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## Towards a Bill of Rights For Russia: Progress and Roadblocks

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# Towards a Bill of Rights For Russia: Progress and Roadblocks

Vasily A. Vlasihin

## **Abstract**

Almost three years before the Soviet Union collapsed after the failed coup d'état, I arrived at JFK International Airport as a member of a Soviet lawyers' delegation.

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Almost three years before the Soviet Union collapsed after the failed coup d'état, I arrived at JFK International Airport as a member of a Soviet lawyers' delegation. At the airport, I was involved in a short but impressive dialogue with a United States customs officer. The officer, a young man, checked my passport and after seeing what was inscribed in my United States visa stamp asked me, "are you a Soviet lawyer?" I was too tired to explain that although I was trained as a lawyer, I never practiced, and that my work focused primarily on research. So, I just nodded affirmatively.

"Oh, how wonderful! Welcome to the United States," replied the officer, "but is there any law in the Soviet Union?!"

Customs check-points are not the best fitting place for academic lectures, so I just murmured confidentially in response, "there is, and quite a lot of it."

If I had been willing to give a lecture at the customs check-point, and if the officer had been willing to listen, I could have told him that during the previous seventy years of the Soviet regime, the country developed a certain legal system. This system of laws, as in any other country, is comprised of a Constitution, statutes, executive acts and administrative regulations, and other enactments. There are also legal institutions that are designed to be guardians of the legal system. These institutions include a judiciary, a bar, and prosecutorial and law enforcement agencies.

However, when I advised the customs officer that there is "quite a lot of" law in the Soviet Union, I was not attempting to commit perjury in front of a representative of the United States Government. Quantitatively, Soviet law has been developing rather rapidly. In the second half of the 1980's, there were more than thirty thousand legal enactments adopted only by the national legislature and the government.

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This essay is based upon author's remarks before the 1991 Annual Meeting of the Kansas Bar Association. It was revised and updated in respect of the latest constitutional developments in Russia. This essay was solicited for the Law Review by Professor Paul R Joseph.

However, while asking his question, that young customs officer, I am sure, had in his mind not just a mechanically assembled body of laws and regulations or a combination of legal institutions and agencies, but something which he and most of his fellow citizens understand as the idea of the Rule of Law.

A black letter description of the notion of the Rule of Law is not easily given. This notion implies quite a few things, such as constitutionalism, separation of powers, a bill of rights under which rights and liberties of an individual are safeguarded, a limited government, an independent judiciary, judicial review, fair legal order, due process guarantees, and justice administered under the fair law. Of course, this list is not exhaustive.

I did not blame that officer for his seemingly "ignorant" question. Since his boyhood, he heard of the Soviet Union as a "rule-of-the-state-law"—a totalitarian police state country—not as a rule-of-law state. That was true.

In the years preceding Gorbachev's *perestroika* policies, law and the legal profession at large in the Soviet Union did not serve the interests of the people, nor did they protect the rights and freedoms of an individual. Although the country had many laws, most of them suppressed democracy, oppressed citizens and pressed economy into what is now called a bureaucratically centralized administrative-command system. The system of legal agencies was effectively dominated and controlled by the Communist Party, the security apparatus, and prosecutorial agencies. We had law of tyranny; law of fear which equals the absence of law.

With the emergence of *perestroika*, the idea of the Rule of Law has made its way into the political vocabulary of our society. Once looked upon as an empty Western "bourgeois" slogan, the Rule of Law has rapidly become a goal as well as a great moral value of *perestroika*.

As this goal was set, the society battered by the lawlessness of the past and exhausted by "the rule-of-the-state-law" started the reform of the legal system in the move to achieve the goal.

Naturally, the country striving for freedom has made its first steps to ensure rights and liberties that come first: freedom of religion, expression, press, assembly and association, and also certain procedural guarantees in the system of criminal justice to prevent law enforcement abuses.

