

national rankings compiled by the likes of the World Economic Forum and the World Bank. With this in mind, Russian efforts appear almost entirely inappropriate for the task in hand.

Ultimately, then, despite the promise of significant resources being allocated to the likes of energy efficient technology, nuclear technology, space technology and communication, pharmaceuticals, and strategic infor-

mation technology, the fact that Russian industrial policies are not appropriate for the domestic context means that modernization Putin-style is quite unlikely to result in anything other than, at best, the development of small 'enclaves' of innovation, weakly linked to the wider Russian economy, and too small to generate wide-scale economic modernization.

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Acknowledgement

The articles in this issue of RAD are products of a Norwegian Institute of International Affairs (NUPI) research project "Modernizing the Russian North: Politics and Practice", which is funded by the Research Council of Norway.

ANALYSIS

Raiding in Russia

By Richard Sakwa, Kent

Abstract

Raiding has become one of the characteristic features of Russia in the twenty-first century. Raiders rely on their positions of authority and typically act with government approval, and often in concert with governmental authorities, to exert an improper influence on the prosecution process, in particular with the courts and the police. Applying the model of the dual state, this article notes the salience of instances of 'reiderstvo' from Yukos to Hermitage Capital. The political orders associated with the constitutional and prerogative states are locked in a stalemate. Meta-corruption operates in an economy of rents and political factionalism and is beginning to create a distinct order of its own. The entwining of political and criminal activities damages government, the courts and the investment climate and impedes modernisation.

Two political orders are locked in a stalemate in contemporary Russia: the constitutional state based on the rule of law and institutionalised processes, and the prerogative state operating outside of the constitutional constraints to which it is formally committed. This 'prerogative state', or as we call it, the administrative regime (*Verwaltungsstaat*), represents a distinctive case of 'domain democracy', where the rules applied to the rest of society do not apply to itself. The tension between these two principles of governance characterises Russian politics. Each of the two orders has its own logic and supporters, but the systemic paralysis provoked by the tension between these two pillars generates legal nihilism and opportunistic rent-seeking by officials, law-enforcement agents and economic actors and has allowed the consolidation of a third force.

Meta-corruption

Raiding (known as *reiderstvo* in Russian) has become not only an economic phenomenon, but also something permeating social life. The term is used to describe all sorts of attacks by one agency against another. For example, when in September 2011 Father Vsevolod Chaplin, the head of the public relations department of the Moscow patriarchate, called for women to observe a modest 'dress code', this provoked a furious reaction and a court case against a journalist who condemned the church's intervention in daily life. The journalist, Boris Obratsov, was accused of 'extremism', applying Article 282 of the Russian Criminal Code which provides a wide range of reasons to prosecute dissent, and the whole episode was called 'raiders in cassocks'.¹

1 Aleksandr Kukolevskii, "Reideram v ryasakh" naznachili tsenu', *Kommersant-Vlast*, No. 38, 26 September 2011.

Raiders and their activities are typically directed from the highest level of society and are endemic in the political fabric. The attack on the Yukos oil company from 2003 onwards can be interpreted as a spectacular case of *reiderstvo*. The defining feature was the instrumental use of the courts and the tax system to achieve political goals. The Yukos affair amply demonstrated the ability of the regime to apply 'telephone law'; that is, to influence judicial outcomes desired by the regime.² It was a classic case of a 'prosecution to order' (*zakazannoe delo*) accompanied by the malpractices that became known as 'Basmanny justice'.³

There are numerous other cases that can be considered examples of raiding, notably the attack on Togliattiazot (Toaz) and against Yevgenii Chichvarkin, the head of the mobile phone and electronics company, Evroset. The tensions between the two pillars of the dual state are also revealed in the Volgotanker, Russneft, TNK-BP, and Hermitage Capital (which will be discussed below) cases, to list just a few. This is far more than the venal corruption which is so much commented on as the defining feature of contemporary Russia, but what we can call meta-corruption: the systemic corruption of the constitutional order by the administrative regime and its agents. The entwining of political and criminal activities degrades government, in particular the law enforcement agencies, and undermines the autonomy of the courts and popular trust in them. Corporate raids of this sort, moreover, damage Russia's reputation and undermine its investment climate.

'Raiding' entails the hostile attack of one corporate entity against another, often accompanied by physical 'raids' by armed state organs. A report on the subject by the Centre for Political Technologies (CPT) defines raiding as:

'The illegal ... seizure of property ... The winning of control in the widest sense by one company over another by using both illegal and legal methods; the seizure of shares by provoking business conflicts; ... a way of redistributing property, which in essence is banditry, but which formally conforms to some sort of judicial procedure'.⁴

In contemporary Russia, raiding is categorised by various colours: 'black raiding' relies primarily on illegal methods; 'grey raiding' uses a combination of semi-legal

and illegal means; while 'white raiding' relies on semi-legal actions alone.⁵ In launching the CPT report, Alexei Makarkin, the vice president of CPT, categorised the raid on Toaz as 'one of the most glaring examples of a corporate raid in modern times, alongside Yukos, Arbat-Prestige, Eldorado and East Line'.⁶ In raids of whatever colour, criminal proceedings are used to force a business competitor to relinquish their stake to the raider, usually at a considerable discount or for no value at all. State agencies and officials are often complicit in such corporate raids.

