

TWENTY YEARS OF RUSSIAN LEGAL REFORM

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Abstract: This article examines what has changed in Russian law since the collapse of the Soviet Union. Among the accomplishments are the emergence of constitutional jurisprudence, the development of commercial law, and an increase in the basic transparency of the law. However, Russia is still not a rule-of-law country because the state is not subordinated to its own laws.

Three distinct stages of legal reform can be identified in Russia over the past twenty years, largely corresponding to the terms of Russia's first three presidents. Boris Yeltsin stands out as a law creator, as his administration re-wrote the constitution and much of Russia's legislation to meet the demands of a democracy and market economy. Vladimir Putin assumed the role as the primary enforcer of law as he re-centralized the Russian political system and called for a "dictatorship of law," essentially requiring the strict observance, but not the broad interpretation, of the law. Finally, Dmitry Medvedev tried to present himself as the great promoter of the rule of law and legal reform, attacking corruption and seeking to overcome Russia's historical "legal nihilism."

Some overlap admittedly exists between these three periods. The centralizing trends so pronounced under Putin actually began under Yeltsin. Putin also has a reputation as a law creator, especially during his first term in office, which saw the introduction of such landmark pieces of legislation as the new Criminal Procedure Code and the Land Code.

Finally, Medvedev, while talking about decentralization, in fact played a significant role in strengthening the so-called “power vertical,” most notably, by extending the president’s and the Duma’s terms to six and five years, respectively.

In retrospect, Russia’s legal trajectory since the collapse of the Soviet Union has been both profound and contradictory, so what I propose to do in this brief essay is to provide a rough balance sheet of twenty years of legal reform. The Soviet Union was governed by “socialist law,” which broadly promoted social over individual rights, presided over a planned (as opposed to a market) economy, and assumed a pedagogical role in the promotion of socialist ideology. Socialist law in its heyday was recognized by many commentators as one of the major legal systems of the world, along with the common law and civil law traditions. The end of the Soviet Union witnessed the disappearance of socialist law, at least in terms of its political and legislative content—although not necessarily in the mentality of those who lived under it.

By choosing the collapse of the Soviet Union as the point of reference for this essay—as opposed to a direct comparison with Western legal systems—I intend to highlight what has changed in terms of the rule of law since the collapse of the Soviet Union, and what critical problems remain, with the caveat that just because I am dividing this paper into two parts does not mean that I am making a “half full, half empty” argument. No matter from what perspective you view the Russian judicial system, legal reform remains a long, uphill struggle.

New Branches of Law

One of the most profound changes in Russian law over the past twenty years has been the emergence of a constitutional jurisprudence. While some Soviet defendants raised constitutional issues as part of their defense, the Soviet Union lacked a constitutional tribunal that could review whether Soviet laws, in fact, corresponded to the demands of the constitution. Thus, for example, in the famous trial of the dissident Vladimir Bukovskii, his lawyer could only argue that no crime had been committed, as set forth under the statute, as opposed to arguing that the underlying legislation itself was unconstitutional.¹

Today, it is accepted that a Russian citizen can make a constitutional argument before the courts, claiming that certain laws or government actions violate one’s fundamental rights. We also have twenty years of jurisprudence from the Constitutional Court articulating what these rights mean in practice, addressing such important areas as private property,

¹ Dina Kaminskaya. 1982. *Final Judgment*, trans. Michael Glenny. New York: Simon and Schuster: 190-94.

social rights, and basic civil and criminal procedure. The Constitutional Court is by no means a perfect institution—it has given in to the power vertical on several occasions, most notably in the appointment of governors case, when the Court upheld the appointment of regional leaders from Moscow even though the Russian Constitution allows each region to independently establish its own organs of state power. Nevertheless, in hundreds of less controversial cases, the Constitutional Court has begun to clarify these fundamental civil and social rights, a crucial step towards creating a living constitution.

In addition to the establishment of constitutional jurisprudence, the past twenty years has witnessed a significant transformation of Russian commercial law and, more broadly speaking, Russia's return to its continental, civil law roots. Socialist law responded to a unique set of economic incentives—state ownership of property, centralized planning, an excessive focus on workers' rights—none of which corresponded to the demands of a market economy. Therefore, Russia had to create a new civil and commercial legal system essentially from scratch. Private property rights were enshrined in the 1993 Russian Constitution. In addition, the first part of the new Civil Code was approved in 1994 and part two was introduced in 1996. Both pieces of legislation provided critical legal protections for the market economy, as well as defined basic contract principles. Private companies also began to be formed based on Russia's joint stock company law and limited liability company law, thereby introducing new forms of private ownership. Finally, the jurisdiction of Russia's commercial (*arbitrazh*) courts was significantly expanded to handle economic and contract disputes among entrepreneurs and between private business and the state.

