in government rhetoric and in mass media friendly to the government. Still, a fair amount of the NGOs won the

¹⁴⁹ Interview with Kulaeva, October, 2008.

¹⁵⁰ Interview with Kulaeva, October, 2008.

¹⁵¹ Interview with Šarogradskaa, December 2008. See also Belobranin, Andžej (2009): "Tverdaâ pamât' gubernatora" in *Novaâ Gazeta v Sankt-Peterburge*. April 26, 2009. Available at <http://www.novayagazeta.spb.ru/2009/26/4/>, accessed April 30, 2009.

cases in courts – in a country where acquittal rates in general are very low and where courts traditionally have been supporting the executive branch of power.

The most severe punishment among the informants was arguably imposed on CERP, RPI and EUSPB. One staff worker in another Russian NGO, however, claimed that CERP would also have walked free, had its leadership made a greater effort fighting the selective law enforcement.¹⁵² The final outcome of the legal prosecution of CERP in 2008 remained unclear. Seemingly the NGO was from November 2008 rehabilitated and again legally registered.¹⁵³

The court rejected RPI's initial appeal. Regardless if the rent was paid by other organizations, the court found the contracts not in accordance with formal demands. According to a journalist from *Novaâ Gazeta*, all that mattered to the court's decision was formalistic bureaucracy, while other well documented facts of obvious relevance were ignored.¹⁵⁴ The RPI was sentenced to pay the 750,000 roubles of rent, and was thrown out of their premises at the St. Petersburg House of Journalists.¹⁵⁵

In the case of EUSPB, the NGO was closed down temporarily, in principle until the fire security had been improved to a satisfactory level. As noted above, the demanded level was unattainable within the legislation regulating the use of heritage buildings. The final damage to the EUSPB, however, turned out to be less severe than first expected. Even the program of Grigorij Golosov, which many believed was the real centre of the conflict, was continued – contrary to Golosov's own expectations.¹⁵⁶ Still, the university's activities were suspended in the period of the presidential elections, which according to one interpretation is exactly what was intended from the very outset of the prosecution.¹⁵⁷

¹⁵² Interview with Russian NGO staff, 2008.

¹⁵³ The initial liquidation of CERP was nonetheless appealed to the European Court of Human Rights later the same month. Correspondence with Kanevskaâ, November, 2008.

¹⁵⁴ Belobranin, Andžej (2009).

¹⁵⁵ Belobranin, Andžej (2009).

¹⁵⁶ Ballo (2008).

¹⁵⁷ Interview with Barandova, July, 2008.

In the similar charges against CW and ERC Bellona, the FRS called for the tax authorities to make further investigations, a call that was rejected. The FRS also filed formal warnings in a certificate of audit. As noted above, a formal warning in itself is not a harsh sanction, but it worsens the future legal security of the NGO. Both CW and ERC Bellona appealed the formal warning to court. The same did Memorial Moscow, which in addition was initially issued a fine by the tax authorities. After an initial treatment in the court system, the fine was reduced dramatically, but the organization nonetheless appealed again. Elena Žemkova, executive director of the Moscow office, states that the decision to appeal a second time was first and foremost a matter of principle. Facing a fine, however, would also have placed the NGO in a curious legal situation, mentioned above.¹⁵⁸ In the end, Memorial Moscow was fully rehabilitated. Along the way, however, it spent a large amount of resources in dealing with “more or less constant inspections” and not least by fighting in court for one and a half year.¹⁵⁹

CW and ERC Bellona were both acquitted in court, but also complain about the burdensome processes. Timofeev in CW suggests that state agencies use administrative measures deliberately to keep pressure on the NGOs while simultaneously hindering them in functioning effectively.¹⁶⁰

4.3 The Legal Foundation - A Typology of Incoherence

The legal charges against the informants' NGOs have certain similarities. The cases that are based on NGO legislation match to a large degree the expectations to weak or incoherent legislation. The FRS utilized several provisions in the NGO-law that had been criticized earlier for being too vague or too burdensome to comply with. The various accusations of tax evasion are often based on the tax legislation while not considering the exceptions valid for

¹⁵⁸ Had the fines not been rejected by court, the NGO would have been faced with an interesting situation; all the financial assets of NGOs have to be spent to promote their stated official goals. As paying fines is not defined as one of Memorial's official goals, paying them would be in conflict with the legal status of the organization. Interview with Žemkova, December 2008. See also Gnezdilova (2007), p. 17, and part 4.1.1. above.

¹⁵⁹ Interview with Žemkova, December, 2008.

¹⁶⁰ Interview with Timofeev, April, 2008.

charitable and non-profit work. In these cases, incompetence seems just as important as weak legislation.

As seen above, the selective enforcement of the NGO-law is built on several paragraphs and definitions whose interpretation is disputed. Certainly a law must always be somewhat flexible so that fairness in each unique case is not sacrificed for formalistic rigidity. When questions regarding legality to a large degree are up for debate, however, it undermines the authority of the law and increases the influence of those who are in charge of its implementation. Given the strict interpretation of the FRS, we can see patterns similar to Ledeneva's model. Ledeneva states that "the incoherence of formal rules compels almost all Russians, willingly or unwillingly, to violate them".¹⁶¹ This is a popular way to frame the question among informants and analytics alike: "according to this, everyone can be found guilty".

The below typology categorizes some traits of legislation that strengthen the potential for selective law enforcement to be successful. The typology is not necessarily exhaustive but reflects the findings of this research. The categories are also not rigid, and can be overlapping. Still, they help to explain some fundamental problems of Russian NGO legislation and why it plays such a significant role in selective law enforcement. I identify four distinguishable categories of relevance; *catch-all paragraphs*, *administrative catch-all traps*, *rubber paragraphs*, and *generic security concerns*.

Catch-All Paragraphs

Maybe the most obvious component to look for in legislation, according to which everyone might be found guilty, is the catch-all paragraph. Catch-all legislation and incoherent legislation can often be considered synonymous. In this thesis, however, a catch-all paragraph refers to a piece of official law or regulation, according to which a large amount of the legal subjects *indeed is* guilty of non-compliance. When a large number of subjects does not comply, "punishment becomes a resource in short supply".¹⁶² Faced with a catch-all

¹⁶¹ Ledeneva (2006), p. 13.

¹⁶² Ledeneva (2006), p. 13.

paragraph, the law enforcers are therefore left with only two choices: enforce the paragraph according to some selection or do not enforce it at all.

In accordance with the above definition, the legal demand does not need to be impossible to follow in order to be characterized as catch-all. It is sufficient that it is not in line with its subject's expectations or norms. Software piracy is illegal in many countries; still a large amount of teenagers download such material weekly if given access to the necessary hardware. This is not because they are unable to refrain from doing so, but because they do not acknowledge neither the associated norm nor the real potential for punishment. This is also central with Ledeneva, who states that informal practices thrive where there are discrepancies between societal norms and formal rules.¹⁶³ A sudden punishment of one single non-complier would certainly cause uproar in most democratic states – neither the law nor its arbitrary or selective enforcement is consistent with the societal norms.

An apt example from the investigated cases is the EUSPB's problems with the fire security agency, GPI. Barandova, who was actively defending the university, holds that the list of requirements and procedures indeed was formally correct. Yet, strict compliance was not expected to be necessary, given that fire security is poor in most old St. Petersburg buildings and that the regulations had never before been enforced strictly against the EUSPB.¹⁶⁴

Administrative Catch-All Traps

Administrative measures can also be functioning as a kind of catch-all mechanism, if they lead to massive non-compliance and are connected to significant punishment. When this is the case, their enforcement is likely to be regarded as selective. In an administrative catch-all trap, each isolated demand could be fulfilled. The sheer amount of demands, however, makes it difficult or close to impossible to comply with every detail. The response among Russian NGOs has often been reluctance to cope with even parts of it. In this way, strictness unaligned with common norms can turn out to be counterproductive in terms of formal regulation, encouraging mass non-compliance and making effective enforcement difficult.

¹⁶³ Ledeneva (2006), p. 22

¹⁶⁴ Interview with Barandova, December, 2008.

The 2006 amendments to the legislation on non-governmental organizations include administrative demands that have been described as so strict that nobody could really fulfil them. Regardless of what is possible or not, the empirical evidence is clear regarding mass non-compliance on these matters. In 2007 only 20% of the NGOs delivered annual reports in time. In 2008, the percentage went up slightly to 25%.¹⁶⁵ In other words, non-compliance has been, and presumably still is, the standard.

With regard to cases against the informants' NGOs, parts of the procedures against ERC Bellona could provide an example of a catch-all trap in effect. Among a total of several hundred pages of documentation presented during the period of the FRS' inspection, accusations on two minor infringements were allegedly found and filed in a certificate of audit. In this case, however, the court rejected the FRS' accusations. Thus, the state agency did not manage to apply the administrative catch-all trap in this case after all.

Rubber Paragraphs

Similar to catch-all paragraphs are the rubber paragraphs, recognized by the great discretion they grant the law enforcement structure in terms of interpretation. Such discretion is typically resulting from the lack of definitional clarification. These paragraphs can be stretched like rubber, hence the name, to encompass most legal subjects. In other words, rubber paragraphs provide another kind of catch-all mechanism, but only according to their strictest interpretation.

The FRS was, until the summer of 2008, legally authorized to decide whether or not an NGO's activity had been promoting the goals set by the organization itself. The discretion left to enforcement agencies was in this regard so wide that this and other provisions by many observers were expected to be wielded against the NGOs unwanted by the authorities. This is a typical example of a rubber provision – a provision that could be stretched to fit the purpose of the enforcers or the informal interests manipulating them.

Rubber paragraphs provided the legal basis for prosecution in several cases. ERC Bellona, CW, CERP and Memorial Moscow all faced accusations that they did not work according to

¹⁶⁵ Ahmetgaliev et al (2008), p. 31 and 35.

their registered legal category. Importantly, rubber paragraphs always make room for legal discussion in courts. In the case of ERC Bellona, CW and Memorial alike, the FRS did not manage to convince the courts to accept its interpretation.

Generic Security Concerns

Security concerns can be considered a sub-category of the rubber paragraphs as described above. However, they are clearly distinguished by their explicit reference to political goals of vital importance – to safeguard the territorial integrity, legal order or essential values of society. Threats against these fundamental pillars of the state cannot be defined precisely, and thus the legal formulations dealing with them are by necessity vague. They are deliberately designed to initiate informal negotiations of legality in crisis management.¹⁶⁶ As other rubber paragraphs, they refuse to make sense within a strictly formal view upon law. An apt example of a generic security concern is legislation formally combating extremism or terrorism. Authorities will not let a terrorist walk away and the law should not be an obstacle: ‘show me a terrorist, and I will find a paragraph to match’.

Activists and political opposition have been criticizing the authorities for including such paragraphs in the NGO-law. They argue that these formulations can be used – and in fact have been used – as political tools of repression, in conflict with both constitutional and international human rights. The most frequently quoted of the security concerns included in the NGO-law is the one applied against CERP. As noted, the FRS charged CERP for threatening the state’s interests. CERP suggested the Russian police had insufficient knowledge of migrants rights, something that was interpreted as undermining the police’s integrity, and hence the integrity of the Russian Federation.¹⁶⁷

¹⁶⁶ See *interl alia* Frankel, Ernst (2006[1941]): *The Dual State – A Contribution to the Theory of Dictatorship* (in translation). New York (2006): Lawbook Exchange, p. 49.

