

# A Russian Experience

*Under the auspices of the American Bar Foundation and the People to People Ambassador Program, lawyers and judges travel abroad to share experiences with their counterparts around the world. This article recounts the experiences and impressions of the author, who, with about 20 other lawyers, got an up-close look at the legal system in Russia. Among others, they were able to meet and speak with the Chief Justice of the Russian Supreme Court, the presiding judge of the Moscow Courts, several law professors and the students at two well-known law schools, including President Vladimir Putin's alma mater, the University of St. Petersburg Law School. The group also spoke with a variety of practicing lawyers, other judges, law professors and officials.*

**W**e traveled in April and yes, except for the summer, Moscow and St. Petersburg are cold, dark and crowded. They are now also filled with vehicles. Every Russian was given the opportunity to acquire his or her home free of charge by the State. Many used the resulting equity to buy the most visible symbol of importance in the old Soviet Union—a car. The roads are jammed with cars, old junky trucks and modern buses, and are lined with signs proclaiming the virtues of Citibank and other American financial institutions. (Not very often do our bankers have a shot at an entire country that is free and clear.)

Russia is definitely no longer isolated. I saw Volkswagens, P.T. Cruisers, a Ferrari dealership, all manner of SUVs and a good number of high-end Mercedes. The famous department store G.U.M. was filled with the same brands one might find at Scottsdale Fashion Square, and we frequently sighted American fast food

franchises. Bars and restaurants are lively, the food is good and, surprisingly to me, Americans are well received. The people in general are not well dressed<sup>1</sup> and adhere to the Russian saying that “only a fool smiles without anything to smile about.”

Nonetheless, everyone I talked to was enthusiastic about the larger role the courts have assumed since the 1993 Constitution, albeit with the usual grumbling about how specific issues have been handled. What encouraged me most was the general assumption that the people are entitled to these courts and see them as protection, however flawed, from the government.

A caveat to any hopeful comments about the rule of law in Russia must be that the twin obstacles of bureaucracy and bribery are deeply entrenched in the Russian mentality. On more than one occasion, when asked to comment on judicial corruption, lawyers responded with a twinkle in their eye that it was “getting more expensive all the time.” Never stated but implicit in conversations

about this problem was the idea that a small tip for an underpaid judicial officer was not all that offensive and was not really a payment for a favorable decision.

We also heard a story of the litigant, believing in the new rule of law, who went to court and obtained the relief he sought against another individual. The loser, relying on the old Russian ways, then went to see his favorite bureaucrat. Shortly thereafter several families of Chechens were moved into an apartment (read, small room) that shared the winning litigant's kitchen. To a civilized Moscovite those new tenants must have seemed like a cross between the 1930 Oakies and the worst gang members Los Angeles presently has to offer. The question of who won the dispute between the two litigants is clear. According to the story, the litigant who thought he had a victory at trial signed a Satisfaction of Judgment and Release, and the Chechens were moved out.

Such stories notwithstanding, Mr. Putin's pronouncements support the Rule of Law. That catchphrase is regular-



ly used and purports to be one of his highest priorities. The idea is that the people are likely to be much more supportive of government if courts rather than the bureaucracy (our executive branch) determine citizen rights. Officially, the government wants a transparent independent judiciary in which disputes and accusations of criminal conduct are resolved by courts that the citizens believe to be fair. In the highest-profile cases, or cases important to the government, it may be hard to keep the powerful hands of the government off. The Yukos trial was under way while I was there, and the guilty decision was a foregone conclusion by virtually every lawyer and citizen: Old socialists on meager incomes are not fond of newly minted millionaires whose business is to sell the natural resources most think should belong to Russia.

But what comprises the Rule of Law?

Since 1993, the Russians have had to cobble together a strange amalgam of rules, principles and procedures to effectuate what was intended to be a highly

visible, non-secret judicial system working openly to resolving the disputes of the Russian citizens and “enterprises.” The prosecutor also no longer has the right to unilaterally arrest people or conduct searches. Now he or she (it is most often “he”<sup>2</sup>) must apply to the courts (usually a “she”). The system has public defenders for all serious crimes with a right to counsel embodied in the new constitution.<sup>3</sup>

Because the Russian people are deeply suspicious of criminal convictions imposed by the government, jury trials are now mandated, and those have now been implemented in every jurisdiction except Chechnya. I was astounded to find that the U.S. Information Agency provides a former Assistant United States Attorney to oversee a program that brings both English and American lawyers to Russia to teach Russian lawyers jury advocacy. The Russian command mentality is only beginning to learn that a prosecutor cannot tell a group of Russian jurors what they must do.

