

change the situation because the people responsible for enforcing the new laws remain the same.

It is possible that inserting civil society into the bilateral relationship between the state and business would

improve the effectiveness and transparency of the deals that are carried out. Such a possibility deserves further investigation.

About the Author

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Further Reading

- Official site of the Federal Anti-Monopoly Service: <http://www.fas.gov.ru>
- Official site of the Audit Chamber: <http://www.ach.gov.ru/en/>
- Information site on Russian forests: <http://forest.ru>

ANALYSIS

The Magnitsky Case and the Limits of Russian Legal Reform

By William E. Pomeranz, Washington, DC

Abstract

Sergei Magnitsky died in November 2009 after spending 11 months in pretrial detention. The reforms adopted after his death highlight the difficulty of fighting entrenched interests to make Russia's criminal justice system compatible with the government's modernization efforts. Medvedev initiated changes in Russian law, but has not succeeded in changing the behavior of law enforcement agencies. Putin's declaration that Mikhail Khodorkovsky should remain in jail just before the court announced its decision in the second trial suggests that the courts will continue to be used for political purposes.

Two Prisoners

Two proceedings dominated Russia's legal landscape during 2010. The first one, obviously, was the second prosecution of former oil magnate Mikhail Khodorkovsky. That trial reached its predictable conclusion on December 27, 2010 with the conviction of Khodorkovsky and his co-defendant, Platon Lebedev. The other prominent case concerned Sergei Magnitsky, a successful corporate lawyer who died in November 2009 after spending 11 months in pretrial detention. But whereas the public greeted the Khodorkovsky verdict with a sense of resignation, the Magnitsky controversy continued to resonate more than a year after his death. The Magnitsky case, in fact, sheds an important light on what has been President Medvedev's signature initiative to date, namely his fight against legal nihilism and call for broader legal reform. In the wake of Magnitsky's death, Medvedev intervened to promote an investigation of the circumstances surrounding both Magnitsky's failure to

receive medical treatment and his long imprisonment without trial. Medvedev also pushed forward new legislation to limit the use of pretrial detention procedures, yet by the end of 2010, Medvedev still had not managed to remove the stain of the Magnitsky affair from the Russian legal system.

The Detention of Sergei Magnitsky

The Magnitsky case stands at the confluence of two of the most destructive trends in Russian law: the politicization of the criminal justice system and the spread of corruption within law enforcement. William Browder ran one of the largest foreign investment houses—Hermitage Capital Management—in Russia. Browder was famous both for his rather upbeat assessment of the Russian market and his repeated demands for greater transparency within Russian companies. The latter clearly irked Russian state officials, and in November 2005, Browder was denied a visa essentially for political reasons.

The second shoe against Browder dropped in November 2007, when the Interior Ministry began an investigation into Hermitage that ultimately resulted in the Ministry seizing the company's computers, certificate of registration, and corporate seal. A massive corporate fraud proceeded to occur whereby low level Interior Ministry officials illegally seized control of three of Mr. Browder's subsidiary companies and, through rigged legal proceedings, received a \$230 million dollar tax refund.

Into this investigation stepped Sergei Magnitsky, a Russian lawyer for a U.S. law firm who uncovered the fraud perpetrated against Hermitage and so informed the authorities. For this initiative, Magnitsky himself was arrested, denied bail, and charged with tax evasion in what was a less than subtle attempt to pressure him to testify against Hermitage. Magnitsky never turned, however, despite being subject to horrendous prison conditions. As Magnitsky's health deteriorated, his desperate pleas for medical care were summarily rejected by the chief investigator in the case. Magnitsky died in November 2009 of pancreatitis, although the official investigation into Magnitsky's death later claimed he died of a sudden, and unexpected, heart attack.

