The Russian Court System

The Russian court system is composed of three essentially separate and distinct court systems. They are the: (1) Courts of General Jurisdiction; (2) Arbitrazh (or Commercial) Courts; and (3) Russian Federation (and in a few cases, "subject"-level) Constitutional Courts. In distinction to the legal system of the United States, both the Courts of General Jurisdiction and the Arbitrazh Courts have their own appellant structures, which do not eventually end up in a single final-instance court such as the United States Supreme Court. With respect to constitutional issues, in the Russian system, if a constitutional issue is encountered during the course of litigation in either the Courts of General Jurisdiction or in the Arbitrazh Courts, the constitutional issue is referred out to the Constitutional Court, adjudicated there, and then reported back to the appropriate non-constitutional court for further proceedings in accordance with the Constitutional Court's ruling.

In very broad terms, the Courts of General Jurisdiction adjudicate criminal and family disputes, as well as civil disputes between private individuals. The Arbitrazh Courts adjudicate disputes between business entities, although the phrase "business entity" includes individuals who are registered to do business. The Russian Federation Constitutional Court adjudicates matters which are governed by the Russian Federation Constitution. A small minority of subjects of the Russian Federation have sufficient political status to permit them to adopt their own "subject" constitutions, and therefore, their own "subject" constitutional courts.

Given the Civil Law roots of the Russian legal system, it has historically been understood that judicial decisions have had no precedential effect. Modern Russian legal theorists argue, however, that a system of legal precedents is emerging, for two reasons. First, the decisions of the Russian Federation Constitutional Court are increasingly broadly disseminated, and through their dissemination, have become recognized as law. Second, pilot projects through which the decisions of the Karelian and Archangel Supreme Courts have been published, and more recently, through which jury trial decisions of the entire Northwest Administrative District (comprising 10 subjects of the Russian Federation) have been published, have led to a broader understanding of relevant lines of court decisions. The resulting increase of awareness, within the legal profession, of relevant decisional trends, continues to sew "precedential" seeds in what was once a purely Civil Law system.

THE RUSSIAN LAWYER

The members of the Russian legal profession are essentially the same as those of the American (or other common law) system. They include (1) prosecutors; (2) advocates (private sector trial lawyers); (3) legal consultants (in-house lawyers for commercial enterprises); and (4) notaries ("transactional" lawyers, who handle mostly real estate transactions and decedents' estates).

Of these various types of Russian lawyers, notaries are the most dissimilar to their common law counterparts. Notaries can perhaps be best understood as "representing the deal", as opposed to a particular party. In the event that a disagreement arises between two sides to a real estate transaction, or between parties in interest to an estate, the transactional aspect of the undertaking is put on hold while the dispute is resolved between the disagreeing parties in court, either pro se or with separate representation. Once the dispute has been resolved, the matter is referred back to the notary, who concludes the transaction in accordance with the outcome of the litigation. It is also worth noting that Russian notaries were, historically, governmental employees. There was a brief period of time when private notaries flourished thanks to the privatization of primary residences. During this heyday, private notaries earned a fraction of the value of the privatized residences, and quickly became wealthy. However, a legislative backlash, coupled with the end of the residential privatization spike, put an end to this windfall, and since that time, the position of notary has reverted, for the most part, to a public one.

At the time of the break up of the Soviet Union, all legal professionals graduated from the same law schools. Once they graduated and began to specialize, however, there was very little professional interaction between and among them. Prosecutors viewed themselves as being part of a very different profession than notaries, who in turn viewed themselves as being part of a very different profession than advocates, and so on. It is difficult, if not impossible, to have a unified rule of law in a system in which the members of the legal profession are, themselves, fragmented.

In this respect, the creation of "unions of jurists" has been a powerful unifying force. As presently configured, these organizations, which are analogous to common law bar associations, bring together members from all walks of the legal profession, including judges. With the evolution of the rule of law in Russia, the segments of the legal profession are, indeed, becoming more similar in terms of their rights and responsibilities, and their needs and desires. The unions of jurists have become not only focal points for the legal profession, but advocacy arms as well.

