

2017

"Great Laws, Bad Implementation" : Criminal Justice Reform in Russia Since the Fall of the Soviet Union

Taryn Strohmeyer

Follow this and additional works at: http://chicagounbound.uchicago.edu/international_immersion_program_papers

Recommended Citation

Strohmeyer, Taryn, "'Great Laws, Bad Implementation' : Criminal Justice Reform in Russia Since the Fall of the Soviet Union" (2017). *International Immersion Program Papers*. 66.
http://chicagounbound.uchicago.edu/international_immersion_program_papers/66

This Working Paper is brought to you for free and open access by the Student Papers at Chicago Unbound. It has been accepted for inclusion in International Immersion Program Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

“Great Laws, Bad Implementation” — Criminal Justice Reform in Russia since the Fall of the Soviet Union

Taryn Strohmeyer

INTRODUCTION

“We have a completely new code – the best in the world, but with the worst implementation.” This is the way eminent criminal defense attorney Murad Musaev of the law firm Musaev & Partners in Moscow described the situation in Russia since the implementation of post-Soviet reforms to the criminal justice system. This was not the first or the last time I would hear about this notion of the Russian criminal justice during my trip to Russia with The University of Chicago Law School International Immersion Program, during which a group of eleven University of Chicago Law students and myself travelled to Moscow and St. Petersburg, learning over the course of ten days about the legal regime, political landscape, history, and culture of Russia through coordinated meetings, talks, lunches, dinners, and events with lawyers, UChicago alums, professors, and advocates.

Over and over again, my classmates and I heard the same notion regarding Russia’s post-Soviet transition, which began in the early 90s with a new constitution and led to the adoption of a new criminal code. The students, lawyers, and scholars we met in both Moscow and St. Petersburg all seemed to echo the same belief that Russia has “great laws” but simply suffers from “bad implementation.” This paper will investigate this claim, analyzing what is meant by the idea that Russia has “great laws, bad implementation,” laying out some of the issues with the

Russian criminal justice transition and considering a few of the factors that might cause this impression or phenomenon.

In the first section, this paper will provide general background on Russia's transition from communism to democracy, including the adoption of a new constitution and implementation of a new criminal code. The second section of this paper will describe the problems and failings of the Russian criminal justice system that lead scholars and lawyers to decry the code's "bad implementation." Then finally, the third section outlines some of the potential contributing factors and causes of the problems described in section two.

I. GENERAL BACKGROUND OF POST-SOVIET TRANSITION IN RUSSIA

The problems of criminal justice reform in Russia today are a product of the overall transition from communism to democracy in Russia after the fall of the Soviet era. This section will briefly outline the events that led to the fall of the Soviet Union, the transition to a democratic regime, and the efforts to reform the criminal justice system in the new Russia. This section will also provide brief insight into the criminal justice system before and after the fall, and some of the difficulties faced in implementing criminal justice reform – both of which will be touched on in greater detail at other points in this paper.

a. Historical Foundations

Mikhail Gorbachev was the last leader of the Russian Communist regime. His reign, which was marked by a series of democratizing reforms, ultimately

resulted in severe economic crisis and an accompanying widespread dissatisfaction that ushered in the ultimate collapse of the Soviet era.

The Gorbachev years severely weakened the communist regime. During his time in power Gorbachev implemented the concepts of “glasnost” (openness) and “perestroika” (reconstruction of the Communist regime).¹ These essentially capitalistic and democratic reforms included implementing elections with a multi-party system, establishing a presidency for the Soviet Union, and loosening overall the central controls of the Soviet Union over the countries of Eastern Europe.² Gorbachev believed that his reforms would revitalize the Communist regime and lead it to triumph in Europe; however, they instead caused great instability and an extreme economic crisis that turned the population against him.³ Furthermore, these reforms began a “slow process of democratization” that led to the fall of the Berlin wall, worked to destabilized Communist control, and ultimately set the stage for the eventual collapse of the Soviet Union.⁴

On December 25, 1991, Gorbachev resigned his post and the Soviet Union finally fell, leaving Boris Yeltsin as the president of the new Russia.⁵ Upon the collapse of the Soviet Union, the former monolith broke apart into twelve

¹SHANNAN C. KRASNOKUTSKI, “THE HUMAN RIGHTS IN TRANSITION: THE SUCCESS AND FAILURE OF POLISH AND RUSSIAN CRIMINAL JUSTICE REFORM” 33 Case W. Res. J. Int'l L. 13, 23 (2001).

² Id.

³ Id.