Russian juries, like juries everywhere, have their prejudices. A jury trial in which

someone is accused of terrorism is almost a foregone conviction, and by the same token, bribery of a doctor almost never results in a conviction (doctors are supposed to treat everyone under the Russian health care system, but on a fairly frequent basis, doctors are accused of giving preferential treatment to those who will supplement the governmental fee). Defendants from the Muslim Republics fare poorly in Moscow or St. Petersburg trials. In Moscow, the acquittal rate is an astounding 30 percent,<sup>4</sup> a rate many attribute to citizens’ profound mistrust of the once all-powerful Russian prosecutors.

The Russian judicial system is all federal, stretching across 11 time zones. Though the Chief Justice of the Russian Supreme Court supposedly cannot tell



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one of the 125<sup>5</sup> Justices in his court how to vote, they are undoubtedly mindful of the fact that they could be sent to tend to judicial supervision needs a very long way from Moscow. The Chief Justice makes those assignments.

Even in the lower courts, judges have occasionally complained that the Chief Judge of the lower court in which they sit has tried to tell them how to rule. The Russian judicial system does not have the concept of *stare decisis*, so one case has no binding effect on the next. The lawyers and judges with whom we spoke, however, pointed out that there are three organizations busy gathering decisions for Internet publication and that, “Psychologically, those decisions are very important.”

In an effort to avoid the immense power of the bureaucracy, judges theoretically serve for life. Before they can be considered for judgeship, they must pass a test. Then, after they are appointed by a committee and approved by the Chief Justice, the lower court appointments must be approved by Mr. Putin, and the Supreme Court appointments are approved by both Putin and the legislature. The Chief Justice of the Supreme Court is given a renewable six-year term. After a judge has served a three-year probationary period, that judge cannot be removed except for “misconduct.”

Recently, accusations have surfaced from removed Moscow judges that the Chief Judge arranged their firing because of dissatisfaction with their light sentences and defense orientation. “Unfounded leniency” and “crude violations of the law” apparently can be grounds for removal by the Supreme Qualification Collegiate of Judges (the “Collegium”). Currently, legislation is pending to allow members of the Collegium to be fired. This is generally seen as a move to give the executive branch more power over the judiciary.

The Russian courts are divided into the basic court system that takes care of all civil and criminal matters, a 15-member constitutional court that measures Russian administrative actions and laws

against the Constitution, and what has inaccurately been translated as an “arbitration court.” It is really a court that resolves economic disputes, not one that holds arbitrations.

The “arbitration court” is left over from a court that existed in the Soviet days. At that time, various state-owned commercial enterprises would bicker over who was at fault for the non-production or non-performance of certain mandates. The court’s job was to allocate fault, with the occasional collateral result of a trip to Siberia for the failed production chief.

The concept of that court was retained and its duties expanded. Now, it handles economic litigation between “enterprises” and individuals having economic claims, as well. It is apparently not the exclusive place where individual economic claims are resolved. The Chief Justice of the Russian Supreme Court, Alexander Lebedev, said that frequently disputes between individuals asserting economic damage come to civil courts, and civil courts have the power to resolve those claims.

There are now courts everywhere, Justices of the Peace are swamped with claims of spousal abuse—Russia still calls it “wife beating”—and the other consequences of drunken behaviors. Civil courts, which equate to our Superior Courts, hear claims for damages, most often against the government. One must remember that virtually all of the property, the hospitals, the buildings and many businesses still are operated by the government. The new capitalism, with its huge increase in automobiles and private property that can be used as collateral to support borrowing, has resulted in an increased number of personal injury and creditors’ rights cases. There, as here, contingency fees are allowed and are eagerly sought in injury cases.

If a criminal court runs onto a claim of unconstitutionality, the criminal court rules on the matter if it thinks the answer is clear and submits notice of its decision to the Constitutional Court. If it thinks the resolution is unclear, it certifies the question to the Constitutional Court for

resolution.