None of these reforms were seamless—and Russians have been incredibly inventive in finding ways to undermine, distort, and get around the original intent of this business legislation. Nevertheless, the past twenty years has witnessed a remarkable upsurge in the amount of civil and commercial litigation, and as Professor Kathryn Hendley has shown in her research on the use of the courts, Russians are increasingly becoming more adept as consumers of law.²

A third critical development since the collapse of the Soviet Union has been an increase in the basic transparency of Russian law. When I first went to Russia in the early 1990s as a program officer for the National Endowment for Democracy, I remember meeting with a leading environmental group. They proudly showed me their latest collection of relevant environmental legislation, which consisted of newspaper article cutouts that were glued into a scrapbook. In contrast, today one can go to a bookstore in Moscow and purchase a copy of the relevant legislation and

² Kathryn Hendley, 2009. "'Telephone Law' and the 'Rule of Law': The Russian Case," *Hague Journal on the Rule of Law* 1: 241-62.

accompanying commentaries. You also can find this basic information on the web, along with all relevant Constitutional Court and Higher *Arbitrazh* Court decisions dealing with these laws. Publication of case law does not mean that Russia is moving toward a formal system of precedent or that the practice of “telephone law” has completely disappeared. Nevertheless, access to legal information today has improved dramatically compared to what existed during the Soviet Union.

The Limits to Legal Reform

Yet, for all these changes and legitimate accomplishments over the past twenty years, Russia still is not recognized as a law-based state. Why does this remain the case? There are multiple explanations for the continuing negative perceptions of the Russian legal system, and I will only address some of the most prominent ones in this essay. To begin with, while the 1993 Russian Constitution may have evolved as a legal document over the past twenty years, it has largely stalled—and even regressed—as a fundamental statement of political principles. The basic separation of powers, as set forth under the Russian Constitution, has ceased to exist as the Russian parliament no longer challenges the executive branch in any meaningful way (as actually occurred during the Yeltsin years). The Russian Constitution further includes the right to elect, and be elected to, organs of state power. And yet direct elections for governors, senators, parliamentary deputies, and even many mayors have been eliminated, and with them the chance to challenge the ruling political elite at the ballot box.

Other fundamental political and civil rights promised in the Russian Constitution have been undermined as well. Opposition political parties are denied registration to participate in national and regional elections. Freedom of assembly rights also have been restricted, to the extent that small protests organized at the end of 31-day months by the group Strategy 31 have been treated as fundamental threats to the ruling elite and violently broken up. Pockets of independent media remain—on radio, in print, and on the internet—but national television is tightly controlled by the state, and one cannot imagine a vibrant political system without a fully independent press.

The aftermath of the 2011 Duma elections may yet lead to a fundamental reappraisal of Russia’s early legal development, that despite major setbacks, the first two decades of Russian legal reform somehow set the stage for important political change. A more realistic assessment, however, suggests that twenty years of legal reform has not broken the essential features of the Russian state; like its Soviet (and tsarist) predecessors, the Russian state does not feel bound by the laws that it passes. Moreover, while some positive words can be said about the evolution of civil and

constitutional law over the past twenty years, criminal law remains mired in the Soviet past. For people who find themselves ensnared in the Russian criminal justice system, there is a 99 percent chance that they will be convicted. In addition, thousands, if not tens of thousands, of criminal charges continue to be filed where the primary aim is to disgorge money or businesses from Russian entrepreneurs, not to punish genuine illegal activity.