Magnitsky's death struck a nerve in Russian society. It turned out that he was one of thousands, if not tens of thousands, of Russian business professionals who have landed in jail for engaging in what generally would be considered normal business practices. Instead of creating wealth and pursuing innovation—the supposed objectives of Russia's modernization program—these entrepreneurs increasingly found themselves facing dubious criminal charges that served as a pretext to extort businesses, property, money, or in some instances, all three.

Medvedev's Response

Magnitsky's untimely demise in custody drew significant media attention to the above practice. As a result, President Medvedev authorized an independent probe within two weeks of Magnitsky's death, to be conducted by the Moscow Public Oversight Commission, a non-governmental organization formed under the auspices of the Russian Public Chamber. On December 28, 2009, the Commission issued a scathing report on Russia's prison system and the psychological and physical pressure that Magnitsky endured during his time in pretrial detention. The Commission added that some wards in Butyrka prison (the last prison that Magnitsky was held in) could justifiably be called tortuous. The Commission further criticized the investigator, the prison medical staff, the judge, and the procuracy's office, all of whose actions—and negligence—ultimately contributed to Magnitsky's death. The case of Sergei Magnitsky, the

Commission concluded, “can be described as a breach of the right to live.”

Medvedev further used the Magnitsky matter to intervene directly into the Russian criminal justice bureaucracy. He fired 20 top federal prison officials in December 2009, including the chief of the Butyrka prison. He also later dismissed the deputy head of the Federal Penitentiary Service and the head of the tax crimes department in the Moscow branch of the Ministry of Interior.

Medvedev moved on the legislative front as well. He quickly signed a law banning the detention of people suspected of tax-related crimes. He also called for more far-reaching changes to the Russian Criminal Procedure Code to stop the abuse of pretrial detention procedures. Medvedev's amendment, ending pretrial detention for certain types of economic crimes (fraud, embezzlement) if they were committed in the area of entrepreneurial activity, subsequently came into force on April 9, 2010. In May 2010, Medvedev once again was drawn into this controversy when a prominent businesswoman, Vera Trifonova, died in pretrial detention in what was again alleged to be an attempt to extract false testimony. In this instance, Medvedev ordered Alexander Bastrykin, the head of the Investigative Committee, to look into Trifonova's death.

Medvedev's initiative was backed up by other actions both inside and outside the government. In June 2010, the Russian Supreme Court issued a plenum decision that sought to clarify the meaning of the phrase “entrepreneurial activity.” This term was not clearly defined under Russian criminal law; as a result, judges were refusing to release detained business people, claiming that these persons were not engaged in “entrepreneurial activity” *per se*. In order both to address this legislative gap and to stop this practice, the Russian Supreme Court's plenum decision referred judges to the Russian Civil Code's definition of this term.

Non-governmental organizations also got into the discussion of how to prevent the criminalization of legitimate business activity. Most notably, the Center for Legal and Economic Studies, a Moscow-based NGO consisting of prominent judges, lawyers, and scholars, issued its “Concept of Modernization of Criminal Legislation in the Economic Sphere.” As this report made clear, Russian criminal law had yet to catch up to the changes in civil legislation that had occurred since the adoption of the 1993 Russian Constitution. This legislative disconnect—along with the excessively broad interpretation of criminal statutes by Russian law enforcement—served as the major contributing factors in the arrest of Russian business people. Therefore, the report proposed the elimination of several criminal provisions,

including the article covering “illegal entrepreneurship,” to ensure that normal commercial activity was not criminalized. The Center presented its findings on September 16, 2010 to the Russian parliament, which appeared to be seriously considering at least some of the report’s recommendations.

