

The Unexpected Demise of Russia's High Arbitrazh Court and the Politicization of Judicial Reform

By Peter H. Solomon, Jr., Toronto

Abstract

The closing of Russia's successful High Arbitrazh Court and its merger with the Supreme Court, an unpopular and disruptive move, struck informed observers in Russia as an arbitrary political decision. As such, it joined other recent initiatives vis-a-vis the courts that reflected political expediency rather than the needs of the courts or aspirations of their reformers.

Bolt from the Blue

On June 24 2013 at the Petersburg Economic Forum, Russian President Vladimir Putin announced his decision to close down the High Arbitrazh Court, the 70-judge body that stood at the top of the hierarchy of arbitrazh (or commercial) courts, and merge it with the Supreme Court of the Russian Federation (which already had 120 judges). There had been no earlier public discussion of such a development, especially within the judicial community, and the official explanation that this move would eliminate the occasional conflicting interpretations of law among the two high courts struck most observers as lame. The decision was especially strange because the High Arbitrazh Court was an exceptionally well managed and effective court that served the needs of the business community.

Further details about this revolutionary change became known only in stages, first with the submission in October of a draft law on the necessary constitutional changes and then in February 2014 of draft laws implementing the merger. Putin signed the legislation on February 6, 2014. The strong objections, warnings, and suggestions from judges, legal scholars, and the business bar were all but ignored, by both deputies in the State Duma and the drafting group in the State Legal Administration of the President. Discussion in the State Duma of the law on constitutional changes was rushed and superficial, with all three readings happening within ten days. Such haste had become common for bills that mattered to the President.

The imminent closing of the High Arbitrazh Court in the summer of 2014 raises questions about how well courts in Russia will handle business disputes in the future. It is also worth considering how this initiative connects to the long term pursuit of judicial reform in the Russian Federation and what it says about President Putin's approach to policy in the legal realm during this third term as President.

The Court Merger and Its Consequences

The High Arbitrazh court, along with the rest of the arbitrazh courts, came into being in late 1991. As formerly

state owned firms started to privatize in the late 1980s, the bodies that had handled disputes among them—the tribunals of state arbitrazh (within the executive branch)—were forced to act as courts, a fact soon recognized by their change in status. Specializing in business disputes and disputes between business and government, the arbitrazh courts soon developed a reputation for competence not shared by all courts of general jurisdiction. Moreover, in the past decade the arbitrazh courts led the way in automation (including the capacity to file claims by computer), in transparency (publication of decisions on websites and in databases), and in procedural and operational simplifications that helped them serve the needs of business firms—mainly because of inspired direction by the High Arbitrazh Court (HAC).

Replacing HAC will be a thirty judge collegium for economic disputes within the structure of the Supreme Court. The new collegium will act as the final instance for cassation reviews of decisions rendered by the three remaining levels of arbitrazh courts, which will continue to operate as before. These courts are about to lose some jurisdiction to the courts of general jurisdiction, including over challenges to the legality of economic regulations and the calculated value of land in cadastre surveys. More important, the management of their budgets and court administration will be handled for the first time by the Judicial Department under the Supreme Court and its regional branches, which service the courts of general jurisdiction; previously, the staff of the HAC performed these functions.

In theory, the merger of the courts could have been effected with the same judges continuing in place, but the positions on the new economic collegium of the Supreme Court will not be assumed automatically by current judges on the High Arbitrazh Court. Rather, all aspirants for positions on the new Supreme Court (including current members of both high courts) have to make applications and pass muster of a special qualification commission made up of judges from regional courts chosen by regional councils of judges (a procedure that seems to denigrate judges of HAC and the Supreme Court). In other words, with the merger of courts comes

an opportunity for rotation of judges (perhaps a violation of judges' constitutional rights), and in practice the dismissal of judges perceived by their colleagues to be nonconformists, including from HAC.

As it happens, not all judges on HAC were prepared to join the enlarged Supreme Court. Not only did they not fancy working in new conditions, but many did not want to move to St. Petersburg! Early in 2013 President Putin had announced another unexpected and unpopular decision, to move both the Supreme Court and High Arbitrazh Court from Moscow to Petersburg, where they would join the Constitutional Court that moved in 2006 and create a "city of courts" (against the wishes of many of its residents). With the merger there would be only one Supreme Court left to be moved, but the prospective disruption in the lives of judges and court staff, with spouses who work in Moscow, dachas in the region, and children and grandchildren nearby, remained intolerable. The earlier move of the Constitutional Court was seen by many as an act of judicial counterreform, designed to produce a more compliant court with less competent staff. If Petersburg lacked the depth of legal talent to support the Constitutional Court (19 judges, 200 staff), how much greater would be the challenge for the Supreme Court (170 judges, 1,000 staff)? In short, the court merger and the move to Petersburg ensured that some of the most experienced judges in handling business disputes would retire.

It was also unclear what would happen to the accumulated wisdom of HAC reflected in its guiding explanations and most important published decisions. In his response to the initial draft law on the merger, the Head of HAC Anton Ivanov called for clarification of the status of these materials, but Duma leaders handling the bill refused, even suggesting that it would be a good thing if the jurisprudence of HAC were forgotten! Gratuitous insults may reflect the culture of the Duma, but the concerns expressed by Justice Ivanov remain valid. Judges on the arbitrazh courts throughout Russia cannot achieve consistency in their decisions without guidance from HAC. In short, the way that the merger has been conducted thus far promises confusion and inconsistency in the handling of business disputes, and this augurs ill for the business and investment climate in the Russian Federation.