Constitutional niceties regarding rights and liberties were not unknown to the Soviet citizenry—they were written into both the Stalin Constitution of 1936 and the Brezhnev Constitution of 1977. However, these two documents were merely pieces of paper.

Besides, ours is not a common law society, but a country of statutory law. It means that the actual contents of the rights and freedoms of an

individual are not defined by the Constitution and its authoritative interpretation by the judiciary, but by statutes and governmental regulations construing constitutional commands. Until *perestroika* statutes regarding basic constitutional rights were virtually non-existent. However, there was a huge volume of sub-statutory governmental regulations (most of which were issued in secrecy and thus were unknown to the public) that "construed" these rights in a very destructive way.

Consequently, the new and freely elected legislatures moved to adopt statutes which would, in detail, spell out our particular constitutional rights and liberties, thus making the first moves toward a bill of rights for the people.

Much has been done to provide a statutory framework for the constitutional rights in the years of *perestroika*. Even after the disintegration of the Soviet Union and the emergence of Russia as an independent state, many Soviet laws which affected the rights and liberties of the people and which did not contradict the Russian legislation were left intact and operative on the territory of Russia.

Law on the freedom of religion has started the revival of religion in the country. Religious faith is no longer a suspicious trait of a person in society which was in the past, forcefully atheistic. New churches and religious groups are being formed on a wide scale. Sunday schools are there. The outburst of the religious freedom has led to situations which by the United States standards of the constitutional "establishment clause" would be judged unacceptable. The state owned television and radio gives airtime to sermons and other church authored programs. In my view the Russian Orthodox Church is being provided with more time on the air as compared with other churches. Furthermore, some public schools are experimenting with the Bible reading and sermons.

Inspired by the policy of *glasnost*, freedom of expression is blooming. Criticism of the government is so widespread that sometimes one may wonder if there is anybody who has anything good to say about any government action.

Provisions of the criminal code which used to give free hand to the state security organs to prosecute political speech and political dissidents were revised. Recently President Boris Yeltsin pardoned several convicts who were claimed by the West to be the last political prisoners.

Liberty of the press is guaranteed by the law on the press and other mass media. Under that law, government censorship is prohibited in absolute terms. There are now so many publications, with such a variety of opinions, that an average Russian brought up in the spirit of having just one

truth published by the Communist Party paper "*Pravda*" (Truth) now can be easily lost—in which of the opinions is there the truth?

Subject to certain regulations, the freedom to assemble is widely used by the citizens of various political leanings. Rallies of half a million people have become common.

Freedom of association verbalized in a corresponding statute gave birth to an assortment of various associations, unions, organizations and parties. Once a one party society, we have rapidly become a multi-party system. It is really amazing to hear of monarchists, anarchists, liberals, social-democrats, libertarians and even republicans and democrats. The Communist Party, outlawed after the August 1991 *putsch* by the decrees of President Yeltsin, is being galvanized by small groups but they do not succeed.

We have moved to introduce what is known in the United States as "due process" protections of an individual against abuses by law enforcement and criminal justice authorities.

Now, legal assistance of a counsel is provided to a suspect or a defendant at the earliest stages of criminal proceedings. The Miranda Rule seems to have sprouted out of the hard soil of Soviet/Russian justice. Elements of a jury trial are being introduced. It was proposed that serious cases shall be tried by a panel of two judges and three assessors or jurors. (The present scheme is a panel of a presiding professional judge and two lay judges called "People's Assessors"). Currently, in Russia, there is a movement to have jury trials as they are known in the United States. The leading proponent of the jury system is the energetic and wise Chief Justice of Russia, Vjacheslav Lebedev.

Prosecutorial over-zeal of the law enforcement establishment in most cases does not go unattended. There are more acquittals by courts, and closer judicial scrutiny of the police and prosecution evidence. The "Exclusionary Rule" is becoming more and more of an integral part of criminal procedure. Judges are no longer "rubber-stamps" for a government prosecutors' decisions.