¹⁶⁷ *Ugrozu suverenitetu, političeskoj nezavisimosti, territorialnoj neprikosnovennosti, nacional'nomu edinstvu i samobytnosti, kulturnomu naslediju i nacionalnym interesam Rossijskoj Federatsii*. Federal'nyj zakon ot 10 ânvarâ 2006g. No18-FZ. Article 3 (4-7-4) and elsewhere.

4.4 Punishment – More Than Legal Sanctions

As argued above, the mechanism of selective law enforcement is feeding like a parasite on a weak formal system. The weak formal system grants informal interests with the possibility to apply the law selectively according to extra-legal criteria. In choosing this strategy, however, the informal interests become dependent on the enforcement structure's ability to impose punishment. As seen, the courts have rejected the formal charges against the NGOs in several cases. Therefore, the enforcement at first glance seems to have failed. The courts, however, are not included in the legal process before the final stage. Both existing reports and the interviews indicate that regardless of acquittals in courts, the processes carry with them several unpleasant consequences. In addition, the legal processes *themselves* hurt the NGO as they unfold, exhausting their time and resources.

The variety of ways to punish selected NGOs is extensive and this remains true even when we focus entirely on the mechanism of selective enforcement. The presented empirical data proves that punishment includes, but is not limited to, legal sanctions. A way to operationalize punishment is to look at whether or not the non-compliers are put in a worse situation than those who complies.¹⁶⁸ According to many informants, this is the case irrespective of acquittals in courtrooms. To bring the discussion of selective law enforcement further, we thus need to take a closer look on what might constitute punishment, transcending the scope of legal sanctions.

4.4.1 A Typology of Punishment

Punishment takes many forms. Some are linked directly to the mechanism of selective law enforcement, and some are not. None of the varying forms should be neglected, although the former are here of primary interest. The categories identified below are, in the order of presentation, *formal legal sanctions*, *procedural punishment*, *additional pressure for formal compliance*, and *indirect punishment*. Notably, the last three are not dependents on the judicial branch's powers of sanctioning.

¹⁶⁸ Macrory (2008), p. 37.

Formal Legal Sanctions

A formal legal sanction is punishment formally sought by the law enforcement agencies. The legal sanction always refers explicitly to alleged non-compliance with the formal rules. Some of the informants have experienced formal legal sanctions, including CERP and RPI, though in the case of RPI, the punishment was formally the enforcement of a private contract. Administrative legal sanctions were initially imposed by state agencies upon Memorial Moscow, CW and ERC. These were however appealed to court, where the NGOs won.

Procedural Punishment

Procedural punishment is a form of punishment legally embedded in formal procedure codes, but still not officially recognized as a legal sanction. The FRS can hinder an NGO's work to a considerable degree by procedures such as making inspections, rejecting registrations and initiate court-cases. As these procedures clearly hinder the NGOs from their full functioning and originate with official legal documents, they are directly relevant with regard to selective law enforcement.

Seemingly, much discretion is left with the enforcement agencies both with regard to the selection of which NGOs are to be inspected and to the amount of work that each inspection impose on the selected NGO. As noted, both external observers and representatives of the FRS deemed the requirements impossible to enforce. In other words, also the state capacity to make inspections and survey delivered material is a "resource in short supply".¹⁶⁹ Regarding inspections, the authorities have chosen to investigate only some organizations, but the official justification for this selection does allegedly not hold water.¹⁷⁰

As have been seen, the incoherent law makes room for a lot of court proceedings even when the NGOs in the end can prove themselves not guilty, and the NGOs need to spend a lot of time and resources to win the cases. The same is true for denials of registration, which can be imposed selectively in the same way as other punishment. Attempts to register may succeed in the end, but considerable time and resources are wasted in the process.¹⁷¹ Importantly,

¹⁶⁹ Ledeneva (2006), p. 13.

¹⁷⁰ Ahmetgaliev (2008), p. 83-84.

¹⁷¹ See *inter alia* MGH/HRWF (2008), p. 14-15.

procedural punishment is not formally recognized as punishment. This makes it even more attractive as a weapon. First, it can be imposed without the support from courts. Second, because of the inspections' status as regular monitoring, the NGO have a hard time arguing against their legitimacy.

Additional Pressure for Formal Compliance

Additional pressure for compliance is closely connected to the mechanism of selective enforcement. Yet, it is clearly at odds with the common understanding of punishment. It refers to the pressure to perform excellently where others perform mediocre or fail to perform at all. One might say it is a burden that certain NGOs impose on themselves to *eliminate the pretext* for selective enforcement. As discussed in chapter 6, the NGOs' efforts to comply with formal demands in part contradict expectations based on Ledeneva's model. The bureaucratic demands are seemingly not entirely impossible to comply with, and the NGOs actively pursue formal compliance even when they hold the demands unreasonable.

With the new amendments, NGOs are required to deliver annual reports on their work and financial expenditures. As noted above, non-compliance with this demand is the rule rather than the exception. Formally, however, everyone is expected to comply with formal rules in the same way. The pressure to comply can therefore be framed as punishment only in a *relative* meaning. The omnipotent threat of enforcement make some NGOs live up by demands ignored by others. As a result, the *de facto* legal situation of a conscious violator of informal rules is worse than the one of a corresponding complier, even *before* any formal non-compliance or punishment has taken place. NGOs that perceive themselves as potential victims of selective law enforcement spend more time on bureaucracy than others. They expect their administrative reports to be more closely scrutinized than others and thus feel additional pressure for formal compliance.

One interview from the field provides a striking example on how this may play out in reality. The informant's NGO is according to its legal status supposed to deliver annual reports.¹⁷² When I asked the president of the NGO about the demands, however, it turned out she had

¹⁷² This has been verified by external sources.

never even heard of them. All the NGO was expected to deliver to the authorities, was the annual report for the state's tax-service, she stated.¹⁷³ The NGO leader did not fear becoming a victim to selective punishment and consequently did not worry about bureaucratic details. Notably, the demand for annual reporting is among the most criticized by other informants.

Indirect Punishment

This fourth category is possibly beyond the scope of selective law enforcement, but of vital importance for the organizations. This punishment is still selective, but only indirectly related to legal procedures. As mentioned, recent reports have gradually turned their focus to indirect problems of the NGO-law and its implementation. Indirect punishment is maybe the most fundamental problem for the group of NGOs the informants represent. Džibladze believes the marginalization of the NGO-community to be the intended purpose of selective law enforcement. Furthermore, he believes it to be successful:

I don't think the legal offensive is counterproductive. It has reached its goal of marginalizing the critical NGOs and isolating them from society. Thousands of NGO-workers have been thrown out of their offices recently and many more give in to intimidation. [...] Because of the campaign and government rhetoric, NGOs have experienced isolation from the grassroots movement, the universities, the local branches of government agencies. I often meet with various organizations, stating "we like you and respect you as professionals, but cooperating with you is too dangerous" [...]

As a result, the impact of the NGOs' policies has been reduced. Also some foreign governmental donors have withdrawn their support, as they feel they cannot "make your government unhappy" [...] Of course, also the staff and leadership of NGOs are losing their motivation when they don't see any influence, but are just working to cope with constant inspections. The NGOs have faced recruiting problems since the turning point in 2005, when Patrušev called for new legislation. The young professionals, who have been a backbone for NGOs have earlier been drawn by good career opportunities and high salaries. Now it is not prestigious, and even bad to have worked for critical NGOs, and because of the economic development, the private and state sector can provide higher salaries than before.¹⁷⁴

By other words, the rhetoric and legal prosecution in combination have a huge impact on Russian human rights NGOs in terms of isolation from society. Russians and foreign

¹⁷³ Interview with NGO leader, December, 2008.

¹⁷⁴ Interview with Džibladze, December, 2008.

governments both seem reluctant to deal with organizations framed as unwanted by Russian authorities. Džibladze also tells of human rights NGOs that experience serious internal disagreements about how to cope with the ongoing politization of their work. In sum, “the biggest problem [regarding the legal situation of Russian NGOs] has turned out not to be the closure or denials of registrations or the similar, but the ‘chilling effect’ and the self-censorship”, Džibladze concludes.¹⁷⁵ The degree of *self* in self-censorship can be debated. At least in this context, self-censorship is just another word for successful enforcement of informal rules – measured in deterrence.

4.4.2 Theoretical Remarks on Punishment

To understand the full impact of selective law enforcement, I have adopted a broad definition of punishment. This choice makes for at least three theoretical remarks. First, I have stressed that the *perceptions* of why punishment takes place is a vital determinant of how the punished will adapt. In the same way, it is the *perception* of punishment that determines its deterring effect, regardless of the intentions behind it. Punishment defined by objective criteria is therefore an inaccurate tool to estimate the deterring effect: The NGOs *perceive* to be punished and will, according to a rational choice, base their further considerations on this perception.

Furthermore, even if deterrence remains a vital goal of enforcement, the research indicates it is just one side of selective law enforcement. Compliance to informal rules can not only be enforced through deterrence, but also by temporarily hindering non-compliance through preoccupying the NGOs with administrative burdens. The costs involved also reduce the NGOs’ financial capacities. Even if the sanctions against EUSPB and RPI would turn out not to have a deterring effect, they will still contribute to hinder informal non-compliance. I presume that the stripping of RPI’s resources will reduce its effectiveness temporarily, and the university was closed for the period of the presidential elections, effectively hindering its possible influence on them. Also denials of registration, although not specifically

¹⁷⁵ Interview with Džibladze, December, 2008.

investigated, can provide an obstacle to effective work for NGOs, as they cannot access their bank accounts etc. without registration.¹⁷⁶

Finally, it is also worth noting that my theoretical model in chapter 3 states that the outcome of selective law enforcement by definition is exclusively formal (Fig2). The research, however, clearly demonstrates how formal procedures also have informal consequences. Indirect punishment can certainly not be considered formal sanctions, yet it is in part a consequence of selective law enforcement. What remains crucial for understanding the mechanism of selective law enforcement is that punishment within this mechanism, regardless of its characteristics, is a *product* of manipulative use of the formal system. Although the nature of punishment in itself can be debated, it is within selective law enforcement always *imposed through formal channels*.

¹⁷⁶ See Gnezdilova (2007), p. 24, footnote 56.

5. Informality in Selective Law Enforcement.

Although the formal proceedings are of vital importance in the mechanism of selective law enforcement, they are only a *pretext* for enforcing *informal* rules. By penetrating the formal legal system, informal interests make use of the state's monopoly on violence to promote their personal or political goals. Thus, the formal proceedings presented above are just one side of the story, and not very telling on its own. Now it is time to look at the informal aspects of selective law enforcement.

In reports and among informants alike, the Russian authorities are accused of using the formal enforcement structure to achieve informal ends. This chapter, therefore, first discusses the informal pressure that some NGOs have experienced from the Russian government in the investigated period. The aggressive rhetoric does seemingly have an important function in communicating the informal rules in selective law enforcement against Russian NGOs. The second part of the chapter deals with the informants' perceptions of these issues. Why was they selected for punishment, and how come they know why?

