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Improving Russia's "Investment Climate": Will the Latest Wave of Judicial Reform Succeed?



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President Dmitry Medvedev appears perfectly to understand the crucial importance of judicial reform if Russia is to attract significant investment. On 4 February 2010, at a meeting to which I will refer further below, he said the following:

"... the investment climate in our country is directly dependent on the judicial system efficiency. Every time I meet with Russian entrepreneurs or foreign investors, they always say the same thing: if Russia is to have a first-class investment climate, the judicial system has to develop, mature and be able to effectively discharge its responsibilities."

Since the early days of his Presidency, Medvedev has been highly critical of what he terms "legal nihilism" in Russia. On 10 September 2009 in his unprecedented article published on the internet, entitled "Go Russia!", Medvedev described Russian as having "a primitive economy based on raw materials and endemic corruption." He promised "measures to strengthen the judiciary and fight corruption", but also declared that "An effective judicial system cannot be imported."

He then very specifically promised:

"Our judicial system must be a central component here. We have to create a modern efficient judiciary, acting in accordance with new legislation on the judicial system and based on contemporary legal principles. We also have to rid ourselves of the contempt for law and justice, which, as I've said repeatedly, has lamentably become a tradition in this country... We need to eliminate attempts to influence judicial decisions for whatever reasons. Ultimately, the judicial system itself has to understand the difference between what it means to act in the public interest or in the selfish interests of a corrupt bureaucrat or businessman... It is the job of the courts with broad public support to cleanse the country of corruption. This is a difficult task but it is doable. Other countries have succeeded in doing this".

Those statements not only amount to a startling indictment of the present state of the judicial system in Russia, but highlight the crucial role of the judiciary in eliminating corruption and helping to modernise Russia.

The urgency of Medvedev's call has been confirmed many times by those seeking to invest in Russia. In October 2009, Bill Browder, whose Hermitage Capital Management was one of the largest foreign portfolio investors in Russia by 2005, told an audience at Stanford University that "Anyone who would make a long-term investment in Russia right now, almost at any valuation, is completely out of their mind. My situation is not unusual. For every me, there are 100 others suffering in silence." As if to confirm Browder's fears, the Hermitage lawyer Sergey Magintsky, who, on Browder's behalf, had been fighting corruption in Russia, died in custody in Moscow on 16 November 2009. As I show below, his death provoked a furious scandal in Russia and abroad.

The need for reform was highlighted in October 2009 with the publication of another report ordered by Institute of Contemporary Development (ICD) – President Medvedev is the Chairman of its Board of Trustees – and prepared by the Centre for Political Technology. This report is entitled "The Judicial System of Russia. The Fundamentals of the Problem." The report was based on qualitative sociological research carried out in 2009, by means of expert interviews in several regions of Russia with judges and retired judges, advocates, academic lawyers, business people and NGOs.

The report concluded that the main problem for the judicial system in Russia is not its corruption, which does not exceed the level of

corruption in Russian as a whole, but the high level of dependence of judges on government officials. The research showed cases which do not concern the interests of government bodies are decided objectively. But in the most significant cases judges protect the interests of the officials and not those who are actually in the right. A case decided in accordance with the law, but not in the interests of officials, will be overturned on appeal and returned for further consideration. And the more frequently judgments are overturned, the more grounds there will be for dismissing a judge who has simply decided according to law. Judges bear these unwritten rules in mind, and make their own conclusions as to which cases to decide according to law and which not.

The research revealed all the levers by means of which the dependence of judges is maintained within the system itself. The most important factor in the work of judges, the report says, is fear and dependence on the chairman of the court. The chairman of every court has powerful levers for putting pressure on judges. The chairman decides on the distribution of cases to particular judges, awards bonuses, and resolves the judges' housing problems. The promotion of a judge is decided by the chairman, and the chairman may take disciplinary proceedings against a judge right through to the judge's dismissal. At the same time, the chairman of any court in Russia is appointed and re-appointed by the President of the Russian Federation, which ensures the chairman's dependence on the authorities. Thus, a rank and file judge when taking a decision must keep an eye on the court chairman, and the chairman in turn must correctly interpret signals from the Kremlin, the local administration, influential government officials, politicians and businessmen.

Thanks to these levers, government officials have at their disposal a "directed" court, which can be used in part as a disciplinary mechanism and as an instrument for advancing the interests of particular economic groups.