Once a neglected segment of the legal system, the judiciary is gradually gaining prestige and status. Due to public support and new laws, judges are gaining independence. Practically speaking, we no longer hear of the instances of "the telephone justice," that is, of judges taking instructions on the phone from the powers-that-be on how to dispose of a sensitive case.

Good statutes were passed in order to insulate the judiciary from infringements upon judges' independence. For example, a statute was passed which has raised the status of judges and a contempt of court statute. This law provided for civil and criminal penalties for any pressures,

motivated by politics or money, placed upon courts. The tenure of judges was extended to ten years instead of five, and it is planned to be extended to life tenure. Judges' salaries were increased immensely, and the process of their election was given into the hands of higher level legislators. The reasoning behind the latter is that the process of electing judges by a peer level legislature would flounder on the shoals of localized interests and pressures.

The courts have also been given extensive powers to provide judicial protection to citizens' rights against governmental abuses of power. The courts, not the bureaucracies themselves as it was in the past, are now fully empowered to handle the complaints of citizens against governmental bodies or officers of any level. The elements of "habeas corpus" have also been introduced into Russian criminal justice; an arrested person now has the right to challenge, in court, the prosecutorial decision to detain.

Thus, judicial review is making its way into our legal system. The Constitutional Court of Russia has been established as a separate single body to exercise constitutional review of legislation, executive, and administrative acts.

Our privately practicing lawyers work within colleges of advocates. Until the end of the 1980's these colleges were tightly controlled by the government and the Communist Party. The independence of the Bar was virtually non-existent. Indeed, the Bar was a step-daughter of the Soviet legal system dominated by the law enforcement and prosecutorial agencies. With the formation of the national bar association, in 1989, the legal profession started to acquire the attributes of a civilized bar. Restrictions on the attorneys' fees were lifted, the attorney-client privilege became inviolable, and colleges of advocates became independent in running their business. Advocates drastically expanded their roles and status in criminal and civil litigation, and in business. Apart from colleges, separate private law firms are popping up.

The picture painted above shows a rosy garden of the legal paradise in our society. In fact, we are very far from entering the realm of the Rule of Law. Much has been done, but much more has to be done. On the way to that realm we too often run into road-blocks. The largest road-block is the lack of the traditions of democracy and constitutionalism, the lack of a genuine legal culture.

I would like to quote from an American authority, with whom I wholeheartedly concur. After his visit to the Union of Soviet Socialist Republic in 1990, the United States Attorney General Dick Thornburgh, delivering remarks in Philadelphia, said:

What is really missing [in the Soviet Union] is what might be called a "legal culture." Time and again, we found a naive belief that all that was needed was to pass the correct statutes, to get the right laws on the books to create a "rule of law."

It is going to take a commitment to the lawful, democratic process, and we tried to emphasize legal process—due process of law—even over substantive rights, as the true safeguard of the people's liberties. Again, they asked us often, and in much confusion, about separation of powers. The idea of deliberately building in a tension between separate branches of government—our concept of checks and balances—was extremely puzzling to them and, to some, incomprehensible.<sup>1</sup>

All too many people in Russia think that once you get the right statutes on the books, you automatically qualify to enter the realm of the Rule of Law. But, Russians still do not trust the law itself. It is a great pity that the old Russian saying, "the law is like the shaft of a wagon, it goes wherever you turn it," maintains a firm grasp on public consciousness, reflecting the failure of the legal system to provide ultimate protections to the people against abuses of government.

The law itself does not yet contain the maximum possible remedies for citizenry to protect individual rights and freedoms with the help of the courts. Most vital disputes, even those of a legal nature, are still channeled through bureaucracies. People do not yet view courts as their protectors. The Bar, by and large, has not become—in the eyes of citizens—a champion of rights and liberties.