Historically, the powerful personage in the court system in Soviet times was the prosecutor. Judges were functionaries who by and large executed the will of the prosecutor and historically were women. But now some women have real power. The Chief Judge of the Moscow City Courts, Olga Yegorova, may be an anomaly, but she is obviously a powerful person more than willing to exercise her power. Such chief judges serve six-year terms and are appointed by presidential decree.

Arbitration clauses are enforced. As noted previously, arbitrations have nothing to do with the arbitration court. Many business agreements provide for Chamber of Commerce arbitration in Oslo or Geneva. Most international clients are not yet comfortable with a Russian arbitration.

Unlike the United States, Russian judges will also apply international law, not just treaties to which Russia is a signatory. We were told that other European courts have the same concept. Much of the administrative and procedural basis for the new court system has German antecedents. Juries, of course, were adopted from the English and American experience.

More than 100 law schools have sprung up since the new Constitution was written in 1993. A number of these are admittedly diploma mills, but even legitimate schools are huge. Putin’s old law school, at the University of St. Petersburg, has 6,000 law students.

Law school is a five- or six-year affair, but the first two years really approximate a normal collegiate education. Students start after high school (11 grades) and typically enter at age 17. The last two years are a combination of work and study, and at age 22 or so, if someone has gone straight through, they are a lawyer. Graduation is enough, no bar exam is required.

An entirely separate matter is the designation of “advocate,” one qualified to represent clients in court. Potential advocates must serve a two-year apprenticeship after law school and must take a fair-



ly comprehensive examination. Once certified as an advocate, they can represent clients in court but must behave in accordance with court and ethical rules. Only advocates have an attorney-client privilege. An advocate who is not in private practice, but who works in-house for an “enterprise,” cannot assert such a privilege.<sup>6</sup> Recently, a ruling was obtained by several large accounting firms that non-advocates are entitled to represent businesses in court, as well. The advocates complained rather bitterly that those unlicensed lawyers or paralegals are not subject to the disclosure and ethical rules that govern advocates. Advocates were concerned that businesses that would otherwise hire advocates will be drawn to those unconstrained by rules of disclosure and honesty.

Some of Russian written rules look just like ours, but the Russian interpretation can be cause for some rather shocking differences.

The Russian Constitution has the same separation of church and state concept that the U.S. Constitution does, and if you talk to Russians they are emphatic that the Russian Orthodox Church has no role in the state and is not promulgated by the government. Nonetheless, Mr. Putin meets regularly with the head of the Russian Orthodox Church, and if you go to the newest building constructed to house the Moscow City Courts, a small Russian Orthodox chapel stands on the grounds confronting everyone who comes to the entrance of the courthouse, obviously so that litigants can seek divine but Orthodox intervention in matters before the court.

Separation of the judicial and executive branches is also mandated by the Constitution, but Chief Justice Lebedev freely discussed the fact that following our meeting he was going to see Mr. Putin for an extensive and substantive meeting. Several members of the delegation imagined what big news in our country such a meeting between the Supreme Court Chief Justice and President Bush would be.

The Russian constitutional court ran

into some problems when its chief justice was shuttling back and forth between the legislature, the judiciary and the administrative branches, opining as to what proposed course of action would probably be held constitutional in an effort to resolve the unconstitutionality of an existing piece of legislation that was to be replaced by modified legislation. This good-old-boy interaction is deeply entrenched in the governmental psyche and in fact was one of the few ways that the government in communist days could function effectively.

Some specific constitutional provisions that might raise an American eyebrow are a privilege against incrimination that extends to the defendant’s spouse and “close relatives.”<sup>7</sup> Apparently close relatives usually means children and other members of the extended family that have historically shared living quarters in the always-limited Russian apartment buildings. Also noteworthy in this time of angst in the United States over Social Security is a provision that requires a citizen, whenever able, to care for his or her parents.<sup>8</sup> The Russian constitution now also contains a right to privacy.<sup>9</sup> Everyone has the right to choose their “type of activity and occupation,”<sup>10</sup> and “everyone shall have the right to a home. ... Low income citizens and other citizens mentioned in law who are in need of a home may receive it free of charge or for an affordable payment from the state.”<sup>11</sup> Everyone has access to “free pre-school, secondary and secondary vocational education”<sup>12</sup>; free higher education is “on a competitive basis.”<sup>13</sup>

Chernobyl and other previous events Russians thought evidenced a disregard for the populace have led to a number of provisions that require the bureaucracy to disclose hazards and protect the environment, and which make the government liable for injuries it causes.<sup>14</sup> Because the State already has to provide medical care and a home, damages do not begin to approach Western compensation levels.