The ability of corporate raiders to conduct hostile illegal takeovers, via the abuse of office by law-enforcement officials and the abuse of courts, is described in vivid language by another report on the phenomenon:

'A new danger is stalking Russian business, and spreading quickly to the regions. A new powerful force has arisen, for which the first priority is just to get rich, never mind how; the worst thing is the consequences which ensue after it is used in artificially provoked corporate conflicts. It is like a plague of locusts, leaving behind it nothing but naked fields and the remains of a harvest completely destroyed. The lack of preventive measures like laws or other barriers has created a very beneficial environment for this evil to flourish. Small and medium business might be completely destroyed, and taken under the control of raiders'.

In a climate in which the court system, the forces of law and order, and the supervisory authorities collude with the raiders, 'there is no possibility of combating illegal captures effectively'.⁷ The former mayor of Moscow, Yuri Luzhkov, called raiding a form of 'economic terrorism'. Raids in Russia are not comparable to mergers and acquisitions activity in the West, which can help economic efficiency and enhance market capitalisation, because in Russia raiders typically 'are normally not interested in the production process'.⁸

Hermitage Capital Case

The Hermitage Capital case has joined with the Yukos affair to become symbolic of the rise of what has become the third pillar of the Russian state, a criminal-administrative-business (CAB) network that has been forged in the crucible of *reiderstvo*. For a decade after having established its presence in Russia in 1996, Hermitage Capital Management, associated with HSBC, was the largest foreign investor in the Russian stock market. In

2 Alena Ledeneva, 'Telephone Justice in Russia', *Post-Soviet Affairs*, Vol. 24, No. 4, October–December 2008, pp. 324–50.

3 *Basmannoe pravosudie: Uroki samooborony: Posobie dlya advokatov* (Moscow, Publichnaya reputatsiya, 2003); www.ip-centre.ru/books/Basmannoe.pdf.

4 Centre of Political Technologies, *Reiderstvo kak sotsial'no-ekonomicheskii i politicheskii fenomenon sovremennoi Rossii: Otchet o kachestvennom sotsiologicheskome issledovanii* (Moscow, Tsentr politicheskikh tekhnologii, May 2008).

5 *Ibid.*, p. 13. The various colours are defined at pp. 13–14.

6 Mikhail Mkrtychyan, 'Ne na tekhn napali', *Samarskie izvestiye*, 21 May 2008.

7 A. V. Kitz and V. V. Zhagornikov, 'Administrative and Court Resources as a Weapon in the hands of the Raiders', *The Jurist*, No. 10, 24 October 2005, pp. 45–48, at p. 45.

8 Yuri Alexeyev, 'Raiders on the Attack', *Financial Control*, No. 11, 16 November 2005, pp. 64–71, at p. 64.

November 2005 it came under sustained attack, taking the classical form of a corporate raid, and in the end had to fight false bankruptcy proceedings. Its founder, Bill Browder, has further been classified a threat to national security and denied entry to Russia. The basic strategy of the hedge fund was clear—to improve corporate governance and thus to achieve added value for stockholders. Browder and Hermitage Capital publicly exposed the corruption in some of Russia's largest state-owned companies, and thus challenged the interests of highly-placed officials in government. The exposure of fraud and corruption clearly antagonised powerful sections of the Russian elite. The resources of the state, including the Ministry for Internal Affairs (MVD), the Federal Security Service (FSB), the General Prosecutor's Office (GPO) and the arbitration and civil courts have harassed and intimidated Browder and his associates. It is clear that the affair is an egregious case of the spillover of factional conflict into the business and legal arena.

Lawyers acting on Hermitage's behalf have been intimidated and targeted by police for searches and questioning as witnesses, in violation of lawyer-client privilege (a tactic also used in the Yukos affair). On 20 August 2008, the Moscow offices of all three law firms representing Hermitage (none of which were associated with each other) were raided by police, in particular those of the Moscow-based American legal services and auditing firm Firestone Duncan, in which the lawyer Sergei Magnitsky was a partner, and those of independent lawyers Eduard Khairtdinov, Vladimir Pastukhov and Vadim Gorfel. Documents granting the lawyers powers of attorney to represent Hermitage Capital in the courts were seized, thus impeding their ability to represent their clients, who were scheduled to appear in court that week. At the end of August, they were called to Kazan to act as witnesses in the case, against Article 8 of the Russian Law on Lawyers, which prohibits the questioning of lawyers concerning cases in which they are involved.