Any English speaking student of the Russian legal system must be careful in using the word "lawyer". That word is typically translated as "advocate". Needless to say, significant distortion of meaning occurs when an English speaker refers to "lawyers", only to have the comment be understood by the Russian audience as excluding prosecutors, legal consultants and notaries. The correct term in such cases is "jurist", which is clearly understood to include the entire profession, including legally trained judges.

LAW SCHOOL PARTNERSHIPS

RARoLC supports partnerships between United States law schools and Russian law schools, both through its core USAID grant, and also through the Newly Independent States College and University Partnership Program (NISCUPP). This undertaking supports the following initiatives, among others: (1) curriculum development; (2) law professor and law student exchanges; (3) legal clinics; (4) computer classrooms; and (5) legal specialization programs (such as environmental summer schools).

Special mention of legal clinics is in order. This concept was unknown in Russia prior to 1994. Since then, legal clinics have been created in many parts of Russia. These clinics afford both invaluable practical experience for law students, and desperately needed free legal services for those who are least able to afford them. Clinical areas of emphasis include family law, housing law, veterans rights and domestic violence.

ADVERSARIAL METHODS

The Soviet legal system was based on the "inquisitorial model". In this model, a much greater proportion of the courtroom process falls on the shoulders of the presiding judge than is the case in the common law or "adversarial" system. In the adversarial model, the burden of introducing evidence, and carrying out the burden of proof, falls upon the opposing parties (the adversaries)...the prosecutor and the criminal defense lawyer in a criminal case, and the opposing attorneys in a civil case. A discourse on the relative merits of the two systems is beyond the scope of this introduction. Suffice it to say, however, the post-Soviet evolution of the Russian legal system has many examples of portions of the system which are evolving from an inquisitorial to an adversarial model. This evolution places significant demands on all participants. On one hand, the Russian judges must learn to be less activist, relying instead upon the opposing lawyers to carry forward their own burdens (or not), and to limit themselves to deciding the issues that are properly placed before them, rather than seeking the just result in absolute terms.

In order to become better participants in the adversarial process, prosecutors and advocates must learn the art of direct and cross examination. They must learn to conduct these inquiries in the context of a "theory of the case", which must guide all elements of evidence, tactics and advocacy. They must learn to make opening statements and closing arguments, and they must learn effective ways of proving facts and arguing points of law. Ultimately, by use of these diverse skills, they must learn to persuade.

THE AMERICAN LEGAL SYSTEM

RARoLC's philosophy is based on the premise that the Russian side chooses the subjects which are to be jointly undertaken. In most areas of the law, Russia has a long history and a deep experience. It would be foolish for us to think that we have the knowledge and background to set the agenda. We pride ourselves in supporting the Russian implementation of Russian legal initiatives. We participate in, and support, the training of Russians, by Russians, on Russian subjects. That being said, there are certain areas in which the study of American law by Russian legal professionals is warranted.

Since 1991, in order to support the privatization of real property, systems of registration of real property rights, and of adjudication of conflicting real property interests, had to be created essentially from scratch. No one is alive today who remembers first hand how real property ownership was treated before the Bolshevik Revolution. Similarly, the emergence of private commercial interests since 1991 has created the need for a dispute resolution system for which there is no historical precedent in modern day Russia. In areas such as these, a comparative study of the US system by the relevant Russian legal professional can be instructive. Likewise, when primary responsibility for search warrants, arrest warrants and pretrial detention in Russia shifted from prosecutors to judges, the American experience became relevant. Keep in mind that even though the American system might be relevant, more often than not, the American solution does not present a practical solution for modern day Russia. For example, if the United States were to implement a title registration system from scratch, it would undoubtedly adopt something much more like the Russian Torrens system, than the title recordation to which we are institutionally wedded in the US at the present time.