The report also contains statistical data showing that the rate of acquittal in non-jury cases is less than 1%. The judges themselves recognise that acquittals are reversed on appeal 30 times more often than convictions. This is why convictions predominate, and there is a fear of acquitting. The authors of the research conclude that the present position of judiciary may be improved by attracting competent professionals to the ranks of the judges, but it will not be possible to retain them. They also consider that the number of complaints to the European Court of Human Rights will continue to grow. They add that the contemporary Russian judicial system, as in the Soviet times, cannot lead to independent justice. This does not mean that every judicial decision is dictated by someone or other. It means that any decision in any case may be dictated.

It will be a complex task to reform the judicial system. According to Vyacheslav Lebedev, the long-serving Chairman of the Supreme Court of the Russian Federation, there are 25,000 judges of general jurisdiction in Russia, and in 2009 the President appointed altogether 2000 new judges. In 2009 363 judges of general jurisdiction were on the instructions of their court chairman. Of them 61 were dismissed. A judge dismissed in this way also loses rights to compensation and to a pension. 302 judges received warnings, and nine were subjected to criminal proceedings, five of them for intentionally handing down grossly unjust decisions.

Lebedev also revealed that in 2009 there were 602 jury trials, 12% more than in 2008, and with an acquittal rate of 18.7%. However, 19% of acquittals were overturned on appeal. This must be set against the fact that in 2008 alone the courts of general jurisdiction heard 13,400,000 civil cases, 1,100,000 criminal cases, and 5,682,000 cases

concerning administrative violations (misdemeanours).

Since October 2009, there have been two dramatic and positive developments. First, on 21 November 2009, the Constitutional Court of the Russian Federation ruled that as a result of Russia's signature of Protocol 6 to the European Convention on Human rights (ECHR), and despite the fact that it has never ratified, Russia may not impose the death penalty. This was, effectively, abolition.

Second, on 15 January 2010 the State Duma finally voted to ratify Protocol 14 to the ECHR, on reform of the procedure of the Strasbourg Court, which Russia had signed in May 2006 and long delayed ratifying. The Federation Council voted in favour on 27 January, and President Medvedev signed the Law on Ratification on 4 February 2010. Russia was the last of the Council of Europe's 47 member states to do so.

Are these harbingers of real reform?

President Medvedev marked the occasion by inviting the heads of the highest courts in Russia – Valeriy Zorkin, Chairman of the Constitutional Court, Vyacheslav Lebedev, Chairman of the Supreme Court, and Anton Ivanov, Chairman of the Higher Arbitrazh Court – along with other senior officials from his Administration, to his residence at Gorky outside Moscow, where, as I noted above, he stressed the vital importance of judicial reform for Russia's economic future. He also expressed the hope that as a result of his proposed reforms, Russians would be less likely to turn to the Strasbourg Court. The greatest number of applications, one quarter of the total, come from Russia – 11,000 in 2008 and 14,000 in 2009.

Also on 4 February 2010 Medvedev's ICD published another report, entitled "*21st-Century Russia: Reflections on an Attractive Tomorrow*" signed by the influential commentators Igor Yurgens and Yevgeny Gontmakher. An article in the English-language *Moscow Times* reported many Russian commentators writing off the report as PR by Medvedev.

At the centre of its argument the report placed the necessity of judicial reform. This provoked a high degree of scepticism. Alla Ivanova in the *Nezavisimaya Gazeta* rejected the proposals as proposing the "Ukrainisation of the whole country" (a reference to Lenin's vision of the "electrification of the USSR"). The sober business daily *Vedomosti* commented with a headline "Back to the future..." – a section of the report is entitled "Back – to the Constitution", and in the view of the *Vedomosti* article many of the proposals appear to signal a return to Yeltsin's policies.

This is not the first attempt at judicial reform since the collapse of Communism in 1991. The fall of the USSR was preceded by publication of the *Conception of Judicial Reform* published on 24 October 1991, and the enactment on 22 November 1991 of the *Declaration of the Rights and Freedoms of the Person and Citizen* by the Supreme Soviet of the RSFSR. The Constitutional Court, created as the USSR reached its death-throes, started work in January 1992, followed on 26 June 1992 by enactment of the Law "On the Status of Judges of the Russian Federation". On 16 July 1993, enactment of the new Part X to the Criminal Procedural Code (UPK) introduced jury trial, as an experiment, in nine Russian regions.

In a second wave of reform, President Putin from 2000 to 2003 expressly referred to himself as following in the footsteps of the great reforming Tsar, Alexander II, and his law reforms of 1864. Putin too presided over creation of a system of justices of the peace; installation of jury trial throughout Russia with the exception of Chechnya; enhanced judicial status; and a much reduced role for the prosecutor in criminal and civil trials.