Russian Law Enforcement Fights Back

The above efforts were not without consequence. Some entrepreneurs, with the notable exception of Khodorovsky, were released from pretrial detention as a result of the new legislation. In his case, the court found that the criminal charges levied against him in the second prosecution were not related to the types of entrepreneurial activity covered by the new amendment to the Criminal Procedure Code. There was also a noticeable decrease in the number of people arrested during the first half of 2010, a drop that was attributed, in part, to the new restrictions on pretrial detention. At the same time, however, Russia’s law enforcement authorities found ways to thwart Medvedev’s initiative and the intent of the new legislation. Indeed, the Russian Supreme Court felt compelled to issue the above plenum explanation because investigators were not observing the new procedural requirements. According to Chairman of the Russian Supreme Court, Viacheslav Lebedev, in 80 percent of the cases involving persons charged with economic crimes, investigators simply did not refer to the appropriate provisions of the Criminal Procedure Code, thereby failing to indicate that the alleged charges were related to entrepreneurial activities.

Russia’s investigative organs began to wage a more aggressive counter-attack during the second half of 2010. Far from being punished, the Magnitsky investigators were honored by the Ministry of Interior for their work on the case. The procuracy further chose not to investigate the lavish spending spree of the principal investigator in the case. Colleagues of Magnitsky had alleged that the investigator’s family had spent upwards of \$3 million dollars in 2007 and 2008. Finally, in a truly Kafkaesque twist, the Interior Ministry accused Magnitsky, the whistleblower, of being the actual mastermind behind the scheme to defraud the Russian state of \$230 million.

There were other more subtle messages delivered as well. A judge in Astrakhan found herself under criminal investigation for releasing a businessman from pretrial detention based on the new amendments to the Criminal Procedure Code. The head of the law firm that originally hired Sergei Magnitsky fled to London, alleging that he had been implicated in a multi-million corporate fraud scheme similar to the one that had ensnared William Browder. Finally, new nominees were put for-

ward for membership to the Moscow Public Oversight Commission with no apparent connection to the human rights community.

Magnitsky and the “Innovation Society”

Despite such cynical attempts to whitewash the investigation, the Magnitsky affair has continued to resonate inside Russia and internationally, with the U.S. Senate, the European Parliament, and the United Nations looking into the matter. Undoubtedly, the Magnitsky case highlights the need for new legislation, particularly in the area of criminal law. It is highly discouraging that some 16 years after the introduction of the Russian Civil Code—the Russian economic constitution—the Duma still has not gotten around to revising Russian criminal law to correspond to the nation’s market economy. As a result, business activity permitted under Russian civil legislation somehow remains punishable under criminal law. On a positive front, Russian jurists have taken definitive steps to address this situation, although how their proposals get translated into law remains to be seen.

New legislation, by itself, however, will not solve the deep-rooted problems within the Russian legal system. As the Magnitsky case demonstrates, Russia also must confront certain entrenched, highly corrupt institutional interests predominant throughout the agencies responsible for law enforcement. Finding the political will for such a major assault appears more difficult. First Deputy Prime Minister Igor Shuvalov referred to the Magnitsky case as a “sad story” but argued that Russia still needed time to reform the system: “We cannot just fire all these people,” he insisted. And yet, unless and until there is a fundamental overhaul of the personnel—and mentalities—of Russia’s lower level law enforcement agencies, the strong likelihood remains that there will only be more Magnitskys in the future.

Such a prospect naturally gets in the way of Russia’s attempt at economic modernization, the oft-stated objective of Russia’s current president and prime minister. The Magnitsky case exposes just how far Russia remains from promoting such an environment; instead of encouraging entrepreneurs—and a culture of economic risk-taking—Russia has a disturbing habit of putting its business people in jail. And as the Magnitsky affair further shows, this tendency touches not just domestic economic activity but foreign investment as well. To attract those foreign investors, the Russian government has been busy over the past year promoting the Skolkovo Center for Innovation, a proposed model for modernization that holds out as one of its primary advantages the opportunity to go around the Russian legal system. Foreign companies who agree to partici-

pate would receive special legal treatment in such areas as tax, customs, land use, migration, and advertising.

