

Analysis

Can President Medvedev Fix the Courts in Russia? The First Year

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Abstract

President Dmitry Medvedev's reform of the judicial system does not address the real problems that the courts face. In practice, judges have little scope for independence in controversial or politically important cases because they are beholden to their superiors for promotions and a variety of perquisites. Likewise, there is a longstanding bias in favor of the prosecution. Medvedev's reforms seek to make judges more accountable, limit pretrial detention, and humanize criminal law, but they do not address the fundamental issue of judicial independence by decreasing the power of chairs of courts or increasing judges' sense of professionalism.

Disjunction between Reforms and Problems

One of the goals of Russia's 1993 Constitution was to make courts and judges independent so that they would deliver impartial judgments even in cases that were controversial or involved powerful players. Since the end of the Soviet era, Russia has put into place most of the institutional protections associated with judicial independence—including security of tenure with removal only for cause upon approval of peers; decent funding of the courts, including judicial salaries; and control by judges of organizational support for the courts. But, as of 2009, observers of justice in Russia, including President Dmitry Medvedev, recognized that, such institutional protections notwithstanding, many judges still faced pressures that could compromise their neutrality—both outside attempts to influence their decisions and systematic biases in the work of courts.

Arguably, the failure to achieve full and authentic independence for individual judges represents the greatest deficit in Russian justice today, a deficit that must be addressed before the courts in the Russian Federation (RF) will be trusted by most of the public. Medvedev seems to recognize this, but his many commitments on legal and judicial reform, while admirable, do not promise a remedy. I reach this conclusion after contrasting the sources and mechanisms of inappropriate pressures faced by judges with the president's judicial reform agenda as of spring 2009.

Informal Practices Limit Judicial Independence

How can one account for the failure of institutions in the Russian Federation to protect judges? One reason is the persistence of informal practices in the administration of justice that dilute the impact of institutional protections and shape the conduct of judges. Another is the limits on the practical meaning of judicial reform set by cultural factors and the larger political context.

Let us start with security of tenure as an example of what can happen once informal practices are taken into account. The law states that after a three-year probationary period judges who pass fresh scrutiny of their bureaucratic and political masters as well as their peers receive appointments for life. But if those judges ever seek promotion to a higher court or appointment to the post of chair or deputy chair of a court, they must face the same careful scrutiny by the same set of players, including the heads of the relevant high court and officials in the presidential administration. The result is that making a successful career as a judge requires meeting the expectations of the figure who must write the crucial recommendation (the chair of the court), as well as judges on higher courts. Suppose that our judge is not ambitious. Even so, she must avoid offending the chair of her court because in reality that figure can engineer the judge's dismissal. To be sure, a judicial qualification commission (JQC) must find in the judge's conduct grounds for dismissal, but the commissions are commonly under the thumb of the corresponding chair of the regional court, who in turn tends to respect the views of chairs of district courts, and the latter often find pretexts to dismiss judges whose real sin lies in lack of deference to the chair or to the informal norms of conduct for judges, such as the avoidance of acquittals. Last fall, the JQC of Volgograd region dismissed Judge Elena Guseva, who refused to provide regular reports to her chair on all cases in progress that involved officials or governmental bodies, a demand that she believed violated judicial independence. The Supreme Judicial Qualification actually supported the dismissal, but was overruled on April 2 by a RF Supreme Court panel that decided that Judge Guseva had been right after all. Then, the Court reinstated the judge, an act that commentators welcomed as a landmark.

Moreover, the power of chairs of courts over their judges plays a vital part in the process of outside influ-

ence on judges. It is common practice for powerful politicians or business people to approach the chairs of courts for favors, which the latter feel compelled to provide in order to maintain good working relations. Usually chairs can assign cases to judges known to be cooperative (although experiments with random case assignment could temper this). For their part, most judges acquiesce to the chair's bidding. Failure to do so could result in losing discretionary perks and in critical reference letters, if not also in disciplinary measures.

Another informal practice that affects judicial impartiality is the accusatory or prosecutorial bias, reflected in the avoidance of acquittals and use of alternatives such as compromise decisions and sending cases back to investigators or procurators for new evidence. In practice judges in Russia avoid acquittals because they lead to negative evaluations of the judge's performance. Judges are also expected to avoid overrules, a norm that encourages conformity with the anticipated view of higher court judges. These expectations are built into the system of evaluating the performance of judges. The rate of acquittal in judge-only trials remains less than one percent; in contrast to the 15 percent at trials by jury.

A Difficult Context

The development of informal practices that undermine the formal protections of judges has not taken place in a vacuum, but reflects contextual and cultural factors. One such factor is the attitudes of politicians and officials toward law and courts. Within public administration in the RF the status of law remains murky, and regulations are based less on the laws than on officials' involvement in networks of exchange. Many officials and politicians treat laws as instruments to serve the interests of those who can mobilize them. There are also problems with the mindsets and culture of judges. In part because of the organization of the judiciary in a bureaucratic hierarchy, in part because of deficiencies in training, judges in Russia lack a strong sense of professional identity. They see themselves more as functionaries than as professionals with a distinct mission. Yet, judges who thought of themselves as professionals would be more likely to care about the quality of reasoning in their decisions, and to resist inappropriate attempts to influence them.