⁴ United States Office of the Historian, *The Collapse of the Soviet Union* (April 23, 2017), <https://history.state.gov/milestones/1989-1992/collapse-soviet-union>.

⁵ KRASNOKUTSKI, supra note 1, at 23.

independent republics: Russia, Ukraine, Belarus, Kazakhstan, Armenia, Kyrgyzstan, Uzbekistan, Moldova, Azerbaijan, Turkmenistan, and Tajikistan.⁶ Yeltsin was ultimately able to reorganize several of the republics into what is today the Russian Federation, a single state composed of the remaining republics left after the fall of the Soviet Union; but, this marked the beginning of a rapid period of transition for the new Russia that was both economic and political.⁷

b. Transition to Democracy

The 1970s had marked the beginning of a long downward trend in economic power for the Soviet regime, which reached crescendo in the final years of the USSR.⁸ In 1989 and 1990 the USSR suffered from severe declines in outputs, extreme shortages, horrendous living conditions, and overall fear of an impending collapse.⁹ After the collapse, Yeltsin began an extensive program of radical democratizing reforms.¹⁰ “The program laid out a number of macroeconomic policy measures to achieve stabilization. It called for sharp reductions in government spending, targeting outlays for public investment projects, defense, and producer and consumer subsidies. The program aimed at reducing the government budget deficit, imposing new taxes and controlling inflation. Crucially, the reformers planned to liberalize trade and make the ruble convertible, thus opening up

⁶ United States Office of the Historian, supra note 4.

⁷ KRASNOKUTSKI, supra note 1, at 23.

⁸ United States Office of the Historian, supra note 4.

⁹ DENIS AVEN, “RUSSIA’S ECONOMIC TRANSITION: CHALLENGES, RESULTS, AND OVERHANG”, (April 2, 2013), <http://www.yaleeconomicreview.org/archives/380>.

¹⁰ KRASNOKUTSKI, supra note 1, at 23.

Russia's economy to the world.”¹¹ Furthermore, almost overnight the communist regime of the Soviet Union transformed into a multiparty democracy with regular elections and a capitalist economy based on markets, free enterprise and private property.¹²

With the fall of the Soviet Union, the new Russia also had to undertake the tremendous task of establishing a new legal regime. This involved adopting a new constitution and implementing a new criminal code. On December 12, 1993, the new Russia adopted by referendum its new constitution.¹³ While the new constitution still gave considerable power to the president and included restrictions on the sovereignty of regions within the Russian Federation, it guaranteed “a spectrum of rights: freedom of conscience, freedom of movement, freedom of the press, the right to private property and the right to own land, which the previous document restricted.”¹⁴

Then in 1997, attempts to overhaul the criminal code were finally successful when the new code was passed in the Duma.¹⁵ However, the changes were not officially made into law until current Russian president Vladimir Putin pushed the

¹¹ AVEN, supra note 9.

¹² Id.

¹³ Serge Schmemmann, *Yeltsin Approves New Constitution Widening His Role*, N.Y. TIMES, Nov. 9, 1993, <http://www.nytimes.com/1993/11/09/world/yeltsin-approves-new-constitution-widening-his-role.html>.

¹⁴ Id.

¹⁵ PETER H. SOLOMON, JR., POST-SOVIET CRIMINAL JUSTICE: THE PERSISTENCE OF DISTORTED NEO-INQUISITORIALISM, 19 J. of Theoretical Criminology 159, 166 (2015).

code through in 2001.¹⁶ The new criminal code includes over 3,500 amendments, but is still based on the old Soviet code, which limits the rights of the accused and provides no right to a jury trial.¹⁷ “An estimated 150,000 criminal cases were expected to require review based on the new code” to determine if the prisoners in such cases should be released because the laws under which they were convicted no longer exist.¹⁸ For both the new constitution and criminal code, the new Russia looked to Western Europe and the United States as models.¹⁹

c. Criminal Justice Reform

Under the Soviet era, the criminal code served to protect the interests of the state and keep the masses under control.²⁰ Judges served five year terms, were subordinated to the Communist Party, and generally carried out the wishes of the government lest they face removal.²¹ The laws, which were notoriously ambiguous, were easily mutable depending on the whims and desires of the authorities enforcing them.²² Those charged with crimes had little protection— there were no jury trials, defense attorneys were not taken seriously by the court, and judges also

¹⁶ *Justice System in Russia*, (Apr. 23, 2017), http://factsanddetails.com/russia/Government_Military_Crime/sub9_5e/entry-5198.html.

¹⁷ SOLOMON, *supra* note 15, at 163.

¹⁸ *Justice System in Russia*, *supra* note 16.