Even though the informants' answers differ, the heavy impact of informal pressure is unquestionable. Albeit informal rules are not as precisely formulated as written ones, their existence is seen as self-evident by most. Importantly, the research indicates there is a connection between governmental rhetoric and the informants' perceptions of informal rules. In the third part of the chapter, I analyse how this link can be interpreted. I argue that since institutionalized informal practice leads to common expectations, the informal interests do not have to rely on manual control to deliver punishment selectively.

5.1 Governmental Pressure on Russian NGOs

Looking at official Russian statements, it is not difficult to identify certain groups of NGOs that do not fit the Kremlin ideal. The investigated period was marked by a peak in aggressive rhetoric directed specifically against parts of civil society. Within the logic of *suverennaâ demokratiâ*, the sovereign democracy, the authorities argue foreign influence on Russian civil society is illegitimate, interfering with the Russian people's prerogative to rule its own country independently. Furthermore, the political leaders envision for Russian civil society a

role in cooperation with and assisting the state, rather than being a watchdog and a check upon the executive power. Foreign funded human rights NGOs are often in conflict with these policies, being both influenced by foreign capital and critical to the regime's dealings with human rights issues. Interestingly, the rhetoric against foreign influence often refers to the NGO-law, although the law does not formally address this issue.

Sovereign Democracy

The doctrine of sovereign democracy is not formulated in an extra-ordinary way. Vladislav Surkov, a Kremlin advisor and central in the doctrine's development, holds it necessary to establish a sovereign democracy "where the power, institutions and actions are chosen, formed, and managed exclusively by the Russian [*rossijskij*] nation".¹⁷⁷

Strictly interpreted, however, the doctrine is in conflict with foreign aid, which is "by design a mechanism of international diffusion".¹⁷⁸ Beyond doubt, the NGOs in question do work in accordance with their donors' wishes; else they would have not received the grants. According to Sarah Henderson's research, Russian NGOs funded from abroad typically lack "grassroots' consistency, and mimic their donor's style of organization and "post-materialist values".¹⁷⁹ Also Aleksandra Chauhan has noted that foreign aid "encourages NGOs to develop ties of accountability to the donor, rather than to domestic constituencies".¹⁸⁰ Sada Aksartova even claims that Western donors have been "guided by considerations having little to do with the needs and characteristics of receiving societies".¹⁸¹

In the Kremlin, the foreign sponsorship of NGOs in Russia is seemingly seen within the logic of a zero-sum game – an increase in foreign influence means a reduction of Russian sovereignty. Especially, the combination of *political activity* and foreign funding has been

¹⁷⁷ Surkov, Vladislav (2006): "Nacionalizaciã budušege" in *Ekspert*, no.43, November 20, 2006. The term *rossijskij* means that Surkov has the civic definition of nation in mind, and not the ethnical.

¹⁷⁸ Chauhan (2007), p. 2.

¹⁷⁹ Henderson, Sarah L. (2003): *Building Democracy in Contemporary Russia – Western Support for Grassroots Organizations*. Ithaca: Cornell University Press, p. 10-11.

¹⁸⁰ Chauhan (2007), p. 31, footnote 48.

¹⁸¹ Aksartova, Sada (2006): "Why NGOs? How American Donors Embraced Civil Society After the Cold War" in *International Journal of Not-for-Profit Law*, vol. 8 (2006), no.3 p.16-21, quote from p. 21.

heavily attacked verbally by Kremlin representatives. Both following quotes originate with Vladimir Putin:

*I am against having foreign governments finance political activity in our country, just as our government should not finance political activity in other countries.*¹⁸²

*I object categorically to foreign funding of political activity in the Russian federation. I object to it categorically. Not a single self-respecting country allows that and neither will we.*¹⁸³

Putin also refers explicitly to NGOs in similar phrases:

*I can say – and I think it is clear for all – that when non-governmental organizations are financed by foreign governments, we see them as an instrument that foreign states use to carry out their Russian policies.*¹⁸⁴

*[The amendments to the NGO legislation are] aimed at preventing the intrusion of foreign states into Russia’s internal political life.*¹⁸⁵

Kim Reimann, that examines the worldwide growth of NGOs from a top-down perspective, holds that internationally oriented NGOs are “social actors that persuade, pressure and teach states new ideas, values, and practices” so as to socialize them into accordance of the international value hegemony.¹⁸⁶ The Kremlin accusations are sharper, however, and include accusations of outright espionage. Nikolaj Patrušev, then head of the FSB, warned in 2006 against a “sharp increase” in espionage under the cover of international organizations.¹⁸⁷

¹⁸² Putin quoted in Civil G8 (2006): “Verbatim report on President Putin's meeting with participants of the ‘Civil G8 2006’ International Forum of Non-governmental Organizations” in *Transcripts of the Plenary Sessions*. Available at <http://en.civilg8.ru/forum0307/1989.php>, accessed April 7, 2009.

¹⁸³ Putin quoted in McMahon, Robert (2005): “Russia: Putin ‘Foreign Funding’ Remarks Draw Civil Society Concerns” in *Global Policy Forum*, July 21, 2005. Available at <http://www.globalpolicy.org/ngos/state/2005/0721russia.htm>, accessed April 7, 2009.

¹⁸⁴ Putin quoted in Schofield, Matthew (2007): “Putin cracks down on nongovernmental organizations” in *McClathy Washington Bureau*. Available at http://www.mcclatchydc.com/miscellaneous/need_to_map/v-print/story/15642.html, accessed August 8, 2008.

¹⁸⁵ Putin quoted in Lowenkron, Barry F. (2006): “Human Rights, Civil Society, and Democratic Governance in Russia: Current Situation and Prospects for the Future” in *Testimony at a Hearing of the Commission on Security and Cooperation in Europe*. Available at <http://www.state.gov/g/drl/rls/rm/2006/68669.htm>, accessed September 7, 2008.

¹⁸⁶ Reimann, Kim D (2006): “A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs” in *International Studies Quarterly*, vol. 50 (2006) p. 45-67, quote from p. 59.

¹⁸⁷ Patrušev quoted in Saradzhyan, Simon (2006): “Patruchev Says More Spies Work in NGOs” in *Moscow Times*, December 20, 2006.

Putin has explicitly stated that the NGO-law was needed to “combat terrorism and stop foreign spies using NGOs as cover”.¹⁸⁸

Human rights are part of the essential democratic values Russia demands to take part in defining as a ‘sovereign democracy’. As Putin stated in Munich 2007: “Incidentally, Russia – we– are constantly being taught about democracy. But for some reason those who teach us do not want to learn themselves”.¹⁸⁹ Within the Kremlin rhetoric from 2006 through 2008, the universality of democratic values is typically not challenged, although the Western prerogative to define them is. In 2006 foreign minister Sergej Lavrov stated he was “deeply convinced that the fundamental values of democracy, even though they bear a universal character, are realized in each country in their own way, with due regard to national traditions and other peculiarities”.¹⁹⁰ Similarly, Putin holds that “when speaking of common values, we should [...] respect the historical diversity of European civilization. It would be useless and wrong to try to force artificial ‘standards’ on each other”.¹⁹¹

The Kremlin’s sceptical attitude to the traditional Western demand for monopoly in deciding how democratic values should be realized coincides with a strong division within Russian civil society in terms of funding. Foreign donors have focused their aid on some key issues identified by Julia Khodorova as “civil society initiatives and institutions, development and sustainability, human rights, global environmental protection programs, HIV/AIDS, and economic development”.¹⁹² Henderson concludes that foreign funding has divided the Russian NGO community into “haves” and “haves nots”.¹⁹³ The active expansion of Western

¹⁸⁸ Putin quoted in Kaban, Elif (2006): “Foreign Humanitarian Agencies Suspend Work in Russia” in *Reuters* 19.10.2006. Available at <http://www.globalpolicy.org/ngos/state/2006/1019suspend.htm>, accessed September 24, 2008.

¹⁸⁹ Putin, Vladimir (2007): *Speech at the 2007 Munich Conference on Security Policy*.

¹⁹⁰ MID (Ministry of Foreign Affairs of the Russian Federation) (2006): *Address by Sergey Lavrov, Chairman of the Committee of Ministers of the Council of Europe and Russian Minister of Foreign Affairs, at the Meeting of the Council of Europe Forum for the Future of Democracy on the Theme of “The Role of Political Parties”*. Speech in Moscow, October 18, 2006. Unofficial translation at <http://www.mid.ru>

¹⁹¹ Putin quoted in Stent, Angela (2006): “Berlin’s Russia Challenge” in *Valdai Discussion Club*. September 4-9, 2006. Available at <http://en.valday2006.rian.ru/materials/20070322/52331120.html>, accessed April 7, 2009.

¹⁹² Contrasting Russian philanthropy, which is directed towards “social initiatives, youth and children programs, youth professional and occupational orientation, culture, sports, education, talented children or children with special needs, and rehabilitation of people with special needs. Khodorova, Julia (2006): “Philanthropy in Russian Society Today” in *International Journal of Not-for-Profit Law*, vol. 8 (2006), no.3 p.13-15, quote from p. 14.

¹⁹³ Henderson (2003), p. 10-11.

interests – combined with a growing sceptical attitude towards the Western value hegemony led to the Russian NGO issues becoming what a Kremlin ideologist has called a “soft-power battleground between Russia and the west”.¹⁹⁴

The Kremlin Alternative

At the beginning of his presidency, Putin complained that Russia’s effectiveness as a state was hampered as power was “mainly wasted on political struggle”. Putin goes a long way in suggesting a democracy without competition – built on *graždanskoe soglasie*, civil unity – being a key word in the speech.¹⁹⁵ In the same way, the Kremlin promotes a civil society that abstains from making political decisions and rather provides assistance in implementing them.¹⁹⁶ Patrušev holds the strong state responsible for telling NGOs “what problems they should tackle and for what purpose they should engage in activity”.¹⁹⁷ In 2006, Lavrov suggested that Russian NGOs should support their state by help promoting Russia’s national interests and giving Russia a more positive image abroad.¹⁹⁸ Obviously, human rights were on neither list of wanted NGO activities; already in 1999, as mentioned, Russian authorities demanded that NGOs operating in Russia removed the phrases ‘protection of human rights’ and ‘protection of citizens’ rights from their lists of official goals. The authorities stated that according to the constitution, this responsibility belonged with the state and NGOs were only legally entitled to assist the state and professional lawyers in their work.¹⁹⁹

In short, one might say that Russian civil society is torn between forces trying to implement ‘civil society from abroad’ and ‘civil society from above’. Both concepts are arguably

¹⁹⁴ Aleksej Malarkin quoted in Machleder (2006), p. 9.

¹⁹⁵ Putin, Vladimir (2000): *Rossia na rubezhe tysiacheletii*. Speech from February 2, 2000. Available at <http://www.ng.ru/printed/3681>, accessed April 7, 2009.

¹⁹⁶ Wilson, Jeanne (2008): “Civil Society: A Russian Variant” in *Open Democracy News Analysis*. July 17, 2008. Available at <http://www.opendemocracy.net/Russia/article/Civil-Society-A-Russian-Variant>, accessed April 8, 2009. Also see Chauhan (2007), p. 15-17.

¹⁹⁷ Patrušev quoted in Klitsounova, Elena (2008): *Promoting Human Rights in Russia by Supporting NGOs: How to Improve EU Strategies*. CEPS Working Document No 287 (April 2008), p. 8. Available at http://shop.ceps.eu/downfree.php?item_id=1637, accessed February 26, 2009.