The Content of Real Reform

So, what steps might be taken to improve the conduct and effectiveness of judges? I see as especially promising measures that would reduce the power held by the chairs of courts or increase the professionalism of judges

in Russia. Following a reform in 2002, chairs of courts now serve for two six-year terms (plus the remainder of previous terms). While the need for reappointment makes chairs accountable to their superiors, they remain bosses of their domains. I like the proposal made by jurists close to German Gref in 2006 to have chairs elected by their peers on the court (rather than appointed from above) and for terms of a mere three years. With the resulting rotation, chairs might turn into chief judges rather than bosses. To be sure, chairs would have less management experience, but this deficit could be remedied by shifting more administrative functions to court administrators, a position created only seven years ago. The latter would need higher status and pay to aid recruitment of skilled personnel. Moreover, the leaders of the judiciary would need to be convinced that gains in the independence of judges justified loss of power on their part.

Finally, I am convinced that measures to enhance judicial professionalism would help a lot. Judges with a sense of pride and commitment to an ethos of judging will be less likely to misbehave than judges for whom handling trials is simply a job and approval of superiors more important than standing in the profession. Judicial professionalism will come from changes *in recruitment* (more jurists from full time day faculties and unconventional work backgrounds), *in training* (a serious well designed program for new judges similar to the judges school in Bordeaux, France) and *from a transformation* of the system of evaluating judges. Instead of statistical measures of performance, assessment should be more skills-based (as in Germany) and put a premium on how judges do their work rather than on the content of their decisions. Perhaps, judgments could be more closely associated with particular judges, so that especially good ones develop public profiles (like Anatoly Koni in Tsarist times). The personal dimension of judicial activity, while less prominent in Europe than in North America, helps to make leading judges into figures of attention and respect in many Western countries, which in turn can lead to public veneration and the promotion of role models for young judges.

Medvedev's Actual Reforms

How, then, has Medvedev reacted to the situation in the courts? He began a year ago with strong statements in favor of judicial reform, and last fall he continued along these lines, first in the Annual address to the parliament (the *Poslanie*) and then in his appearance at the 7th Congress of Judges, where he committed himself to a series of reform initiatives, some of which have al-

ready become law. These included measures to enhance the accountability of judges, such as compulsory declarations of income and assets by not only the judge but also members of his family; and initiatives to improve the transparency and accessibility of courts, including compulsory publication of most court decisions starting in July 2010.

In addition, Medvedev supported four initiatives whose realization calls for major expenditures, which the Ministry of Finance is loathe to approve. These include a draft law that would give the Supreme Court the authority to hear complaints against delays in criminal trials that now go to the European Court of Human Rights in Strasbourg, along with funds to spend on awards to complainants—to which the Government on behalf of the ministry has already objected; a proposal to raise the salaries of court staff; and a plan to shift from governments of the subjects to the federal government responsibility for supporting the justices of the peace—a change that the federal government cannot presently afford. The president also called for the expansion of legal aid to better cover civil cases through the creation of new legal bureaux at the municipal level, an idea given detailed expression in a draft Conception of Legal Aid and a draft law submitted to the State Duma. If and when such a law gets passed, its impact will depend upon the level of funding provided.

Medvedev has also spoken repeatedly about the need to humanize the criminal law. Already the Supreme Court has called for a reduction in the use of pretrial detention (asking judges to be stingier in approving requests from procurators). At the same time, a team in the Ministry of Justice is preparing proposals for changes in the Criminal Code.

One Medvedev initiative connects to the reform agenda that I am promoting, that is the need to recruit more judges from backgrounds other than court secre-

tary, prosecutor or investigator. But overall, the president's program for the courts falls short of addressing most of the fundamental issues that prevent judges in Russia from gaining true independence. The president has not even mentioned measures to deprive chairs of their power, or for that matter of undercutting the power of the Supreme Court and High Arbitrazh court over their respective hierarchies (similar initiatives are being discussed in the Parliament of Ukraine). President Medvedev is surely aware of these problems, and he was reminded of these and other aspects of the "bureaucratic management of the courts" and its dysfunctions by Professor Tamara Morshchakova (retired justice of the RF Constitutional Court) in her presentation on April 15, 2009 to a meeting of the Council on Developing Civil Society and Human Rights chaired by the president personally.

Morshchakova also called for an expansion in trial by jury in the Russian Federation as a vehicle for improving criminal justice overall. Her argument had special irony, because of a new law from last December eliminated the jury option in cases involving terrorism and other political matters. Although the law was not associated directly with the president, he chose not to spend political capital opposing it.

In short, while President Medvedev cares about the state of the courts, the financial crisis and the interests of top judges and other state officials set limits on which reform measures the president pursues and what he can accomplish. One can hope that the president's personal interest will protect the courts from the savage budget cuts that they experienced during the financial crisis of the late 1990s. One can also hope that with time the voices within Russia that criticize the dependency still experienced by individual judges will influence the thinking and conduct of the president.

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