¹⁹ SOLOMON, *supra* note 15, at 163.

²⁰ Yuri N. Maltsev, *Economics of Russian Crime*, FEE, Dec. 1, 1995, <https://fee.org/articles/economics-of-russian-crime/>.

²¹ KRASNOKUTSKI, *supra* note 1, at 53.

²² *Id.*

served as prosecutors on their cases.²³ Accordingly, those charged with crimes were almost always convicted, and had little hope of overturning their sentence.²⁴

The new code, which was implemented in 2001, is a combination of European continental civil law and Soviet law.²⁵ While Soviet law retained a prominent role in the new system, reform efforts sought to model the new code after Western Europe and the United States.²⁶ This involved three primary reforms. First, the new criminal justice system aimed to increase the independence of the judiciary.²⁷ Second, the new regime sought to limit the influence of the Russian Procurator, the administrative agency responsible for criminal investigations (hereinafter “the Prosecution”).²⁸ Finally, amendments to the new criminal code were designed to change the Russian criminal justice system from an inquisitorial system to an adversarial system.²⁹

Together these reforms attempted to address the inadequacies and failings of the Soviet era criminal justice system. The reforms were expansive and pervasive, however, upon implementation, as the Sections II and III will explain in greater detail, many reform efforts fell short. These failures are presumably what led to the “great laws, bad implementation” phenomenon, which Russian legal scholars of all

²³ MIRANDA LATHROP BARBER, “REFORMING CRIMINAL JUSTICE IN RUSSIA: PROGRESS REPORT FOR THE TWENTY-FIRST CENTURY,” 13 *Transnat’l Law* 319, 321 (2000).

²⁴ *Id.*

²⁵ KRASNOKUTSKI, *supra* note 1, at 55.

²⁶ SOLOMON, *supra* note 15, at 163.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

types seem to agree characterizes the criminal justice system in Russia since the collapse of the Soviet Union.

II. BAD IMPLEMENTATION

This section investigates what “bad implementation” really looks like in modern Russia and outlines some of the primary ways in which Russia’s so-called “great laws” fail to be implemented. While the Moscow criminal defense attorney, who uttered our here-paradigmatic phrase “great laws, bad implementation,” seemed to downplay the severity of the problems with the modern Russian criminal justice regime—dispassionately commenting: “our implementation is just bad”—research reveals a system plagued by many of the same problems and injustices faced during the Soviet regime.³⁰ It would seem that despite “great laws,” “Russia is still a country where suspects can be detained indefinitely, where arbitrary, politically and even economically motivated prosecutions are common, where coercion of suspects is rampant, where the police can stop anyone on the street without any reasonable cause.”³¹

a. General

“Constitutional change becomes meaningless ... unless it is accomplished by constitutionalist procedure, which, in the practical sense, means generalized assent on the part of most if not all citizens.”³² Following the collapse of the Soviet Union,

³⁰ Maltsev, *supra* note 20.

³¹ *Justice System in Russia*, *supra* note 16.

³² Maltsev, *supra* note 20.

the new Russian Federation overhauled its criminal code, implementing a new system that was supposed to entitle defendants to professional representation, prohibit torture, ensure the independence of the judiciary, limit unnecessary or unlawful detentions, and ensure a speedy, fair trial.³³ However, actual practice has deviated from the ideals envisioned by these reform efforts, and led many to question the legitimacy of the whole system. In the words of Mark Feigin, one of the defense lawyers for anti-Putin protesters Pussy Riot, “it’s very simple—there is no justice in Russia. The decisions taken by courts bear no relation to what is actually written down in the laws of the land.”³⁴

b. Timely Justice

Criminal justice reform in post-Soviet Russia included several provisions devised to ensure timely execution of justice. However, lengthy pretrial detentions and prosecutorial delays remain a widespread problem in Russia.³⁵ Some delays are pernicious, while others are simply products of large case backlogs, lack of discipline, and in some cases negligence or incompetence.³⁶

While the Russian Constitution now prohibits detention for over forty-eight hours “except where authorized by judicial decision,” arbitrary, excessive, and illegal detention is still widely practiced in Russia today.³⁷ Furthermore, the Russian Criminal Procedure Code “sets a two-month time limit on the period

³³ KRASNOKUTSKI, *supra* note 1, at 15.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

between the opening of the investigation and the time that a file is transferred to the [Prosecution] to initiate formal court charges.”³⁸ However, the Prosecution has the discretion to extend this period up to eighteen months without any explanation to detainees.³⁹ This is made worse by the fact that bail is very infrequently offered in Russia, regardless of flight risk or type of crime.⁴⁰ Furthermore, it is not uncommon for Prosecution to arbitrarily extend this period for the purpose of extorting money from friends and family of detainees.⁴¹