The reforms of 2001-2003 were driven through the Russian Parliament against strong opposition from the Prokuratura, and included the three new procedural codes enacted from 2001 to 2003, Criminal, Arbitrazh (Commercial), and Civil, as well as the radical improvements to Yeltsin's Criminal Code of 1996, 257 amendments in all, which were enacted on 8 December 2003. However, this second phase of legal and judicial reform from 2000 came to an abrupt end in late

2003, simultaneously with the arrest of Mr Khodorkovsky and the destruction of YUKOS.

What, then, of President Medvedev's proposed reforms? Will they succeed where the two previous waves have manifestly failed?

On Friday 29 January 2010 the State Duma unanimously approved at first reading a package of laws to reform the judicial system, presented by Medvedev's administration. The most important innovation is the abolition of the present appeal by way of cassation – appeal on a point of law, where success means a new trial in the first instance court. Instead there will be appeal by way of rehearing, where the appeal court will be able to render its own final decision. At present such appeal is only possible from the Justices of the Peace, the lowest level of the courts of general jurisdiction.

There are now five draft laws before the State Duma concerning judicial proceedings and the judicial system itself. According to the advocates from the leading law-firm Padva & Epshtein, as reported on the lawyers' web-site *Pravo.ru*, the most important of these draft laws are:

- 1) Introduction of appeal by way of a new hearing leading to a new judgment, in civil cases in the courts of general jurisdiction. This will take the place of cassation leading in all cases to reference back to the lower court, and the possibility of supervisory review (nadzor), which can re-open a case long after a final judgment has been delivered. Supervisory review has been condemned by the European Court of Human Rights in a series of cases, since it violates the principle of legal certainty. Supervisory review will now be restricted to the very highest instance, the Presidium of the Supreme Court.
- 2) Amendments to the law governing the corporate bodies of judges, especially in the Supreme Court, strengthening the self-organisation of the judges.
- 3) Changes to the procedure for subjecting judges to criminal investigation.
- 4) Changes to the laws on the system of judges of general jurisdiction, one of which is a Law of the Russian Socialist Federation of Soviet Republics of 1986. The objective of the changes is to strengthen and simplify the existing system, which will continue to have the Supreme Court of the Russian Federation at its head.
- 5) Amendments to the laws governing the Arbitrazh (Commercial) Court system in Russia, making possible a combined plenum of the Supreme Court and the Higher Arbitrazh Court. Thus, where a necessary common position can be taken with regard to both the Arbitrazh Courts, and the Courts of General Jurisdiction.

The law introducing appeal by way of re-hearing will come into force on 1 January 2012.

Yuriy Nikolaev of Nikolaev & Partners took the view that in order to cure the judicial system, not only structural reforms will be needed, but the replacement of the majority of the present judges. It is a question of psychology, he said. If a person has been dependent all his life, he cannot take objective decisions. One whole generation of judges must be replaced. And Tamara Morshchakova, former Deputy Chairman of the Constitutional Court, and a formidable commentator, pointed out on *Pravo.ru* on 24 February 2010 that the task of reform is formidable. If a judge seeks to oppose the other state powers, she is simply "eaten up". To this day, Russian judges are not separated from the other organs of state power, and judicial independence is simply not guaranteed.

Are the proposed reforms simply PR by Medvedev? There are two recent comparators.

On 18 February 2010 President Medvedev announced what appeared to be a radical reform of the Ministry of the Interior (the police) sacking a number of generals and giving the Minister, Mr Nurgaliyev, one

month to come forward with radical plans. Many commentators were sceptical, seeing these actions as further evidence that Medvedev is escalating his pre-election campaign against Prime Minister Putin, and showing that it is he who controls the "force ministries". And Ilya Barabanov, writing in *"The New Times"* on 22 February 2010, sees this as simply a "clean-up of uniforms". Most of those dismissed were either about to retire or were the subject of scandals.

These changes for the police followed Medvedev's appointment, on 3 August 2009, of Aleksandr Reimer as head of Russia's penitentiary

system, FSIN. The death in detention of the lawyer Sergey Magnitskiy was followed by a series of dismissals, and on 19 February 2010 Mr Reimer used unprecedentedly strong language in summing up the results of 2009, accusing his subordinates of lack of system, sloppiness and slackness. But many of those dismissed were in fact reformers, who had made real progress in humanising the system.

In the not too distant future it will be possible to make a firm judgment as to whether Medvedev's proposals are the genuine article, or simply an attempt to position himself to continue as President. ■