Many things related to the Rule of Law that are widely accepted and known in the West from time immemorial are just incomprehensible for Russians. The minds of the people brought up in the spirit of "the-rule-of-the-state-law" are not capable of absorbing to the fullest extent the ideas of limited government, decentralized government, checks and balances within the mechanism of the separation of powers, the judicial supremacy, and the priority of individual rights and liberties over interests of the state. It is quite a task to implant ideas of judicial review when a criminal justice official seriously stated in a newspaper that when the judiciary assumes the duty of interpreting statutes and the Constitution, this is the first obvious sign of a totalitarian regime.<sup>2</sup>

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1. The Rule of Law in the Soviet Union: How Democracy Might Work. (U.S. Dept. of Justice, Apr. 4, 1990) (a press release containing remarks by Dick Thornburgh, Attorney General of the U.S., Before a Luncheon Meeting of the World Affairs Council of Philadelphia).

2. MOSKOVSKY KOMSOMOLET, Feb. 23, 1990.

We differ much in terms of the legal culture. Even our kids differ. In 1977 when I was a post-graduate student at Harvard Law School I happened to see an article in, *The New Lawyer*, a New England newspaper.<sup>3</sup> The article titled *What do Judges and Lawyers really do?* contained answers to this question by fourth grade students—ten year olds. Here are some quotations they made about lawyers.

A Lawyer is special she or he helps you win a case to court. They are important to you, they want to help you they are always ready (Karen).

A Lawyer helps people sell or rent lands. A Lawyer is a friend that helps people (Debbie).

A Lawyer is a person who fights for other people if the company is doing something wrong to the person. A Lawyer always tries to tell the truth because if they don't tell the truth then they are committing a terrible sin (Paul).

A Lawyer is a man who helps your family when you get in trouble. He helps you out of trouble (Beth).

At the end of the 1980's, I decided to put the same question to fourth graders in a neighborhood school where our family lives. Here is the vision of a lawyer by Russian kids.<sup>4</sup>

An advocate must defend a guilty man, justify him and accuse him if he thinks so (Sveta).

An advocate investigates crimes. He looks for a person, who committed it, and when that person turns out to be a murderer, this case is submitted to court (Oksana).

An advocate conducts questioning. An advocates works in the police, gives assignments to find criminals, for instance, robbers (Ira).

An advocate is a person, who works at work. He finds out everything (Anya).

An advocate is a person, who seems to do things that are not supposed to be done (Kolya).

An advocate is a person, who is involved in things which are wrong, that is against the law. And he looks very much like a spy, has many high hopes for something dubious (Veronika).

An advocate just sits at his desk (Sasha).

3. I have a clipping of the quoted material, but there is no date on it. The grammar of kids preserved. (On file with the author.).

4. Out of the thirty students polled, eleven replied that they did not know what a lawyer does.

Russian adults, because of the lack of mature legal culture, still do not view their rights and liberties as inalienable, natural, and retained. Most of them still think that it is the state, the government, that grants their rights and liberties. The philosophy of the natural origin of rights (the basis of the Rule of Law notion) is trying to root itself in Russian constitutional thinking. The great self-evident truth "that all Men . . . are endowed by their Creator with certain inalienable Rights" is, as yet, alien to Russians.

Closely connected with the lack of proper legal culture is another roadblock which is often intentionally erected by those who fear progress, those who feel comfortable under the "rule-of-the-state-law," and those who yearn for an iron fist to run the country the way it had been run for decades.

Such people in different echelons of power, paying lip-service to reforms and democratization, try to establish order under which freedoms have to be licensed. Actually, what we have now in Russia is the regime of licensed rights and freedoms.

Statutes on religion, the press, associations, and assembly were a great breakthrough, but whenever there is thinking that rights and liberties are granted by the state, there is the state licensing them. One example of this result is that in order to start a church, or any other type of religious organization, it must be registered with the state in order to get a license to practice religion in a group. Also, in order to start a newspaper or a magazine a Russian has to register with the state to get a license. Moreover, to have a rally or a parade, a permit from the city authorities must be obtained. This is not unknown in the United States. What is unknown is the legal power to discriminate ideologically or politically in the issuance of a permit. Moscow City's ordinance on assembly, for example, gives this power to a city government as well as a discretionary right to deny a permit on speculative grounds regarding "possible" violations of public order. Finally, to start an association or a party, people must register with the government which is empowered to scrutinize the program, the charter, and the by-laws, and has discretion to deny registration. Freedom of association is thus licensed.