Russia will never modernize or innovate—the big buzz words that are used to describe current economic reform in Russia—if members of the business community (large and small) can easily be placed in preliminary detention on trumped-up criminal charges and left to rot in jail. The police are thoroughly corrupt; the Russian Minister of Interior recently announced that large numbers of police officers regularly engage in racketeering activities, and that it will take years to eliminate police corruption. The criminal investigators, procurators, and judges are not much better. The Russian Constitution did introduce jury trials as a possible check on state power, and not surprisingly, juries have significant higher acquittal rates (approximately 15-20 percent) than regular criminal proceedings.³ Yet, even this number is deceptive. Russian prosecutors reserve the right to appeal jury verdicts, a practice that has resulted in the overturning of a significant number of non-guilty verdicts and a second “bite at the apple” for the state.⁴

All of the deficiencies associated with the Russian criminal justice system were on prominent display in the most famous proceeding of them all, the Khodorkovskii trial. Khodorkovskii’s original trial represented the first high profile prosecution conducted under the new Criminal Procedure Code of 2001. The code introduced new adversarial elements into Russia’s largely inquisitorial investigative system, theoretically granting more procedural rights to the accused. And yet, many of these new procedural protections were summarily dismissed during Khodorkovskii’s first trial. He was refused bail, and all requests for extending his pre-trial detention were approved, even when no formal request was made by the prosecution. The defense faced difficulties in cross-examining witnesses, and those persons brave enough to testify in support of Khodorkovskii soon found themselves under investigation.

If one of the true tests of any country’s legal system—and its enumerated procedural guarantees—is how it responds in the face political (or public) pressure, than the Russian legal system clearly failed this test in the first Khodorkovskii trial. Yet, Khodorkovskii’s second prosecution,

³ Kristi O’Malley. 2006. “Not Guilty Until the Supreme Court Finds You Guilty: A Reflection on Jury Trials in Russia.” *Demokratizatsiya* 14: 1: 44.

⁴ O’Malley. 2006. “Not Guilty...” 46.

in many ways, proved even more egregious than the first. The second indictment was largely incoherent—How does one steal 350 million tons of oil without anyone noticing? On the eve of sentencing, Putin held a news conference where he said that a thief like Khodorkovskii belonged in jail. Medvedev issued a mild rebuke of Putin for making such a prejudicial statement before the verdict had been announced, but the final outcome was never in doubt.

The impact of the Khodorkovskii case continues to reverberate far beyond the individuals involved. From a political standpoint, the Khodorkovskii case served as a direct statement to Russia's oligarchs: Do not cross the line between public philanthropy to political opposition, as Khodorkovskii had done, or you will be destroyed. From an economic standpoint, the Khodorkovskii case symbolized that no one's property rights were secure. Indeed, like the tsars of old, Putin re-asserted the notion that property rights were not a fundamental civil right but instead were a privilege that could be revoked at the tsar's will with a single order, with no legal protections. Finally, from a legal standpoint, the Khodorkovskii verdict essentially said it was open season on Russia's businessmen and businesswomen, that no matter how flimsy the charges, the Russian judicial system could strip you of your assets and re-sell your business without consideration of actual property rights.

And thus, the Khodorkovskii case begat the Magnitskii case, which shed a glaring light on Russian law enforcement's unrelenting offensive on the country's business and entrepreneurial class. The death of Sergei Magnitskii in pre-trial detention continues to resonate both inside Russia and abroad, leading to several high-profile public inquiries and the introduction of a U.S. visa ban on some of the Russian participants in the Magnitskii investigation. The Magnitskii case further prompted the direct intervention of President Medvedev, who called for new legal protections for Russians accused of economic-related crimes.⁵ And yet, despite the introduction of new legislation, the abuse of pre-trial detention procedures continues, indicating that it is not simply Russia's laws, but also its underlying legal culture that has to change.

Conclusion

As we reflect back on twenty years of Russian legal reform, it is possible to identify genuine accomplishments—achievements many observers would not have thought possible in just two decades. Most notably, Russia has made significant steps in the transition from socialist law to a more recognizable, continental-based civil law system, in the process opening

⁵ William Pomeranz. 2009. "The Magnitsky Case and the Limits of Russian Legal Reform." *Russian Analytical Digest* 92: 13.

new avenues of constitutional and commercial law. At the same time, the persistent abuse of criminal law, corruption, and the return of certain deep-rooted authoritarian tendencies continues to undermine—and even negate—any progress that has been made in establishing a law-based state. In many ways, the fundamental question that confronts Russia today after twenty years of independence is the same question that confronted the Soviet Union after 70 years (at the beginning of glasnost and perestroika) and Imperial Russia 50 years after the Judicial Reforms of 1864, namely is the Russian state subordinated to—or does it stand outside of—its own laws. Until Russia makes this essential choice, the rule of law will remain a perennial, and ultimately elusive, goal.