¹⁹⁸ Evans, Alfred B. Jr (2006): “Vladimir Putin’s Design for Civil Society” in Evans, Alfred B Jr. et al. (2006): *Russian Civil Society – A Critical Assessment*. New York: M.E. Sharpe, p. 150-151

¹⁹⁹ Ahmetgaliev et al. (2008), p. 16.

oxymora, as the funding structure “involves a set of incentives and sanctions that [...] undermines, rather than facilitates, civil behaviour”.²⁰⁰

5.2 My Informants’ Take on Informal Rules

5.2.1 Pinning Down the Informal Rules

In the interviews, I asked the informants what constituted the extra-legal criteria for selective law enforcement against Russian NGOs. When relevant, I also inquired which informal rules they believed had been violated in the specific case of their NGO, and how this related to the subsequent legal prosecution. Depending on the expectations, the informants’ answers can be interpreted both as strikingly similar and strikingly different. On a few occasions the respondents connect the enforcement to recent *triggers*. More often the respondents believe that selective initiation of legal cases is connected to the organization’s profile or everyday activities being unpopular with the authorities.

Recent Triggers

In a few cases, the reasons for selective law enforcement are pinned down to exact projects. Most notable is the case of the European University of St. Petersburg, where a program regarding democratic elections was seen as a political initiated move in time for the voting for a new Russian president. The head of the university allegedly got a phone call confirming the informal background of the prosecution in a rather blunt way: “Either do you close the program, or we will close you”.²⁰¹ Tatâna Barandova calls the whole incident “a stupid mistake in the presidential administration”. She states the it “believed that the EU created a university to control the election, but this is just nonsense – we got established in the nineties”.²⁰²

²⁰⁰ Henderson (2003), p. 21.

²⁰¹ The call was according to Barandova from “a VIP, probably from the presidential administration”. Interview with Barandova, July, 2008.

²⁰² Interview with Barandova, July, 2008.

General Activities

In explaining the informal reason for prosecution, several informants also refer to activities that the NGOs perform on a regular basis. The situation is especially difficult for “NGOs working on sensitive issues or on an international level”, states Natia Tabina.²⁰³ Anna Šarogradská claims that the RPI got into problems because “the authorities feel uncomfortable with our work; arranging press-conferences, monitoring the press, giving voice to organizations or individuals with *real* problems, supporting films, books...”.²⁰⁴ Šarogradská also mentions that the institute’s relationship with foreign experts being unpopular with the government can have played a part in initiating the legal conflict.²⁰⁵

Foreign Funding

Foreign funding is maybe the one most clearly identified extra-legal criterion for punishment. “Human rights organizations are the main victims of the law, as they receive foreign funding”, states one informant.²⁰⁶ “The situation is difficult for those who receive their funding from abroad” says another.²⁰⁷ Also Makim Timofeev and Taubina mention this criterion in similar ways.²⁰⁸ Žemkova and Šarogradská, however, are both uncertain about the importance of funding. They both believe that foreign funding in general is not popular with the Russian authorities, yet they do not believe this to be a vital reason for why somebody chose to initiate prosecution against exactly their specific organizations.²⁰⁹

²⁰³ Interview with Taubina, December, 2008.

²⁰⁴ Interview with Šarogradská, October, 2008.

²⁰⁵ Interview with Šarogradská, October, 2008.

²⁰⁶ Interview with Krivonos, April, 2008.

²⁰⁷ Interview with NGO leader, December, 2008.

²⁰⁸ Interview with Timofeev, April 2008, and Taubina, December, 2008.

²⁰⁹ Interview with Šarogradská, October 2008, and Žemkova, December, 2008.

Blacklists

The existence of blacklists is an issue several informants relate to informal rules.²¹⁰ There are rumours of informal lists of organizations or individuals that form the basis for legal and other persecution. “If such a list exists, it is probably created by the FSB”, states Ūrij Džibladze, who is not willing neither to confirm nor disaffirm its existence.²¹¹ Taubina seems more certain of the blacklists’ existence: “They have a blacklist of the people they intimidate and I would not be surprised if they had one for NGOs as well”.²¹² Timofeev at Citizens’ Watch gives further explanation for these rumours. His NGO had experienced a sudden and unexplained halt in a cooperation project with the Ministry of Internal Affairs (MVD). The suspicious halt in cooperation suggests intervention from above, he explains. Timofeev also claims that he has unofficial information from an insider in the MVD that CW was on a list of *neželatel’nye*, organizations considered ‘unwanted’ by the government.²¹³

Šarogradskaa mentions blacklisting in connection with journalists visiting the RPI. The institute earlier faced problems after it welcomed Eduard Limonov to hold a press conference on its premises.²¹⁴ The RPI helps many different, and sometimes controversial, people, says Šarogradskaa: “Some of the newsmakers could have been blacklisted by the authorities”.²¹⁵

NGOs’ Profile

When she states the criteria for selection, the executive director of Memorial Moscow focuses more on the NGO’s decision to stay independent, rather than its specific activities: “We got selected because of our independent position – we are not mainstream”.²¹⁶ Džibladze mentions “critical NGOs” as a group that has certainly faced extra problems in

²¹⁰ “Blacklists (if they exist) must have been compiled on the basis of something, namely informal rules. Blacklists do therefore in themselves not qualify to describe the informal basis (i.e. extra-legal criteria) for punishment. Rather, they may help in streamlining the communication of informal rules, as discussed below.

²¹¹ Interview with Džibladze, December, 2008.

²¹² Interview with Taubina, December, 2008.

²¹³ Interview with Timofeev, April, 2008.

²¹⁴ Email correspondence with Šarogradskaa, October 28, 2008. Eduard (Edward) Limonov (born Eduard Veniamnovič Savenko) is the leader of the National Bolševik Party and a well known critic of Putin’s regime.

²¹⁵ Email correspondence with Šarogradskaa, October 28, 2008.

²¹⁶ Interview with Žemkova, December, 2008.

recent years. He believes, however, that it is up to the enforcement agencies, the public and the NGOs alike to interpret signals from high politics.²¹⁷ Taubina's answer to the question concerning who are the most common victims of selective law enforcement is very general in character. She believes that the enforcement agencies "check up on NGOs depending on whether or not they are good in the minds of authorities", underscoring that the exact background for prosecution varies with the cases.²¹⁸

Unclear Rules

Kanevskaâ, the head of CERP, believes that human rights organizations have been specifically targeted for prosecution, and that CERP was no exception. She also, however, believes that a massive campaign has been undertaken against civil society in Russia: "If there are 100,000 NGOs left in two years time, this will be a positive number for us".²¹⁹ Kanevskaâ fears that only pro-governmental organizations will be able to survive in the long run, in addition to those NGOs which possess "sufficient resources and ability to negotiate with the authorities".²²⁰

Kulaeva's interpretation differs somewhat from the other informants. At the time of the interview the ADC Memorial had not been formally prosecuted. The only exception was some minor problems after a fire inspection, but Kulaeva did not interpret the inspection as illegitimate. Still, she states that "everything in Russia is selective".²²¹ Kulaeva believes the authorities are behind the selective prosecution. Regarding the exact criteria for crackdown, however, she is in doubt. "When the law was signed, we immediately saw this as a political move, clearly against us. We were sure they would select *us*. It turned out, however, they really wielded [the NGO-law] against lots of apolitical NGOs, and so far they have not

²¹⁷ Interview with Džibladze, December, 2008.

²¹⁸ Interview with Taubina, December, 2008.

²¹⁹ Interview with Kanevskaâ, April, 2008. It should be noted that the interview was conducted before the reform in the regulatory regime was announced.

²²⁰ Interview with Kanevskaâ, April, 2008.

²²¹ Interview with Kulaeva, December, 2008.

selected us. The increase of controls are evident everywhere, not only against organizations”.²²²

Also Džibladze expresses some doubt about how streamlined the process really is. Even though he believes some NGOs to be more often subjected to law enforcement than others, he underscores that there are many cases of unexpected crackdown. Džibladze concludes: “The only rule that is clear for NGOs is not to make attention and keep your head low”, referring to the general risk associated with criticizing powerful interests in Russia.²²³

5.2.2 Perceptions on the Origins and Communication of Informal Rules

In my interviews, I was also interested in how the informal rules were communicated and the informants’ perceptions on who is pushing their informal agenda into the legal system. All the informants reply that ‘the authorities’ were behind their selective prosecution of their organization. In most cases, they leave the term ‘authorities’ undefined. I emphasize that the informants’ statements are clearly dependent on their different level of abstraction.

The informants use terms as “the authorities”, “the political leadership”, “*vlast*” (that is power/authorities), “the federal government”, and “the government” to describe who they perceive as behind selective law enforcement.²²⁴ In Russia, all of the above terms are associated with the executive branch of power. Although “the federal government” is at least explicit with regard to administrative level, most expressions remain rather vague.

Particular Interests

Amongst the informants, Anna Šarogradskaâ is the one who most clearly identifies regional forces behind the legal problems. Šarogradskaâ blames the “regional authorities, especially

²²² Interview with Kulaeva, December, 2008.

²²³ Interview with Džibladze, December, 2008.

²²⁴ Various interviews, 2008. See full list of interviews below.

governor [Valentina] Matvienko” for persecuting the NGO both in 2008 and earlier: “The city government simply wants to control the media in their region, and act on their own”.²²⁵

Stefaniâ Kulaeva, on the other hand, does not believe in the power of regional authorities in contemporary Russia, especially not in St. Petersburg. According to Kulaeva, Russian politics is dominated by the “St. Petersburg mafia”. Therefore, she holds that federal politics and regional affairs in St. Petersburg are closely connected. “Nothing can happen without Moscow”, Kulaeva concludes.

Tatâna Barandova is clear on who was behind the sudden closure of the EUSPB. For the purpose of explaining the political undercurrents, Barandova links the university’s problems to “the federal authorities”. Yet, she holds specific individuals within the presidential administration directly responsible for the fire inspectorate’s complaints against the university.²²⁶ As mentioned above, there was allegedly a call from the presidential administration confirming this connection.

Flexible Mechanisms

Ûrij DŹibladze also focuses on the federal authorities. He does not, however, believe that most political prosecution is initiated manually on that level: “Rhetoric from high politics contain signals to lower officials, the public, and the NGOs alike. All the enforcement agencies can do is to guess how they are expected to behave”.²²⁷

Natal’â Taubina’s thoughts on the issue can bring some order to this chaos. Who is behind the decisions to prosecute varies with the cases, she states: “In general, organizations are persecuted by those they have criticized – high profile NGOs means high profile decision-makers”. She also seems to agree with some of DŹibladze’s thoughts: “The FRS officials often made their decisions independently, but remained open for commands from executives [in important cases]”.²²⁸

²²⁵ Interview with Œarogradskaa, October, 2008.

²²⁶ Interview with Barandova, July, 2008.

²²⁷ Interview with DŹibladze, December, 2008.

²²⁸ Interview with Taubina, December, 2008.

Džibladze and Taubina are not the only informants who mention signals from high politics. When Barandova comments on the general situation of Russian NGOs, she also focuses on the authorities' rhetoric: "There are waves of signals from power. Speeches... Foreigners can never understand the psychology".²²⁹ Barandova might of course be right in her latter statement, but none the less I intend to make an attempt.