The Prosecution is also notorious for creating delays due to negligence and incompetence in handling caseloads. For example, the Prosecution has a well-documented tendency to delay submitting necessary paperwork to the court.⁴² One study found that the Prosecution only submitted paperwork within the statutory time limits in one-third of cases.⁴³ The situation is so dire in some cases that some suspects “spend as much time in pretrial detention as they would if found guilty of the crime charged.”⁴⁴

c. Fair Trial

Another main focus of the post-Soviet reforms was implementing measures aimed at ensuring a fair trial. This involved measures to increase the independence

³⁸ KRASNOKUTSKI, supra note 1, at 29.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

⁴³ KRASNOKUTSKI, supra note 1, at 30.

⁴⁴ Id.

of the judiciary, limit arbitrary arrests, and afford suspects with competent legal defense. However, this has not played out upon implementation.

Judicial independence and objectivity remains a serious problem in the current regime.⁴⁵ Many judges still remain allegiant to the Party, and susceptible to its influences, despite being technically granted lifetime appointment under the new regime.⁴⁶ Many of Russia's judges retained their positions from the Soviet system and old habits die hard; and those who were newly appointed or simply do not feel such lingering allegiances are still limited by "tight financial ties to the political authorities."⁴⁷ Additionally, judges in Russia still often serve the dual role of judge and prosecutor, which limits their ability to serve as an objective arbiter of justice.⁴⁸ Judges tend to take on this double duty when the Prosecution does not appear, which occurs in approximately 60 percent of cases according to one study.⁴⁹ In such cases, the judge interrogates witnesses, presents evidence against the defendant, and makes the final determination of guilt.⁵⁰

Under the new regime, the role of defense counsel is also quite limited. First, legal defense, while technically guaranteed by law, is often too expensive or too limited in supply to be available to defendants.⁵¹ Second, the inquisitorial system in

⁴⁵ SOLOMON, supra note 15, at 166.

⁴⁶ KRASNOKUTSKI, supra note 1, at 31.

⁴⁷ Id. at 53.

⁴⁸ Id. at 55.

⁴⁹ Id. at 30.

⁵⁰ Id.

⁵¹ SOLOMON, supra note 15, at 164.

place in Russia limits the role of defense counsel in presenting cases.⁵² Third, and most strikingly, more than 99 percent of all criminal defendants in Russia are found guilty.⁵³ This means that defense counsel's role is limited to mitigating sentencing decisions since conviction is almost a foregone conclusion upon arrest.⁵⁴

III. EXPLAINING THE PHENOMENON

“From a legal standpoint, Russia has achieved a democratic system dedicated to protecting the rights of the individual. [However], [s]everal questions remain: why does the Russian system fall so miserably in practice and how does an ostensibly democratic society in the twenty-first century allow it to fail?”⁵⁵ This section considers these questions and presents a few factors that contribute to the failures in implementation, which plague the Russian criminal justice reform efforts.

a. Persisting Politicization

Political concerns play a big part in legal decisions today in Russia in that law enforcement and the judiciary seek to implement outcomes that satisfy the whims of governing parties. According to an article in the Washington Post about the Russian criminal justice system, “rules are words to dance around and laws mean what the authorities say they mean.”⁵⁶ Accordingly, one factor, to which the

⁵² SOLOMON, supra note 15, at 164.

⁵³ Marc Bennetts, *Justice for Russia's 1 Percent*, VOCATIV, FEB. 18, 2014, <http://www.vocativ.com/underworld/crime/justice-russias-one-percent/>

⁵⁴ Id.

⁵⁵ KRASNOKUTSKI, supra note 1, at 15.

⁵⁶ *Justice System in Russia*, supra note 16.

phenomenon of bad implementation in the criminal justice system in Russia can largely be attributed, is distorting political motivations and influences.

As point of illustration, take the extraordinary low acquittal rate. In Russia, there is a popular belief that acquittals are a defect of the criminal justice system.⁵⁷ Too many of these “defects” makes the system appear flawed, and by proxy, makes the government look weak and ineffective.⁵⁸ As a result of this belief, judges are evaluated on the “stability of their sentences,” or in other words, on their acquittal rates, and judges who grant too many acquittals risk being removed for poor performance.⁵⁹

This highlights another problem. While post-Soviet reform efforts attempted to increase the independence of the judiciary, the judiciary largely remains an agent of the state, rather than the people.⁶⁰ Today, judges in Russia are “career officials whose continuation in office and promotion depend upon the good will of the chairmen of their courts.”⁶¹ Judges, who grant too many acquittals, attempt creative or innovative judicial interpretations, or insist on upholding laws to the detriment of the Prosecution’s case, risk displeasing the chairman, and face the prospect of being removed from their position.⁶² This risk of removal seriously impedes the objective implementation and execution of laws in Russia because judges have their

⁵⁷ Bennetts, supra note 52.