The policy of *glasnost* has released the freedom of expression, but totalitarian traditions and those who would rather preserve them, try to limit it. *Glasnost* is not only freedom of speech, it is also freedom of information, openness. However, the cloak of secrecy still covers many parts of the government machinery. "The right to know" is not yet enjoyed by Russian citizens. We are far from having such laws as the Freedom of Information Act or the Privacy Act.

Despite the revision of the criminal law provisions that previously allowed the prosecution of political dissent, the potential for abuse is still

present. Generally worded, Article 70 (anti-Soviet propaganda) of the Russian Criminal Code was the main tool of repression. It was revised, and now the government can prosecute, we are told, only for "public calls for violent overthrow or change of the government and social system secured by the Constitution." This revision was considered to be progressive even by academician Andrey Sakharov.

But in fact, it is worded almost exactly as that part of the Smith Act of 1940 which made punishable advocacy for violent overthrow of the government. In 1975, the Smith Act, which punished pure speech, was frozen by the Supreme Court in *Yates v. United States*.<sup>5</sup> Further, in *Brandenburg v. Ohio*,<sup>6</sup> the Court set forth a test based on "imminent lawless action" to punish speech. I wonder how many years of development will be required for Russian constitutional jurisprudence to reach that test, if it is now employing what the United States had written into law in 1940 and effectively rejected in 1957?

In 1990, the Supreme Soviet of the Union of Soviet Socialist Republics passed a statute, which would not withstand the American constitutional scrutiny. This statute made it a crime, punishable up to three years of imprisonment, to publicly insult the President using "indecent" expressions. I recall that in *Cohen v. California*<sup>7</sup> the United States Supreme Court held that an American who is willing to express him or herself regarding the policy of the government or any of its officers, can freely use any expressions, including obscenities. With the fall of the Soviet Union and of its first and last President, the Union of Soviet Socialist Republics' law of 1990 has naturally become inoperative. But the "punishing political speech" instincts of certain political quarters are still there. In the summer of 1992, in the course of revising the Criminal Code, the Russian parliament suggested passing a provision which made it a crime to publicly insult any highly positioned officer of the state. In the United States, a special zone has been created around governmental officials within which an individual, critical of their policies, may use any expressions. While in Russia, however, certain forces are trying to create such a zone with a quite opposite goal, to silence those who in their criticism of the government, may prefer to use free expressions.

The laws that I have mentioned, along with the flag desecration statute in force, limit political speech and expression, and preserve the potential for politically motivated repressions.

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5. 354 U.S. 298, 314 (1957).

6. 395 U.S. 444, 447 (1969).

7. 403 U.S. 15, 16 (1971) (for example, "fuck the draft").

Built-in statutory devices, which may tend to chip away newly gained rights and liberties, are complemented by vagueness in statutes. Such principles as "facial overbreadth" or "least restrictive means" which have been established by the United States Supreme Court would puzzle our legislators.

Certain forms of political speech connected with conduct may require regulation. However, our law-makers under the pressure from the right, try to regulate all. In doing so, they forget that any regulation means control which may lead to arbitrary restrictions. Indeed, why should there be a law on religion, or on the press? For instance, I state in my public lectures: America is a "lawless" society, two hundred years passed since the adoption of the Bill of Rights, yet they still do not have a law on the freedom of religion, or a statute regarding freedom of the press. After a pause, I add that these freedoms are sacred there.