5.3 Understanding Informal Rules – Their Nature, Origin and Communication.

The informants' perceptions of informal criteria behind legal prosecution are both strikingly different and strikingly similar, depending on the point of view. The responses to what constituted the extra-legal criteria behind punishment varied along several lines. Interestingly, the differences and similarities form certain patterns.

More often than not, the perceptions of informal rules coincide with the government's political signals. First, the informants often frame the extra-legal criteria within terms of the NGOs' oppositional, critical or independent work. This position arguably contradicts the Kremlin ideal of civil unity as presented above. Alternatively, the informants' relate selective law enforcement to their Western orientation, especially financial support from abroad, which is also a trait sharply criticized by the regime. Common to all informants is a strong sense of connection between informal rules and the perceptions of who was behind their formulation and enforcement. The answers to this question can be summed up as "we did something *they* did not like".

One Rule or Many Rules

As seen above, there is a general agreement that extra-legal criteria are perceived to be a crucial factor for determining legal punishment.²³⁰ Furthermore, all the informants agree that it is the authorities that initiate such prosecution. In this sense, the informal aspect of selective law enforcement is commonly recognized among the informants' NGOs. There is

²²⁹ Interview with Barandova, December, 2008.

²³⁰ This is not a finding of the research, but a criterion for the selection of informants, as stated above.

also a general agreement on *which* informal rules that constitute the extra-legal criteria for punishment. However, this is only true when operating with broad and general categories. There are varying perceptions with regard to which informal rules are emphasized among the different informants. The informants' explanations are especially varying when the informants identify exact reasons for prosecution of particular NGOs.

Two of the initial research variables were set up to investigate informal rules. The informants, however, tended to focus not on the extra-legal criteria themselves, but on the repression and the repressor. Regardless of which trait or activity that was seen as the informal background for prosecution, they considered this of secondary importance. The interviewed NGO staff all perceived to have done *something the authorities did not like*, and interpreted the imposed punishment within this understanding. It thus seems reasonable to categorize the informal rules into two separate categories, differing both in origins and permanency.

One rule is by the informants considered the fundamental principle behind selective prosecution in Russia – being unpopular with the regime *de facto* leads to punishment. Seen from this perspective, there is only one informal rule, although it can be formulated in many ways. This rule is recognized by all the informants and it is their principal way of framing their problems when they meet in interviews. The undisputable superiority of the authorities is unquestionably a recurring theme in Russian history. This *core rule* is therefore at least semi-permanent. As Marina Kurckchyan notes, there has never been a rule of law in Russia, but always a rule of men.²³¹

Regarding the more case-specific criteria, informants hold, among others, human rights activities, foreign funding, and promoting the opposition's freedom of speech – to be possible criteria behind prosecution. Yet, the informants tend to look upon these criteria as simply what the authorities 'happened to be dictating' at the given time – these rules were considered subordinate or *ad hoc*. *Ad hoc* rules are all more in flux than the core rule and can be adjusted by the authorities on a relatively short notice by signalling their political will.

²³¹ Kurckchyan (2005), p. 266.

An Institutionalized Communication Channel

The exact character of the subordinate informal rules is not seen as self-evident or permanent among the informants. With an exception for foreign funding, the subordinate rules are in flux and are interpreted differently in each specific case. Yet, the informants' interpretations all stick to the same frame of reference, being the government's rhetoric. I suggest that this may relate to the institutionalized core rule and the resulting establishment of a channel of communication, being rhetorical statements transmitted through the mass media.

Several informants explicitly point to rhetoric being the source of their interpretation of informal rules. "Rhetoric from high politics contains signals to lower officials, the public, and the NGOs alike. All the enforcement agencies can do is to guess how they are expected to behave", states Džibladze.²³² As seen above, several informants think along similar lines. "The situation is difficult for those who receive their funding from abroad, but this is not because of the law but because of *Putin's rhetoric*", states one informant.²³³ According to my model of selective law enforcement this is partly true. Although the problems in a way *do* result from the law, Putin's rhetoric seems to be a main source for the *ad hoc* informal rules as interpreted by the informants.

The common recognition of the core rule ensures that the informants look to high-level rhetoric rather than to court documents to determine the reason for their punishment. *Ad hoc* informal rules can thus be communicated on a relatively short notice and do not need to be properly institutionalized for selective law enforcement to be effective. When I asked if the rhetoric in 2008 was not as aggressive as the years before, Taubina agreed and added: "why should it be – the message had already been delivered".²³⁴

Summarized, the government's political signals have become a main source for interpretation of legal punishment, regardless of the authorities' *intentions* and even without their explicit knowledge. Therefore, in theory selective law enforcement can exist in the

²³² Interview with Džibladze, December, 2008.

²³³ Interview with NGO staff, December, 2008. Emphasis added.

²³⁴ Interview with Taubina, December, 2008.

minds of the punished even if no external interests know of its existence. Interestingly, this does not hinder it from functioning as a deterrent.

Signals to Enforcement Agencies

Yet, it is hardly probable that the informants have developed their view on reality based on nothing but illusions. Furthermore, if the NGOs interpret their punishment in terms of governmental policies and rhetoric, it is reasonable to assume others will interpret the same signals in similar ways. The consequence is an atmosphere where both NGOs and law enforcers will experience pressure, which in turn may result in extra-legal patterns in formal law enforcement. This will again underpin the institutionalization of the core rule. Although the evidence presented here is too limited to draw any conclusions, this way of explaining rather streamlined selective law enforcement may provide a platform for further studies.

Following this line of thought, authorities on different level and in different positions can all make their interpretation of the signals from high-politics. In this way the enforcement agencies may work independently on an everyday-basis, while executives on different levels can exercise additional pressure and even take manual control where they see fit, as was seemingly the case in the temporary closure of the EUSPB. At the same time, authorities lower down the hierarchy of influence can add additional pressure and also get personally involved when they see fit, as long as they do not contradict the Kremlin signals (Fig3).

Some informants believe that the authorities produce and spread blacklists to signal to enforcement agencies what NGOs or individuals should be targeted for persecution. Without further evidence, this line of thought does not amount to much more than speculation. Furthermore, even if authorities do control selective law enforcement through blacklists, this does not explain how the *punished* have developed a perception of informal rules. As stressed above, the informal reason for their punishment must be known for the enforcement to be effective as a deterrent. To keep this information hidden will therefore be a bad strategy. Blacklists can, however, play a supportive role in streamlining enforcement, eliminating possible cases of misunderstanding and limiting lower bureaucrats' power of interpretation.

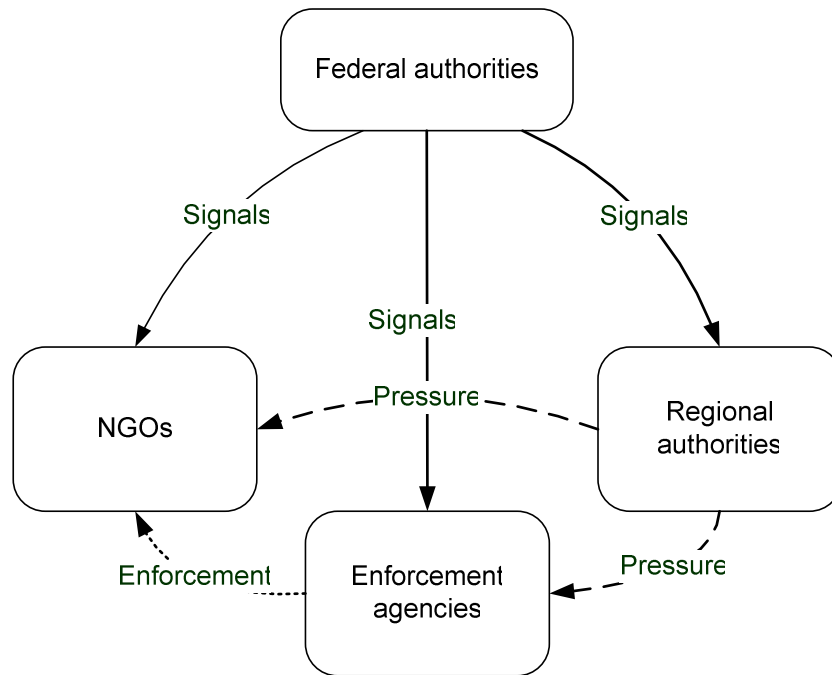


Figure 3: Communication of ad hoc informal rules in selective law enforcement against Russian NGOs

If the rhetoric of the federal authorities was not backed up with punishment or threats of punishment, it would simply equal norm transfer or propaganda. It is certainly legitimate for a regime to develop policies and signal its political will. Selective law enforcement, however, manipulates the reception of this rhetoric amongst the directly involved subjects. In the realm of Russian NGOs, selective law enforcement therefore functions as a mechanism to support political signals by enacting formal punishment where they are not followed.

6. Further Analysis and Theoretical Implications

6.1 Selective Law Enforcement as a Governmental Tool

Although there are some variations in each informant's definition of the term 'authorities', the general picture is clear enough: if we take the informants' statements at all seriously, the mechanism of selective law enforcement is clearly intended to further the informal interests of the Russian regime. The law is seen as a weapon used by the executives to eliminate, or at least seriously hamper, political opposition and insulate Russian society from Western influences.

The informants insist that political authorities are behind the processes of selective law enforcement. This suggestion might at first glance seem strange. Why would the authorities want to penetrate 'their own' formal institutions? Are not informal practices in conflict with the concept of a strong state, being a formal arrangement by definition? I will argue that there are several incentives from the authorities' point of view for keeping up these practices, even though – or exactly because – they undermine the Russian state's democratic institutions. In this regard, it is vital not to confuse the authoritarian leaders with the state itself.

Below, I present some thoughts on why selective law enforcement can be a viable strategy for hybrid or authoritarian regimes on some issues. The thesis does not make any presumptions about the Russian regime's *intent* in this regard. Rather, I discuss how selective law enforcement makes sense as *a way to promote undemocratic interests within the constraints of formal democracy*. Thus, the mechanism provides a valuable tool for hybrid regimes mimicking democratic institutions while at least in part filling them with authoritarian content. To what degree Russian authorities *deliberately* manipulate the legal system on a grand scale, I leave for other projects to investigate.

Authoritarian Leaders and the State

To discuss selective law enforcement as a tool of social engineering wielded by the authorities, it is crucial to look at whose voices the authorities represent. Putin's slogan to create a *sil'noe gosudarstvo*, a strong state, can mislead observers to believe that the political

leadership is guided by a motive to ensure a high state capacity, that is “capacity to secure compliance with formal legal directives”.²³⁵ Incoherent legislation characterized by massive non-compliance is obviously undermining a strong state in this regard.

The leadership of a state, however, does not equal the state itself. Especially in authoritarian or semi-authoritarian regimes, the political leadership will not necessarily work to promote the state’s interests. They might just as well promote the interests of their elite group, alternatively their own personal power. Put simply, the individuals in the political leadership seek to regulate society according to their own wishes. This may arguably be the case in any government. In authoritarian regimes, however, there are few if any effective checks on potential abuse of power.