⁵⁸ Id.

⁵⁹ SOLOMON, supra note 15, at 166.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

own professional fates in mind when determining the legal fates of defendants in their courtrooms.

More straight forward political influences also take the form of exemptions and exceptions for friends and colleagues of the political elite. President Vladimir Putin is well known for exempting government officials and wealthy businessmen from prosecution.⁶³ Furthermore, Russian police often effectuate arrests inconsistently depending on the person involved.⁶⁴

Ultimately, the State today, like in the Soviet era, remains very much involved in the implementation of criminal justice in Russia. The result is a biased and distorted process, which bends to the whims of the political elite and serves the interests of the state and judiciary over the individual.

b. Attitude

Another potential explanation for, or contributing factor to the phenomenon of bad implementation in the post-Soviet regime, could be the attitude with which post-Soviet reforms have been, and are treated in Russia. The transition from the Soviet code to the current criminal code involved a massive overhaul with thousands of amendments, which took great effort and time to be passed into law.⁶⁵ While it is understandable that such massive transition takes time to fully effectuate and perfect, judicial reform has moved slowly and many attempted

⁶³ *Justice System in Russia*, supra note 16.

⁶⁴ KRASNOKUTSKI, supra note 1, at 15.

⁶⁵ Id.

reforms, such as jury trials, have been rolled back after unsuccessful trial runs.⁶⁶ This failure in implementation reflects the pervasive attitude in Russia that the new laws are “ideals to aspire to” rather than mandatory standards.⁶⁷ This attitude can be seen in many forms throughout the criminal justice system in Russia, including the undisciplined implementation of pre-trial detention time limits, the continued removability of judges, and rampant arbitrary arrests, and likely explains why Russia’s allegedly “great” new laws are so poorly implemented.⁶⁸

b. Bad Laws

Up until this point, this paper has accepted the premise that Russia’s new criminal code is indeed comprised of great laws. However, it is worth considering the possibility that the problems, which Russia’s criminal justice has faced since the fall of the Soviet Union, might actually be the product of bad laws rather than bad implementation. According to one account, “the Russian criminal code is so oppressive and pervasive that ‘one must virtually retire to hermitage in order to avoid committing a crime.’”⁶⁹ Thus, perhaps the problem might be explained by an overly large and complex set of laws that is simply impossible or difficult to implement effectively and consistently. Another interpretation of this is that the drawn out and controversial process that the new criminal code underwent in being adopted, during which proposed changes were sacrificed, watered down, and

⁶⁶ SOLOMON, *supra* note 15, at 166.

⁶⁷ *Justice System in Russia*, *supra* note 16.

⁶⁸ KRASNOKUTSKI, *supra* note 1, at 15.

⁶⁹ Maltsev, *supra* note 20.

compromised, produced an inconsistent and/or ambiguous set of laws that is at the roots of Russia's implementation problems. Perhaps too, the bad implementation is simply coupled with bad laws, resulting in the troubled post-Soviet criminal justice regime, which Russian legal practitioners have defensively tried to minimize with the "good laws, bad implementation" phenomenon explored in this paper.

Regardless, it seems clear that further work is required to achieve a truly just, democratic criminal justice system in Russia.

IV. CONCLUSION

There seems to be truth in the commentary provided by those I met during my short visit to Russia. In fact, the simple formulation "great laws, bad implementation" seems to be the perfect, succinct way to encapsulate the problems posed by Russia's massive criminal justice overhaul in the post-Soviet years. Many of the reforms attempted to address the inadequacies and failings of the Soviet system, however, the success of such reforms has been questionable. While it is not fully clear what is at the root of this phenomenon of "bad implementation," nor is it even clear that Russia necessarily has "great laws," it is clear that Russia's criminal justice transition is not yet complete. The Moscow based criminal defense attorney might have seemed to gloss over the extent of the issues in explaining Russia's criminal justice system as a product of "great laws, but just bad implementation." However, perhaps the hope conveyed in his willingness to moderate is one way in which Russia's legal community continues to strive for a fair, just, and democratic criminal justice system.