It is also important to note that far more Russian legal professionals can be trained in Russia for the same cost that it would take to train them in the United States. Bringing two Moscow experts to a Russian region, perhaps in conjunction with one or two American presenters, can provide an educational experience for hundreds of Russian judges and lawyers at less cost than sending three Russians to the United States for a week-long period of observation. This is not to say that worthwhile goals cannot be achieved by bringing a small number of the right Russians to the United States for carefully designed and narrowly focused programs. In fact, this can be a first step in a "train the trainers" model. Clearly, if the goal were to train Assistant United States Attorneys in the District of Vermont, it would make much more sense, and cost less money, for the U.S. Department of Justice to send someone to Vermont for two days, than to send the U.S. Attorney from the District of Vermont to Moscow to study how Russian prosecutors approach the particular issue in question.

RAROLC has been fortunate to receive substantial funding from what used to be called the Library of Congress "Billington" Program. That program is now known as the Open World Program, and over the past several years, has brought literally thousands of Russians to the United States in small groups of professionals from the same professional sphere. The Russian groups are typically four or eight in number, and come with one or two facilitators, and one or two interpreters, respectively. RAROLC has hosted many groups of Russian judges, advocates, prosecutors, law school professors, legal clinicians and more, all through this program. The

participants first spend two days in Washington, D.C., where they undergo a program of general orientation. They then go to a particular state for a one week period, where they receive both a professional program and cultural exposure. In recent years, RARoLC's Open World groups have consisted of legal professionals from RARoLC's partner Russian regions, who have spent the second portion of their programs in their partner U.S. states. This process has provided valuable professional training, and has strengthened the personal and professional working relationships between RARoLC's partnerships.

SUBSTANTIVE AREAS OF LAW

The substantive areas on which RARoLC has focused over the years have included (1) criminal law and procedure; (2) civil law and procedure; (3) commercial law and procedure; (4) real property law and title registration; (5) environmental law; and (6) bankruptcy law. The recent proliferation of new legislative enactments has created monumental tasks for legal professionals just to keep current in their fields.

RARoLC has supported training programs for segments of the profession as they have been affected by new legislation. Typically, when a new legislative enactment, such as the Arbitrazh Procedure Code, is adopted, RARoLC supports events, through local unions of jurists, at which large groups of judges, advocates and law students have the opportunity to attend presentations given by the "Moscow experts"...often literally the individuals who drafted and implemented the legislative enactment in question.

ALTERNATIVE DISPUTE RESOLUTION

When Americans think of alternative dispute resolution, they generally think of arbitration and mediation. Until very recently, neither practice was widely known or practiced in Russia. In courts, every case had to go to trial. The concept of voluntary settlement, incorporated into court orders, was unknown. The result was a great inefficiency, with simple cases taking up essentially as much time as complicated ones, and as a result, with the complicated cases not receiving as much of the judicial resources as they deserved.

The Russian Federation, and its predecessor Soviet Union, have been signatories to international treaties regarding arbitration for several decades...in fact, in some cases, longer than the United States. Nonetheless, little arbitration actually took place in Russia, and there were few instances of efforts to have Russian courts recognize and enforce foreign arbitral awards. All of this is changing, and significant efficiencies can be expected as a result.

Mediation is also gaining favor. Third party neutrals are being trained, and are educating the public about their services. Of course, in a legal system in which, historically, "whatever is not specifically permitted, is forbidden", it is necessary for Russia to adopt implementing legislation in the area of mediation. This is being discussed, and the trend is clearly leading in that direction.

The historical lack of voluntary settlements in Russia also affects the criminal courts. Historically, plea bargaining has been unknown. It is creeping into the system, however, initially in relatively minor criminal cases, and through the new institution of justices of the peace. Interestingly, Russian legal professionals view plea bargaining as a form of alternative dispute resolution.