If we want to include the *intentions* of authoritarian leaders into our discussion, we should not automatically accept the premise that the leadership wants compliance with formal rules. Rather, we should pay more attention to *informal* rules. Any action that increases the level of compliance with the informal rules promotes the interests of the agents formulating them, be it the president or a plumber. This is also true for selective enforcement, being a mechanism enforcing informal rules.

Hybrid Mechanisms as an Effective Means of Control

One scholar who has challenged the notion of a negative correlation between informal penetration and the strength of the regime is Keith Darden. Darden bases his research on various hybrid regimes and points to how corruption can be, and indeed has been, used as a tool by the political leadership.²³⁶ For his research on Ukraine, he applies taped records of the former Ukrainian president, Leonid Kučma.²³⁷ Darden finds that the Ukrainian government kept a list of legal offences committed by state officials, but signalled to enforce the law only when officials displayed disloyalty to Kučma and his regime. As Darden points out: “The threat of exposing [the official’s] wrongdoing constitutes an enormously powerful

²³⁵ Darden, Keith (2002): *Graft and Governance: Corruption as an Informal Mechanism of State Control*. d. New Haven: Yale University, p. 6. Available at <http://se2.isn.ch/serviceengine/FileContent?serviceID=RESSpecNet&fileid=BA9149F1-413C-5AC4-28C4-418F883E5347&lng=en>, accessed March 30, 2009.

²³⁶ Darden (2002).

²³⁷ Leonid Kučma was the president of Ukraine from 1994 to 2005.

sanction [...] This sanction allows the state leadership to practice a systematic form of blackmail with payment extracted not in cash but in obedience”.²³⁸ Because authorities can benefit from mass-violation, they do not necessarily want formal rules to be followed. In Kučma’s regime, the pervasive corruptness of governmental officials created a mechanism where loyalty could be enforced through threats of legal sanctions.

I argue in this thesis that the most important purpose of selective law enforcement is not the punishment itself, but rather its function as a deterrent. The Kučma-regime’s strategy resembles one possible variant of Ledeneva’s *kompromat* or Lauth’s *threat perception*. Not least does it resemble Ledeneva’s *suspended punishment*, being exactly the *threat* of selective law enforcement.²³⁹ Ledeneva’s model is based on formal mass non-compliance, and the assumption that “the violation of unwritten rules can result in the enforcement of written ones”.²⁴⁰ In Darden’s research, the unwritten rules were summed up as loyalty to the political leadership. Notably, this equals the core rule in the presented research.

There is, however, one crucial difference between Ledeneva’s and Darden’s conceptualization of informality; their approaches to agency. Ledeneva focuses on the individual actors’ strategies to cope with the formal institutional insufficiencies – the “improvisation on the enabling aspects of these constrains”.²⁴¹ Darden, as well as my own research, suggests that the “enabling aspects” of these insufficiencies can be used as a large scale tool of social engineering. Ledeneva provides a model on how non-transparency in the economy is reproduced. I suggest that authoritarian leaders can benefit from the non-transparency, thus having incentives to contribute to its reproduction.

Mimic Democracy – Legitimacy at Home and Abroad

I have argued that informal or rather semiformal control can be just as effective as formal in some cases. Still, rulers, including autocrats, have since the days of Hammurabi developed formal regulation to control society. Its effectiveness is unquestionable, and it is not without

²³⁸ Darden (2002), p. 10.

²³⁹ All these terms are discussed in chapter 3 of this thesis. Supra footnote 50, 59, and 60.

²⁴⁰ Ledeneva (2006), p. 13.

²⁴¹ Ledeneva (2006), p. 20.

reason that law is considered a cornerstone of advanced societies.²⁴² One might therefore ask: if the executive authorities are in control of the legislative branch, as is often the case in authoritarian or hybrid regimes and certainly the case in today's Russia, and at the same time have interests outside the legal sphere – why do they not formalize these interests?²⁴³

First, it is hardly legally possible to formalize the informal rules in our context within the constraints of the Russian constitution and international conventions. Most obviously, the informal rules contradict democratic rights such as freedom of speech and freedom to form organizations.²⁴⁴ Second, there are limits to how far a regime can stretch its legitimacy. The legal arrangements can theoretically be made, but the regime would still be faced with tremendous pressure from both within and outside the country's borders. In short, formalizing the informal rules would possibly amount to political suicide.

Selective law enforcement as a way of enforcing compliance to informal rules is relatively cost effective with regard to moral resources – that is, it does not harm the regime's legitimacy dramatically. As the informal rules and the mechanism through which they are enforced are not normatively accepted, it makes sense to keep the procedures *pro forma* and to not formally recognize their informal origins. We should not ignore the legitimacy that the formal legal system lends the mechanism of selective law enforcement. Even in Russia, where the legal system is known to enjoy a very low level of trust, it is still superior to most alternative methods to get rid of opposition.²⁴⁵ Putin famously fronted “dictatorship of the law” as a guiding principle for his restoration of legal unity in Russia. Medvedev entered the

²⁴² See Ginsburg, Tom and Moustafa, Tamir (eds.): *Rule By Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press. This collection of essays approaches the rationality of law in authoritarian regimes through a broad set of case-studies from different parts of the world.

²⁴³ *Edinaâ Rossiâ*, the party closely associated with Putin's regime, gained in the 2003 and 2007 elections, respectively 223 and 315 of the 450 Duma seats. Because of the organization of the Duma, the executives' *de facto* control of the 2003-2007 Duma was even greater than these numbers indicate.

²⁴⁴ See International Labour Organization (1948) and Constitution of the Russian Federation, the (1993) article 30. That said, some analysts claim that also the NGO-law contradicts both the constitution and international conventions. See ICNL (2006) and Kamhi (2006).

²⁴⁵ For a discussion on public support for the principles of rule of law in Russia, see Gibson, James L. (2003): “Russian Attitudes towards the Rule of Law: An Analysis of Survey Data” in Galligan, Denis J. and Kurkchiyan, Marina (eds.) (2003): *Law and Informal practices – The Post-Communist Experience*. Oxford: Oxford University Press

presidential chair on a similar promise to get rid of the “legal nihilism” in the country. Even the authoritarian Soviet leadership recognized legal processes as a source of legitimacy.²⁴⁶

Furthermore, *pro forma* law enforcement is not only a way of legitimizing a controversial practice at home. On the contrary, the conflict has a distinct international aspect, and attracts a fair amount of attention from abroad, not least from the donors. Even if the legal practice is criticized, the mechanism provides the persecution with a cloak of at least some legitimacy. Moscow defines itself within the broad category of modern democracies, insisting on being taken as a serious actor in international affairs. As Larry Diamond points out, alternative sources of legitimacy for political regimes have almost disappeared from the global scene the latest decades. In the contemporary era, Diamond argued in 2002, “democracy is the only broadly legitimate regime form, and regimes have felt unprecedented pressure (international and domestic) to adopt – or at least mimic – the democratic form”.²⁴⁷ By the so-called third wave of democratization, according to Diamond, the number of authoritarian systems with democratic traits increased more than the number of authentic democracies.²⁴⁸ Democratic institutions are also a formal criterion for membership in many powerful international organizations. It is in this regard easy to look at the formal democratic structure, while the degree of real democratic content is essentially disputable.

Dozens of terms have been applied to pin down post-Soviet Russia’s regime type, not least Putin’s regime.²⁴⁹ Common to most of the conceptualizations is that while Russia’s formal system is largely democratic in form, it is in part filled with authoritarian content. In other words, the regime *mimics* democracy. Selective law enforcement, as a tool to streamline society according to the authorities’ informal wishes, fits this generalization perfectly. Within the logic of a mimic democracy, it is certainly more appropriate to get rid of the “internal enemy” through *pro forma* legal prosecution than through brute force.

²⁴⁶ For a brief overlook of law as a source of legitimacy throughout Russian history, see Solomon (2008b).

²⁴⁷ Diamond, Larry (2002): “Elections without Democracy. Thinking about Hybrid Regimes” in *Journal of Democracy*, volume 13 (2002), issue 2, p. 24.

²⁴⁸ Diamond (2002), p. 27.

²⁴⁹ For an interesting commentary on this, see Collier, David and Levitsky, Steven (1997): “Democracy with Adjectives - Conceptual Innovation in Comparative Research” in *World Politics* 49.3 (1997) p. 430-451. John Hopkins University Press. Available at http://muse.jhu.edu/journals/world_politics/v049/49.3collier.html, accessed October 2, 2008.

Conclusively, the informal component's relationship to the formal in selective law enforcement is not necessarily parasitic in the eyes of the political leadership. Rather, the authoritarian leaders may view the relationship as symbiotic, where the informal and formal components of the hybrid legal system complement each other. Within this logic, law can be deliberately legislated in a way that gives room for the executives to ensure their own prerogatives will not be threatened. To refer to Lauth's typology, the relationship between the parts can be either complementary or competitive, all depending on the point of view.²⁵⁰ As mentioned, by way of selective law enforcement the political leadership can promote undemocratic interests within the constraints imposed by formal democracy.

6.2 Understanding Partial Enforcement

In theory, if the punishment corresponds to the expectations of all participants in all cases, the informal rules would amount to an informal, yet in a way transparent and predictable set of shadow legislation parallel to the formal legislation – a parallel set of rules enforced through the same formal channels. In reality, however, constant negotiation and conflict takes place between the law enforcers and the ones to be punished. The informants have a perception of why they get punished, but refuse to accept the legitimacy of this practice. Instead of adapting, the NGOs often fight to reduce the negative impact and mobilize both formal rights and informal power in this struggle.

Some NGOs have experienced internal disagreements because of the political sensitivity of their issues. Furthermore, the hidden impact of so-called self censorship is impossible to estimate. Some NGO workers, however, react to punishment by getting even more determined to fight what they see as the wrong-doings of the regime. Evidently, non-compliance is still a valid alternative to adaptation within the Russian NGO-community. A small but active group of NGOs will in the foreseeable future continue to work according to the very same principles they believe to be the reason for their prosecution. Disagreement

²⁵⁰ Lauth (2000), p. 25 and Lauth (2004), p. 9. *Supra* footnote 36.

and polarization within the NGO community along political lines have been important consequences of this partial enforcement of informal obedience.²⁵¹

Persistent non-compliance with informal rules indicates the relative weakness of the mechanism of selective law enforcement. The principal purpose of selective law enforcement is to enforce the informal rules set by the initiators of the process. A high degree of non-compliance indicates a low functionality in the mechanism and can be explained by imperfect conditions for its functioning in the formal and/or the informal realm. Non-compliance will be a rational reaction if (1) the subjects do not recognize the informal rules behind the punishment (matters of communication); and/or (2) the subjects do not believe in the capabilities of the state apparatus to enforce them (matters of relative strength).

6.2.1 Matters of Communication

The mechanism of selective law enforcement can be seen as more or less institutionalized among the informants in terms of its recognition. The human rights NGOs recognize that certain traits are considered unwanted by the authorities, and they share interpretations of both their origins and their communication. Mainly, they focus on a *core* rule that links disobedience to the political leadership with potential punishment. The Russian authorities have been explicit in communicating their ideals, which the NGOs interpret as *ad hoc* rules, more case-specific rules to fill the core rule with more concise meaning. The NGOs perceive themselves as non-compliers with this set of rules. There are seemingly no fundamental weaknesses in the mechanism of selective law enforcement in terms of communication.