Authentic Judicial Reform versus Political Expediency

The current merger of the two high courts has no connection to the main tendencies of judicial reform that date back to the 1990s. It is not part of the many efforts to enhance the independence or the power or accountability of judges or to make the operation of courts more

efficient or accessible (as did the creation of a new layer of the court system, the Justices of the Peace in the early 2000s). But over the past seven years (from 2007) initiatives relating to the courts reflected outside political goals as often as they did the needs of courts or the values normally served by judicial reform.

Three of the reform initiatives of these years were supported by the judicial community and aimed at improving the administration of justice. These include the attempt to improve public knowledge and opinion about courts through adding press secretaries to courts and developing their websites to include posting of decisions; improving the protections of judges by eliminating the initial probationary period for new appointees and adding a Disciplinary Tribunal to review decisions about firing for cause; and promoting efficiency by replacing cassation review of court decisions with an appeals procedure whereby the second instance court rendered decisions in cases rather than sending them back for retrial.

At the same time, there was also a series of initiatives that did not help the courts and reflected political priorities, sometimes in a glaring way. Thus, to cut down on the embarrassment of so many Russians bringing complaints about their courts to the European Court of Human Rights in Strasbourg, the Russian Supreme Court was authorized to review some categories of complaints and to provide monetary compensation.

Other political initiatives imposed on the courts, though, were less benign. Trial by jury, introduced in 1993 and available throughout most of the RF from 2002, was a cornerstone of the effort to reduce accusatorial bias in criminal trials and make acquittals normal as opposed to a statistical rarity. For the hundreds of cases at regional courts that had jury trials, this was the result, and acquittals in jury trials averaged 15%, with only one third of these verdicts rejected by higher courts. Needless to say, police and procuracy officials did not like jury trials, nor did some persons in the presidential administration. Twice in the past seven years, the range of offenses open to the jury option has been narrowed, first with the removal from juries of political cases, including terrorism (in 2008) and secondly (in 2013) with the transfer from regional courts to district courts, which do not use juries, of trials for thirteen offenses involving maximum sentences in the 15 to 20 year range (including kidnapping, attacks by armed groups, some sexual offenses, and the formation of criminal societies). Changes to the operation of the Constitutional Court in 2010, including both its *modus operandi* and the appointment of its chair and deputy chair, put this body under closer control of the President. And, the decision to move the Supreme Court and High Arbitrazh Court to St. Petersburg reflected President Putin's

personal decision to enhance the political status of his home town, even at the cost of harming and/or marginalizing the courts.

As these examples show, the politicization of judicial reform and legal policy can take two forms. One is the pursuit of initiatives that have little if any connection at all to the quality of the administration of justice or needs of the courts (such as merging or moving the high courts). The other is the adoption of measures that counter or reverse a pattern of reform and represent counterreform (narrowing the jury; controlling the Constitutional Court). This latter counterreform tendency has also dominated developments in both criminal and criminal procedure law since Putin's return to the presidency in 2012. Instead of Medvedev's emphasis on cutting down excessive and inappropriate use of the criminal sanction (in his "humanization of criminal law program"), Putin has used criminal law to both curtail civil society (extending treason; harassing NGOs) and mobilize support from conservative social groups (the anti gay laws and criminalization of speech offensive to believers).

Moreover, in winter 2014 the State Duma was considering returning to the Criminal Procedure Code the concept of "objective truth" (*istina*), a change that threatened the promotion of adversarialism that lay at the heart of the post-Soviet reform of criminal procedure in Russia. If this change is adopted, the judge in a criminal trial will be expected, as in Soviet times, to help the prosecutor uncover the facts rather than serve as a neutral umpire, and to make rulings on the basis of "truth" as well as evidence. This initiative had strong support from the Head of the Investigatory Committee, Alexander Bastrykin, whose investigators sometimes had trouble providing the evidence needed for conviction.

Politics and the Court Merger

The merger of the two high courts exemplified the first form of politicization, a decision that has little or no con-

nection to the policy area at hand, namely the improvement of the courts. However, with the court merger it is unclear whose interests are served by the change and why it was initiated. Insiders in the legal and political worlds of Moscow often cite such personal factors as a desire to undermine the position of the Chair of HAC Anton Ivanov, whose allegedly extravagant lifestyle allegedly offended some in the leadership and who had refused to resign; and/or to find a comfortable future position for Dmitrii Medvedev, a possible pretender for Chair of the new combined court (the current head of the Supreme Court Viacheslav Lebedev is in his early 70s and has health problems). Such rumours cannot be confirmed, but their persistence must trouble judges throughout Russia. There is also a view expressed by a rare defender of the merger (writing for TASS, the government news agency) that it constituted a healthy response to the (allegedly) haughty attitudes of arbitrazh court judges and their business clientele, who had "created VIP courts for their own use and disparaged the other courts available to simple people (the plebs)". Whether or not such social engineering played a part in the decision, it did have a whiff of a "put down" for someone.

Whatever provoked the merger, it did not advance the cause of impartial adjudication, the value at the heart of authentic judicial reform. Nor did it connect to the current agenda of reformers within Russia, which features reducing the power of chairs of courts and changing the evaluation of judges' performance so that they need not fear displeasing superiors or powerful persons. Nor would the merger improve the efficiency of the administration of justice, which, to informed observers, requires the creation of a separate hierarchy of administrative courts, not the demise of the High Arbitrazh Court.

About the Author

Peter H. Solomon, Jr. is Professor of Political Science and Criminology, University of Toronto.