Skolkovo can be seen as an indirect response to the Magnitsky affair. Its special legal regime is meant to assure international companies that they can invest in Russia with being dragged into the Russian legal system. Unfortunately, this option has been tried before (see the 1999 Law on Foreign Investments, production sharing agreements), with limited success. Skolkovo also does not cover all foreign investments—just those projects engaged in certain defined “research” activities (energy, nuclear technology, space, medical technology, computers). Finally, most Russian entrepreneurs do not have the luxury of opting out of the Russian legal system, so for most business people—foreign and domestic—Skolkovo provides little shelter from the legal risks associated with the Magnitsky case.

It appears that the Kremlin still prefers the legal bypass route of attracting foreign investment as opposed to more fundamental legal change. The Magnitsky case, in fact, exposes the outer limits of legal reform in early 21st century Russia. In this instance, Medvedev actually put his rule of law rhetoric on the line, firing top law enforcement officials and introducing concrete legal proposals to try and eliminate the abuse of pretrial detention procedures. The Russian Supreme Court backed up Medvedev’s efforts, while prominent jurists introduced sound legislative solutions to address the problem.

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And yet, despite this coherent—and surprisingly swift—response, these efforts still could not crack the intricate defenses of Russia’s law enforcement bureaucracy. Indeed, investigators seemed far more concerned with breaking the will of a single whistleblower than with recovering \$230 million stolen from the Russian treasury. Medvedev continues to talk about the need to ease criminal penalties for economic crimes. Nevertheless, the lower ranks of Russian law enforcement—in particular, the investigators—not only have weathered the storm surrounding the death of Magnitsky, they have emerged unpunished, and seemingly emboldened, from the process.

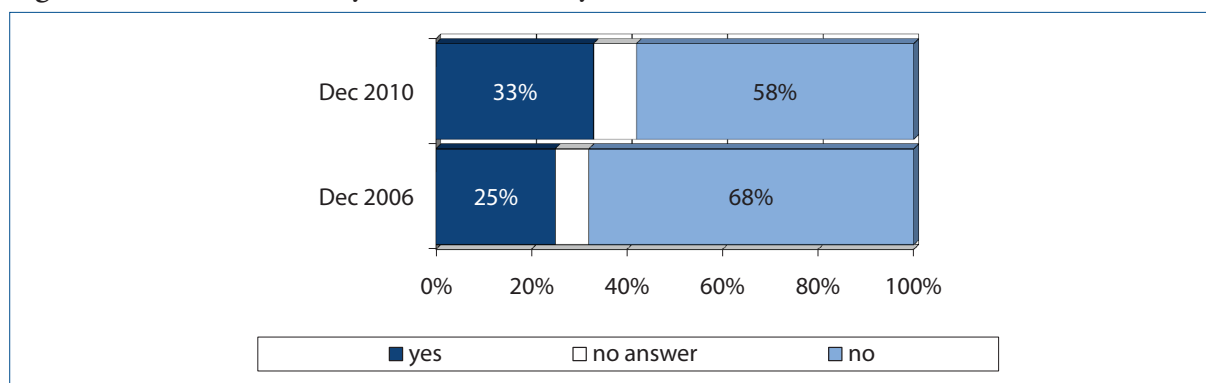
Conclusion

The Magnitsky case increasingly is looking like the high water mark in Medvedev’s effort to reform the Russian legal system. By the close of 2010, it was Prime Minister Putin who seemed to be setting the tone on legal reform, most notably, by announcing on the eve of the Khodorkovsky verdict that a thief like Khodorkovsky belonged in jail. Such a blatantly prejudicial statement indicated that the Russian legal system once again would be called upon to achieve certain political ends, particularly as a new electoral cycle begins. Medvedev could only issue a mild rebuke of Putin, suggesting that—absent his own political mandate—he has taken legal reform as far as he can.

OPINION POLL

Russian Public Opinion on the Legal System

Figure 1: Do You Personally Feel Protected by the Law?



Source: representative polls by Levada Center, 17–21 December 2010 <http://www.levada.ru/press/2011012000.html>