At the same time, the *ad hoc* informal rules are not as clear as they might have been had they been written. There seems to be some uncertainty regarding the exact nature of these informal rules and the punishment is not always according to the expectations. Regardless of the theoretical models, uncertainty remains an important part of the picture. On the one hand, this uncertainty blurs the perception of a causal link between non-compliance and punishment and will thus hinder a streamlined enforcement mechanism. On the other hand, uncertainty creates an atmosphere in which nobody can rely on the permanency of their

²⁵¹ Interview with Džibladze, December, 2008.

organization. An unpredictable atmosphere will lead to statements like Džibladze's: "The only rule that is clear for NGOs is not to make attention and keep your head low".²⁵² Constant uncertainty has several negative consequences for the NGOs, as will be elaborated in the final section of this chapter. Džibladze even holds that "uncertainty is one of Putin's main tools".²⁵³ The informants do not, however, perceive the enforcement to be completely arbitrary. If punishment was considered entirely random, there would be no incentives to adapt to informal rules. For selective law enforcement to take place there must be a *selection*, or at the very least a perception of a selection.

Conclusively, non-compliance among the informants' NGOs only to a slight degree links to problems in communicating the informal rules. Yet, the *ad hoc* rules are rather vague and lead to a somewhat unpredictable situation. Most of the confusion about the rules originates in the actual punishment. As there is room for interpretation of the informal rules, non-compliance is not considered the same thing by everyone – neither among NGOs nor enforcement agencies.

6.2.2 Relative Formal Strength

As noted, the mechanism of selective law enforcement is based on a malfunctioning formal system and a low degree of rule of law. At the same time, it is fully dependent on the formal enforcement structure's ability to meet non-compliance with punishment. The less the subjects are hindered or deterred, the more attractive will the option of non-compliance become. In many of the cases against my informants, the law enforcement agencies have not been able to ensure that the government's policy has been supported by legal sanctions, not least due to the courts reluctance to support them. Since the *indirect* consequences of legal problems are considerable, however, also the NGOs that have avoided formal legal sanctions suffer from the mechanism.

The various characteristics of an ideal sowing ground for selective law enforcement must all be discussed in relation to each other; the strength of the enforcement agencies is only

²⁵² Interview with Džibladze, December, 2008.

²⁵³ Interview with Džibladze, December, 2008.

important when compared to the competence of the NGOs lawyers; and/or to the courts' ability to reject the agencies' claims. The NGOs were acquitted due to their resources and legal skills *in combination* with the courts' ability to reject the charges. Had the NGOs' skills and resources been lower *and/or* the courts sufficiently biased, the NGOs might have experienced more severe punishment. Had the enforcement agencies prepared better cases, on the other hand, they might have been able to push through with some of them regardless of their opponent's expertise. After all, the enforcement agencies had rather incoherent legislation at their disposal.

The Battle on Formal Arenas

Several informants surprised me with their focus on formal laws and how they insist to work strictly in accordance with their own interpretation of them. This might at first glance seem irrational, as the informants themselves believe that non-compliance with *informal* rules, not formal, constitutes the reasons for their legal problems. Furthermore, a common view on the NGO-law among critical Russian lawyers is that according to its provisions, everyone is in principle guilty.²⁵⁴ In the years from 2006 through 2008, the NGO lawyers proved themselves wrong. Rather than being a foundation for punishing everyone, the vague legislation leads to interpretation processes that the organizations themselves can take part in it

It is no newsflash that money and resources can buy a suspect out of trouble through illegal, but also through legal channels. Top lawyers win cases – or else they would not have been top lawyers. The research indicates that it is a reasonable choice for NGOs to fight the authorities on the formal arena, as long as they possess sufficient skills and resources. The enforcement agencies can seemingly prosecute most NGOs based on Russian legislation. To hand out the most severe sanctions however, they cannot escape the clinch with lawyers in court. Furthermore, all administrative legal sanctions can be appealed to the court system. If the court is not biased, the winners in court will be those who are best able to make sense of a senseless legislation. Among the scrutinized cases, the NGOs have been victorious in most of these clinches.

²⁵⁴ *Inter alia* supra footnote 90 and 138

The NGO-law is characterized by incoherency. My research suggests, however, that incoherent legislation not necessarily leads to informal negotiations. The Russian legal system is open for discussing legality on formal arenas, especially when the charges are based on rubber paragraphs, which is a recurring foundation for the prosecution of my informants' NGOs. After all, rubber paragraphs are negotiable by definition.

In the 1990s, Ledeneva observed that “any change in the formal rules [...] is perceived as yet another constraint to be dealt with informally”.²⁵⁵ Seemingly, Russia has changed since then. In the case of Russian human rights NGOs, the mechanism of selective law enforcement has fell victim to its dependency on the formal enforcement structure. To enforce informal rules, the mechanism needs a formal pretext. If this pretext is open for formal discussion, the need to engage in informal negotiations diminishes, and the authorities' gains in form of increased compliance diminish correspondingly.

Relative Competence

Not only have NGO lawyers been able to fight the agencies' application of rubber paragraphs – they have also been able to counteract accusations of administrative infringements based on both NGO and tax legislation. The cases filed by enforcement agencies often seem poorly prepared. Catch-all traps were not applied successfully except in a few cases. Especially when the charges were founded on tax legislation, the agencies displayed a low degree of professionalism regarding non-profit or charitable activity.

To some degree, the acquittals in courts can be explained in terms of the relative strength of the parts on the formal arena. The gap between the NGO lawyers' legal skills and the incompetence of the enforcement agencies concerning non-profit work seems to play an important role. At the very least, the informants themselves depict it this way.

Almost every expert on Russian NGO legislation is associated with the NGO community.²⁵⁶ Organized through their *pravozašitnye organizacii*²⁵⁷, they publish relevant material to help

²⁵⁵ Ledeneva (2006), p. 14.

²⁵⁶ Amongst others, interview with Taubina, December, 2008.

²⁵⁷ NGOs basically concerned with protecting civil rights of Russian citizens. Literally “rights defending organizations”.

NGOs stay legal within unclear legal framework. They also provide legal assistance to NGOs in conflict with law enforcement agencies, and report on cases they perceive to be politically motivated. From 2005 onwards, many NGO lawyers spent much time analysing the draft and final version of the new NGO-law. Several organizations have coordinated their efforts to analyse and withstand selective law enforcement. Their strategy to gain particular expertise on the 2006 amendments probably pays off. In short, the NGOs are supported by an active core of professional lawyers, which provide them with considerable definitional power.

The informants characterize the FRS and the tax authorities as inefficient and unprofessional in their approach to NGOs. The FRS interpretation of the new NGO legislation has varied greatly from region to region. “The FRS staff was neither efficient nor professional”, states Džibladze: “They rather made some legal mistakes than not making a try”.²⁵⁸ Both Kanevskaâ and Krivonos also mention this overzealousness when characterizing the state agencies. “The state officials interpret the law as if everything that is not mentioned in the law is illegal”, states Kanevskaâ.²⁵⁹ Krivonos claim that the FRS operates with the principle of presumption of innocence put on its head: “everyone is guilty unless proven innocent”.²⁶⁰ In almost all the charges against my informants’ NGOs that ended up in courts, the FRS filed legal accusations unable to hold up. In light of the low rate of acquittals in Russian courts, this is remarkable.

Also Russian tax authorities are unprofessional in their approach to non-profit organizations, according both to Chauhan’s research and my informants’ statements.²⁶¹ The tax authorities “approach the NGOs as if they were commercial, having no knowledge of the exceptions regarding non-commercial organizations”, states one of the informants.²⁶² Many acquittals find legal basis in the same NGO legislation that is characterized as tailored made for repression. Also among the cases of the informants, charges based on such

²⁵⁸ Interview with Džibladze, December, 2008.

²⁵⁹ Interview with Kanevskaâ, December, 2008.

²⁶⁰ Interview with Krivonos, April, 2008.

²⁶¹ Chauhan (2007), p. 24.

²⁶² Interview with Taubina, December, 2008.

misunderstandings seem to be recurring.²⁶³ The gap of expertise between NGOs and their state-controlled regulators has supposedly widened even further the recent years, as several of the more skilled lawyers earlier employed by the state now have joined the NGOs at the other end of the table.²⁶⁴

The Possible Battle on Informal Arenas – A Caveat

In an environment where selective law enforcement is possible but only partially functioning, potential targets have at least two choices. First, they can fight the pretext, and second, they can engage in informal bargaining. In many cases, the approach probably includes elements of both strategies. The research indicates that the former is a valid strategy for Russian NGOs with sufficient resources, weak legislation notwithstanding. The research does not, however, track down the latter strategy. In cases not of vital interests to the regime, punishment can probably be protracted indefinitely if the targets are able to offer something to influence the law enforcers' decisions. According to one informant, only NGOs with the "ability to negotiate with the authorities" will survive the government's pressure in long term.²⁶⁵ Until further research has been conducted, we cannot estimate the importance of such measures.

In a few cases, the informants indicate how they have indeed pulled informal strings to influence the outcome of conflicts. When RPI had problems with authorities earlier, they managed to get off the hook because of contacts and friends who arranged a public campaign in their favour.²⁶⁶ Until further research has been conducted, all we can do is to keep in mind the following statement from one of the informants: "We are all experts with high education – we know how to adapt to Russian realities".²⁶⁷

²⁶³ See the charges against ERC Bellona, Citizens' Watch and Memorial Moscow above.

²⁶⁴ Interview with Taubina, December, 2008.

²⁶⁵ Interview with Kanevskaâ, April, 2008.

²⁶⁶ Interview with Šarogradskaâ, December, 2008.

²⁶⁷ Interview with NGO staff, 2008.

7. Conclusions

In this thesis, I have argued that the hybrid mechanism of selective law enforcement is an identifiable phenomenon worthy of attention in its own right. I have argued that it consists of definite traits interrelating in specific ways. Furthermore, it has an identified purpose and is observable for research. Not least, the mechanism is crucial in shaping the everyday work of the informants. This initial research has obtained new insight of both case-specific and more general value for studies of selective law enforcement. Yet, much remains unclear regarding both its theoretical nature and its unfolding in Russian environment. I have sought to present the research's empirical data in a language much influenced by the informants' statements, while subsequently analysing it within a more theoretical language intended to illustrate its more generic relevance.

In this concluding chapter, I first summarize the findings along the lines of the investigated variables outlined in the introduction. Second, I recap some of the main theoretical insights and discuss them in relation to various relevant academic discourses. Along the way, I suggest directions for further research.

7.1 A Summary of the Investigated Variables

The primary research question discussed in this thesis is *how* selective law enforcement unfolded against Russian NGOs in the years 2006 through 2008. The broad framing of the questions certainly does not lead to any short and concise answers. For methodological reasons, I identified four relevant variables, the investigation of which will be summarized below. The separate investigation of each of these all provided certain answers to the research question. Chapter 3 and 5 draw upon these findings to provide a more complex analysis of the phenomenon's unfolding in the theoretical as well as the empirical realm. In the investigated empirical context, informants depicted selective law enforcement to be a mechanism of political control. This provided for a whole range of new perspectives deserving further research. In terms of the mechanism's ability to enforce informal rules, I find the outcome suboptimal for both the relevant informal interests and the NGOs alike.