Khairtdinov, a former judge and lawyer in private practice in Moscow, filed more than thirty complaints on Hermitage's behalf questioning the actions of the government and law enforcement officials, and subsequently faced apparently retaliatory criminal proceedings. A criminal case was opened against Khairtdinov at the end of November 2008, for allegedly using an invalid power of attorney, and on 2 April 2009 a criminal case on the same grounds was opened against Pastukhov. The precarious balance in Russia's power order now looked lost. The system appeared to be out of control as both the constitutional state and the administrative regime were left helpless, and this particular CAB appeared to get away, literally, with murder. The Her-

mitage Capital affair demonstrated the ability of rogue elements to play the system with impunity.

The Hermitage case is an example of the fraudulent appropriation of private property. The case involved the fraudulent transfer of three Hermitage companies (Mahaon, Parfenion and Rilend) and a subsequent tax fraud using these companies. Browder and Hermitage Capital protested vociferously to the Russian authorities, and it appears that in response 'a number of spurious retaliatory criminal cases have been lodged against Browder, his colleagues, and four lawyers from four separate law firms'.⁹ It was precisely the discovery of the fraudulent transfer of ownership of these three companies and subsequent tax fraud that Magnitsky discovered and exposed. In 2008 he gave three witness statements to the Russian authorities in which he stated that the frauds could not have been committed without the use of documents confiscated by MVD officials from Hermitage's offices during the various raids. He highlighted the role of a certain MVD Lt-Col Artem Kuznetsov in their seizure. The last of these statements was delivered on 7 October 2008.

On 24 November 2008 Magnitsky, who had helped Hermitage Capital expose abuse of office and fraud, was arrested by three of Kuznetsov's subordinates and placed in pre-trial detention. Bail was refused by a criminal court. On the same day his law office at Firestone Duncan was searched by police, and in contravention of Russian procedural law, the firm's lawyers were not allowed to be present. His detention was extended on a number of occasions, even though in the first four months he was not questioned on a single occasion.

Magnitsky was kept in poor conditions in the Butyrka prison, where he compiled a 40-page dossier of abuses. On 11 September 2009 he sent a petition to Oleg Silchenko of the MVD's investigative committee, protesting about the lack of evidence in his case and the conditions of his detention:

'[T]he investigators arranged for physical and psychological pressure to be exerted upon me in order to suppress my will and to force me to make accusations against myself and other persons. In particular, the investigators repeatedly proposed that I testify against William Browder in exchange for a sentence to be suspended during the trial and freedom. Every time, when I repeatedly rejected these propositions by the investigators pushing me to be dishonest, the conditions of my detention became worse and worse'.¹⁰

⁹ American Helsinki Association, 30 December 2009.

¹⁰ 'English Translation of Complaint by Sergey Magnitsky to General-Prosecutor Yury Chaika', available from <http://www.scribd.com/doc/22654312/Sergey-Magnitsky-Complaint-to-General-Prosecutor>.

On 16 November 2009, aged only 37, he died after having been transferred to the Matrosskaya Tishina jail hospital (the Butyrka does not have a hospital). He had been diagnosed as suffering from pancreatitis and gall-bladder inflammation, but had been deprived of adequate medical attention and died of pancreatic necrosis, caused by acute toxicological shock. Even here his suffering did not end, since the death certificate stated that he died from acute cardiovascular failure no autopsy was allowed.¹¹ It also subsequently came to light that he had probably been severely beaten in his final hours.

A report on Magnitsky's death published on 29 December by the Moscow Public Oversight Commission, an agency responsible for monitoring prison conditions, made a series of hard-hitting comments. It found that 'psychological and physical pressure was exerted upon [Magnitsky]'.¹² A report on the Hermitage Capital case noted the parallels with the Yukos affair: 'Lawyers acting for the oil giant frequently complained of intimidation, including searches of their offices and confiscation of sensitive documents. Since then, Russian prosecutors have attempted to disbar 14 lawyers who represented Yukos defendants'. The report quotes Jamison R. Firestone, the managing partner of Firestone Duncan: 'It is now impossible in Russia to defend a client who is in a politically motivated case or in a [commercial] case where the other side has a lot of money and is willing to play dirty. At worst, you will end up in prison, in exile, or dead'.¹³ Ella Pamfilova, a former deputy of the State Duma and chair between 2004 and 2010 of the Presidential Council on Civil Society Institutions and Human Rights, noted that dying in prison had become an occupational hazard of being a businessperson in Russia. This was confirmed by the death of Vera Trifonova, a Russian businesswoman in pre-trial detention facing charges of fraud, on 30 April 2010, just six months after the death of Magnitsky. She too was denied appropriate medical care at the Matrosskaya Tishina detention facility (SIZO).