As well as I could tell, Russian lawyers were not overly distraught over the big picture. Like us, they were more con-

cerned with getting their cases heard, getting the other side’s documents and with how to behave for best effect in court than they were about the broader issues of who controlled the system in high-profile criminal cases or constitutional litigation. Some define their role narrowly and just try to proceed within the system. Others clearly are concerned with who knows who, what bribes are rumored, and what ambitions particular judges hold. I listened to a hilarious argument about whether any problem existed if both sides conspired to bribe a judge with exactly the same amount.

The law students we spoke with were focused first and foremost on jobs. The concept of large firms is only just beginning in Russia so that any job search is extensive and fractionated. High-ranking graduates from good schools can make \$2,500 or more (about 72,000 rubles) a month to start. That puts them well into the upper half of Russian wage earners. The State-sponsored schools require an entrance test, and we were told that at the law schools of the Universities of Moscow and Saint Petersburg, the bottom 99 percent need not apply.

Almost all of the law students we met spoke English, usually with decent vocabulary and grammatical structure but with a horrendous Russian accent. As one professor said, “That’s what happens when Russians teach other Russians to speak English.”

If Mr. Putin and the rest of the executive branch let the judiciary survive, the consensus of our group was that the estimated 50,000 to 100,000 new law graduates per year would eventually make it impossible to abandon the newly minted Rule of Law. Young lawyers and law students in Russia are very much like those here. They are idealistic, enthusiastic about all these rights they are hearing about and eager to wield the power these rights promise.

Though the people I met seemed very committed, it is important to remember that they have virtually no tradition of independent lawyers, independent courts or citizen juries. It may be difficult for the

average Russian to abandon redress to his favorite bureaucrat as the primary dispute resolution technique, and even more difficult for the bureaucracy to accept any control by the courts.

But I think the lawyers anticipating reinforcements from all the new law schools were right. Just wait until Russia has more than a million lawyers and 100,000 judges who think they have been appointed for life. It will be impossible to get rid of them, the courts or the rights they use to ply their trade. <sup>17</sup>

## endnotes

1. The members of the judiciary we met were well and fashionably dressed by any standard. Amusing reminders of Russia's military history were huge, complex shoe-shine machines complete with black, brown and clear polish, gyrating cloth buffers and rotating brushes that were permanently installed at both the Supreme Court building and the headquarters of the Moscow City Courts. All of the judges, male and female, had very shiny shoes.
2. We were told that 90 percent of the justices of the peace are women, 60 percent of trial court judges are women and 10 percent of the appellate judges and prosecutors are women. Under the Soviet structure where all of the power was in the prosecutor, prosecutors were virtually all men and the judges were largely women.
3. CONST. OF THE RUSSIAN FEDERATION, Art 48 (1993).
4. MOSCOW TIMES, June 21, 2005, at 3.
5. This sounds like a lot but just imagine every appeal from every state trial court in the nation going to one appellate court.
6. NEW YORK TIMES, Mar. 29, 2005, at 6, reporting on a jailed in-house lawyer who was accused of helping Yukos evade taxes.
7. CONST. OF THE RUSSIAN FEDERATION, Art. 51.
8. *Id.* Art. 38-3: "All bodied children over 18 years of age must take care of disabled parents."
9. *Id.* Art 23.
10. *Id.* Art. 37.
11. *Id.* Art. 40-1, 3.
12. *Id.* Art. 43-2.
13. *Id.* Art. 43-2.
14. *Id.* Art. 42, mandating a "favorable environment" and "reliable information on the state of the environment." "Concealment by officials of facts and circumstances which pose a threat to the life and health of people" shall result in liability. Abuse of office entitle the victims to "justice and compensation for damages sustained."