1) The Legal Foundation for Selective Law Enforcement

The legal foundation for selective law enforcement among the informants' NGOs is dominated by NGO legislation. Also tax legislation plays a significant role and the enforcement of these two bodies of legislation often plays out in concert. The research also examined individual cases founded on other legislation. There are in principle no limits as to which legislation can be wielded selectively, granted the institutionalization of selective law enforcement. Yet, there are certain traits that make some legislation have a greater potential for purposes of selective law enforcement than others. These are summed up in my typology of incoherence, being my analysis of both earlier comments on Russian legislation and the charge raised against my informants' NGOs. Although not exhaustive, such a typology should in principle be valid in any context where selective law enforcement is institutionalized through weak legislation. Naturally, the presence and utilization of each traits of incoherence will vary.

2) The Punishment Imposed through Selective Law Enforcement.

The second variable, being the imposed punishment, turned out to be less rigidly connected to formal punishment than initially expected. Three of the investigated cases resulted in formal sanctions, being the temporary closure of EUSPB and CERP in addition to the forced relocation of, and financial claims against RPI. The research also found punishment to take many forms, amongst which only some are formally recognized as such. This is echoed in recent reports on the implementation of the NGO-law, where the focus gradually has shifted to indirect consequences of political abuse of the law. The research identifies direct and indirect ways in which perceptions of punishment can contribute to enforce the informal rules. I emphasize the necessity to take these into account when discussing the phenomenon's impact.

3 and 4) The Extra-Legal Criteria the Punished Actors Perceive to be Behind the Punishment, and Perceptions Regarding the Informal Rules' Origin and Means of Communication.

The third and fourth variables investigate the informants' perceptions and proved highly interrelated. My informants insisted the government was involved in defining the informal rules. Based on this, I examined governmental rhetoric on the topic. The research indicates that the informants interpret the punishment with reference to governmental rhetoric. In this

way, selective law enforcement manipulates the rhetoric's reception among subjects directly involved. I also found that the concept of informal rules does not closely correspond to the informants' conceptions of the basics of selective law enforcement. Rather, the informants stressed the repression itself and the repressing political leadership of the country. Notably, nobody mentioned economic or personal interests, or any interests outside the executive branch of power.

7.2 Findings, Discourses and Suggested Directions for Further Research

Selective Law Enforcement and Institutional Interrelations

Since the concept of informal institutions began receiving academic attention in the 1990s, researchers have typically operated with informal and formal institutions as clearly differentiated phenomena. Some theoretical works referred to in this thesis have in various ways tried to identify how they interrelate. Lauth, Helmke and Levitsky base their typology of informal institutions on how they relate to the formal. In their work, it is evident that the relation between them is essential. This complicates the issues theoretically.

Alena Ledeneva utilizes the concept of informal practices to challenge the sharp theoretical divisions between the formal and the informal. Informal practices are equally rooted in the informal and formal realm, she states. While the institutions are more or less abstract, the informal practices seek to describe actual societal behaviour. Indeed, Ledeneva ambitiously seeks to describe the way "Russia really works".²⁶⁸

This research draws upon both lines of thought. I try to structure my work within the terminology of formal and informal, and seek to describe large political structures and institutions, as do Lauth, Helmke and Levitsky. On the other hand, I claim that one cannot emphasize the importance of their relations without accepting their reciprocal influence and collective functioning. I therefore operate with selective law enforcement as a complex institution. Christopher Stefes refers to among others Lauth, Helmke and Levitsky when he

²⁶⁸ Ledeneva (2001, 2006), titles.

underscores the essential division between informal and formal structures. Enforcement of informal rules cannot include the official involvement of formal enforcement agencies, Stefes states.²⁶⁹ This study claims that said statement at the very least must be refined. Informal rules can, as argued in this research, be enforced through the mechanism of selective law enforcement. Within this mechanism of enforcing informal rules, official involvement of formal enforcement agencies is not only a possibility – it is a necessity.

Punishment in Selective Law Enforcement – A Broad Perspective

The research also shows how selective law enforcement carries with it serious implications for the prosecuted, even in cases where no legal sanctions are formally imposed. This insight is essential to understand the factual impact of selective law enforcement upon society. Administrative measures themselves can fill the role of punishment in enforcing informal rules through selective law enforcement. In the investigated field, the mandate to make inspections, for instance, is perceived as being used manipulatively. As inspections impose burdens on NGOs and are a resource in short supply, they play the same role in selective law enforcement as legal sanctions. Other legal processes, like defending an NGO in court, do not only draw heavily upon the organizations' resources, but also lead to other problems. When society recognizes the informal reasons for the legal processes, the subject for prosecution can experience being stigmatized in authoritarian regimes where cooperation with opposition might be seen as risky.

The broad impact of selective law enforcement is also evident from another perspective. Although deterrence is the most cost-effective way to prevent non-compliance in the long run, the mechanism of selective law enforcement can block non-compliance in short term. By reducing the non-compliers financial capability and keeping them preoccupied with administrative demands, potential non-compliers can be selectively blocked from functioning. In short, selectively implemented administrative measures can prove a powerful weapon in fighting political enemies by utilizing the states' formal regulatory regimes. The structure of the punishment in selective law enforcement is therefore more complex than indicated in the theoretical model. How the state agencies can and do help regimes in

²⁶⁹ Stefes (2006), p. 18.

shaping society according to the authorities' informal templates is certainly a question that deserves separate attention.

The Balance of Legal Culture and Agency in Selective Law Enforcement

The theoretical model operates with an agent using the law manipulatively to promote her informal interests. In the introduction, I define selective law enforcement to be the *pursuit of legally imposed punishment* – a definition based on *intentions*. The research, however, is one of perceptions. With regard to the unfolding and consequences of selective law enforcement, this approach may be even more useful than one based on intentions. The research further underscores the importance of perceptions – also in the second of the variables I initially approached as formal, namely punishment.

As I stress in the theoretical model, the subject's own interpretation of the punishment is crucial for her decision on how she adjusts her behaviour. Also the question *if* punishment has taken place is subject to interpretation. Thus, changes in the behaviour of subjects can take place regardless of factual intentions behind the prosecution. In some cases, the subjects will experience being selected even if the crackdown is entirely random. When investigating selective law enforcement from a functionalistic point of view, there need be no agent behind its initiation. Even without an agent, the subjects can *perceive* punishment and relate this to informal rules and an agent formulating and enforcing them. The perceived agents do not necessarily have the same perceptions of the events.

The functionalistic approach has its limits. Perceptions do not manifest out of thin air. One criterion is that the phenomenon of selective law enforcement is institutionalized in the actors' political culture. Also, I emphasize that in the investigated empirical field, the existence of agents in selective law enforcement is more than mere illusions. I do suggest, however, that the influence of legal culture upon the questions of agency in selective law enforcement deserves more research. Federal authorities hardly initiate most individual cases of selective law enforcement manually. Yet, the authorities are certainly aware of the ongoing persecution and clearly guilty of neglecting it.

In chapter 5, I discuss how enforcement agencies and NGOs alike may operate according to their interpretation of both formal and informal rules. Granted the formal rules' incoherency, the agencies have to make a selection. The political culture provides guidance on what basis

this selection can be made, as Russia has long traditions of the authorities' influencing legal processes informally. The result is a mechanism in which the government can rely on their political signals to be interpreted as enforceable rules by both enforcement agencies and other subjects of Russian law.

Conclusively, in some cases, selective law enforcement draws heavily upon legal culture not only for normalizing the actors' practices, but also for creating perceptions of casual links that are not always shared by the perceived agents. The intertwined issues of agency and cultural patterns in selective law enforcement should make for further interesting research.

Selective Law Enforcement and the Hybrid Regime.

The research has a wide scope. Selective law enforcement can probably be identified in various forms in many parts of the world. Its very logic resembles that of hybrid regimes as a whole. As argued above, political regimes that fully disregard the principles of democracy have almost disappeared from the global scene in the latest decades. This is also true for contemporary Russia. Through a case study on how selective law enforcement has unfolded in Russia, I make findings that may prove useful for this debate.

As argued in the introduction, selective law enforcement plays on different interpretation of the relations between law and state. First, it tells a story on how the law can function within the logic of rule *by law* – in which the law is seen as a governmental instrument. When legislation is incoherent, society will be marked by mass non-compliance. If there in addition is no principle of legal egalitarianism, everyone is liable for punishment. This leads to a pick and choose game of prosecution where the powerful can dictate the rules. Simultaneously, however, the regime plays upon the legitimizing effect of the rule of law, being a powerful symbol of legitimacy in most or all contemporary regimes. As the hybrid regime strives for the legitimacy granted by independent courts, the courts can indeed oppose the government in less important cases.

In rule *by law* regimes the principle of “no criminal punishment without a pre-existing law” is usually implemented. Punishment, however, is more than criminal punishment, and various administrative measures allow for the rule *by law* to be effective regardless of what the judicial branch deems correct. Within such a ‘rule by administrative law’ system, the opposition is bound to struggle. As a governmental tool for social engineering, I suggest that

selective law enforcement is a way for hybrid regimes to promote undemocratic interests within the constraints of formal democracy. A phenomenon recognized by its democratic form and its authoritarian content, I view selective law enforcement as fitting perfectly the logic of hybrid regimes mimicking democratic practices.

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Interviews²⁷⁰

Barandova, Tatána, PhD-student and former unofficial leader of the protests against the closure of the European University of St. Petersburg (EUSPB), St. Petersburg.

July 30, 2008, on the premises of the Norwegian Institute of International Affairs (NUPI), Oslo.

Žemkova, Elena, member of board in the International Association Memorial and executive director of the Moscow office, Moscow.

December 10, 2008, on Memorial's premises, Moscow

Džibladze, Ūrij, President of the Center for the Development of Democracy and Human Rights (CDDHR), Moscow

December 9, 2008, on CDDHR's premises, Moscow.

Kanevskaâ, Mariâ. Head of the Centre for Enlightenment and Research Programs (CERP), St. Petersburg

April 8, 2008, on Bellona's premises, St. Petersburg.

Further correspondence by e-mail the autumn 2008.

Krivosos, Ol'ga, Lawyer at the Environmental Rights Centre Bellona (ERC Bellona), St. Petersburg.

April 9, 2008, on Bellona's premises, St. Petersburg.

Kulaeva, Stefaniâ, Head of the Anti-Discrimination Centre Memorial, (ADC Memorial) St. Petersburg.

October 23, 2008, on Memorial's premises, St. Petersburg.

NGO leader. President of an interregional NGO, Moscow.

December 10 2008, on the NGO's premises, Moscow.

Šarogradskaâ, Anna, Head of the Regional Press Institute (RPI), St. Petersburg.

October 21, 2008 on RPI's premises, St. Petersburg, by phone from Bellona's premises, St. Petersburg.

Further correspondence by e-mail the autumn 2008 and spring 2009.

Timofeev, Maksim. Lawyer at Citizens' Watch (CW), St. Petersburg.

April 9, 2008, on CW's premises, St. Petersburg.

Taubina, Natal'â, Director of Public Verdict, Moscow.

December 12 2008, on the Public Verdict's premises, Moscow.

²⁷⁰ The list displays the names of the informants, their role within the NGO they were presenting, the city of the NGOs' locales, the date of the primary interview, and the place of interview. In a few cases, the interviews were followed up by further communication until May 2009.