Despite Medvedev's promise to launch an investigation into Magnitsky's death, most of those apparently responsible for his death remained at liberty. The list now extends to some 60 individuals. Rather than being prosecuted, many were instead given awards for exemplary work. In October 2010 Silchenko, for example, was promoted to lieutenant colonel. There was pres-

sure in the European Parliament and the US Congress for them to be banned from foreign travel.¹⁴ US Senator Cardin and a US Representative introduced Bills on 29 September 2010 designed to freeze the assets and block the visas of those responsible for Magnitsky's death. On 23 November 2010, the Foreign Affairs Committee of the European Parliament approved, by a vote of 50–0, a call for EU-wide visa sanctions and asset freezes for those responsible for his death. A resolution to that effect was passed by the European Parliament on 16 December 2010.

Does Duality Still Exist?

The Hermitage Capital case reveals both sides of the dual state. Civil society defenders of the constitutional state prepared reports and condemned the actions of the perpetrators. Even the Presidential Council, mentioned above, investigated Magnitsky's death and detailed the abuses to which he had been subjected and named those responsible. The abuses were indeed defined as malpractices by the Russian public sphere, and ultimately remained susceptible to remedy. However imperfect the 1993 constitution may be, it provides the framework for the development of a pluralistic political society and open public sphere, and as long as the system remains dual, there remains a dynamic of renewal. During the Putin presidency (2000–2008), especially in the early years, considerable effort was devoted to strengthening the judiciary as an institution and the legal system as a whole. Measures included the adoption of a new Criminal Procedural Code, shifting the power of detention from prosecutors to the courts, significant wage rises for judges to insulate them from the pressure of bribes, an increase in the number of judges by a quarter, and an extensive programme of court building and refurbishment.

The Russian government, and in particular the presidency under Dmitry Medvedev from 2008, recognised the harm that *reiderstvo* inflicts on the country and its international standing. Its ability to remedy the situation, however, was caught in the broader contradictions of the Russian polity. The dual state model helps provide a framework to analyse the struggle between Medvedev's reform initiatives, conducted under the banner of modernisation and the struggle against legal nihilism, and entrenched interests, whose most powerful manifestation is the phenomenon of raiding. The main legislative innovations of the Medvedev era include reform of the police (MVD), limitations on the use of incar-

11 Philip Aldrick, 'Russia Refuses an Autopsy', *Daily Telegraph*, 20 November 2009, p. B3.

12 Report of the Public Oversight Commission for Human Rights Observance in Moscow Detention Centers, *Review of the Conditions of the Detention of Sergei Magnitsky in the Pre-Trial Detention Centers of the City of Moscow*, Mimeo.

13 Jason Bush, 'Russia's Lawyers Under Attack', *Business Week*, 29 January 2009.

14 'Cardin Urges Visa Ban for Russian Officials Connected to Anti-Corruption Lawyer's Death', *Helsinki Commission News*, 26 April 2010; www.csce.gov, 26 April 2010. [Media, vol. 1, item 16; see also Media, vol. 2, item 73]

ceration for economic crimes, anti-corruption laws, and attempts to defend the independence of the judiciary.

Medvedev's programme of controlled reform and modernisation sought to bridge the two pillars of the dual state in an evolutionary manner. The achievements, however, were minor, while the failings became increasingly obvious. His reforms were undoubtedly ambivalent, but the results were not entirely nugatory. The tension between the two systems endures, but the phenomenon of raiding demonstrated that a third force has emerged.

Conclusion

Putin's years in power saw the consolidation of a type of selective corporate state, with a consistent policy of incorporation of active social actors and the creation of para-constitutional bodies that subverted the work of the formal constitutional organs designed to do the work of representation and interest articulation. The result was a drastic decline in political pluralism and general competitiveness in the political system. Medvedev did not

repudiate the entrenched elements of corporatism, but sought to relax its parameters and to extend its scope to encompass some of the excluded. In that sense, he was very much a moderniser rather than a liberal. He sought to improve the operation of public institutions, and thus to strengthen the constitutional state. Taken individually, his measures were unable to change the system; but their cumulative impact suggested a movement away from corporatist inclusion towards a more pluralist social order. We now know that Medvedev's gradual decompression was not enough to strengthen the constitutional state to the point that it could challenge the administrative regime to create a more balanced and inclusive social and political order. Worse than that, the continued phenomenon of raiding demonstrated the consolidation of a third pillar and yet another source of attack on the constitutional state—the various criminal-administrative-business groups. The system remains locked in a stalemate whose outcome is unclear.

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Acknowledgement

The author gratefully acknowledges the support of the Norwegian Institute of International Affairs (NUPI) project 'Modernizing the Russian North: Politics and Practice', 2011–2013, funded by the Norwegian Research Council (project number 209365/H30).

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