It is true that "laws on the books" are not enough; there must be more. The following thought, expressed by Judge Learned Hand, fits perfectly into my country's situation:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.<sup>8</sup>

This admonition must be taken to the hearts of Russians. Even a perfect legal system could not by itself assure democratic liberties. Still, one element of such a system is critical. Inadequate place of this element in our system is another huge roadblock. The element to which I refer is the judiciary.

A bill of rights can become a practical reality only in a democracy where the supremacy of the independent judiciary is firmly established, and where the judiciary vested with the power of judicial constitutional review is the ultimate guarantor of rights and liberties. Our society, however, does not yet have such a judiciary.

Russian courts are not empowered to exercise judicial review of legislative or executive enactments. Although it was argued that at least the

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8. Learned Hand, Address at the "I am American Day" ceremony in Central Park, New York, New York (May 21, 1944), in *THE SPIRIT OF LIBERTY, 189-90* (Irving Dilliard ed. 1960).

Supreme Court of Russia should be vested with the power of constitutional review, the legislature has made another choice—the Constitutional Court. As a separate body, this Court was established to judge the constitutionality of statutes, and executive and administrative enactments. The problem with this Court, is that it passes constitutional judgments in disputes which are not based upon actual cases and controversies. In reality, it means that if some statute or executive act is not favored by a certain political group, the group may petition the Constitutional Court, even if such a statute or act does not inflict actual injury. Thus, the typical constitutional standards and requisites of standing such as: "injury in fact," "real interest," "mootness," "abstract issues," and "political question," are truly foreign to the operational framework of the Constitutional Court of Russia. Furthermore, the establishment of such a Court as a tribunal, separate from the regular court system, has deprived the judiciary of its most important power—the administration of justice through the fundamental law of our country, its Constitution. Under the law of the Constitutional Court, whenever a dispute arises in a regular court regarding the constitutionality of a statute or administrative regulation, it is automatically transferred to the Constitutional Court. It is my belief, that by not allowing regular courts to apply and interpret the Constitution, the legislature has drastically diminished the roles of the judiciary in our society.

The judicial branch is far from being on an equal footing with the two other branches of the government; the judiciary in a renewed Russian statehood is truly "the least dangerous branch."

Another feature of the judiciary in Russia which undermines its proclaimed independence is that the courts operate under the supervision of the Ministry of Justice. Although this governmental agency does not have law enforcement powers and is charged with all kinds of legal work for the government, it is still part of the Executive. Organizationally and logistically, courts are dependent on the Ministry of Justice despite all the talk about separation of powers and judicial independence. This is the contradiction which has to be dealt with zealously in order to achieve a truly independent judiciary.

I have indicated only the largest roadblocks on the way to a bill of rights. There are some others. We have instances of abuses of executive powers. For example, in the fall of 1992 ex-President Gorbachev and his staff were unexpectedly and without any due process, ejected from the premises of "the Gorbachev Foundation" which they legally rented. Additionally, in the sphere of freedom of speech, the "heckler's veto" is wide spread. Activities of the legislature sometimes remind us of those days of American development, which were referred to as "legislative tyranny."

For example, in the summer of 1992, the Russian parliament attempted to control the critical press by trying to establish an oversight committee. However, once the fear is eliminated, the hope is still there.

Russia is now in the process of drafting a new Constitution. One part of the draft, which deals with rights and liberties of citizens, is worded in such a way that it takes the shape of a bill of rights in a civilized democracy. It places the highest value on liberties and natural and inalienable rights of human beings. It commands that "the enumeration in the Constitution and the laws of certain rights and freedoms shall not be used to disparage other rights and freedoms retained by an individual." It proclaims popular sovereignty, and its Preamble starts with the words "We, the People . . ."

When I see these moves to ensure constitutionalism, I become optimistic. There is a Latin maxim *Per Aspera ad Astra*—Through Difficulties, Through Thorns to the Stars. In Russia we are now moving painfully through a political thorn-bush. However, we are not just scratching ourselves; we finally see the stars. I firmly believe that Russia shall reach the once unreachable, her stars of Liberty and Justice for All.