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Criminal Prosecution and the Regulation of Business: Ending Russian Exceptionalism and Cultivating the Rule of Law

by

Peter H. Solomon, jr.
University of Toronto
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Send comments to peter.solomon@utoronto.ca

It is well known that in the first two decades of its existence the Russian Federation made the conduct of business activity on its territory difficult and risky through the unusual and excessive use of the criminal law in its regulation. To a degree the criminalization of business practices, including minor breaches of administrative rules that involve no harm or blameworthiness, emerged as a way for authorities in post communist Russia to reassert control over the unfamiliar world of private business activity. A similar tendency is found in other post Soviet countries, although not to the same degree of intensity as in Russia.[1] The prosecution of large numbers of business executives and the imposing upon them of custodial sentences is unique to Russia. It is particularly unusual in a global context. Thus, in the established capitalist countries, especially in Europe but also in Canada and the states of the USA, the criminal law is not the main tool of economic regulation and it is used only to handle serious breaches of well established offenses involving considerable harm to others and usually intent.

Not only is Russia's reliance on the criminal law to regulate business unusual in world terms, but it also causes serious harm to the development of Russia's economy. The LECS group has provided extensive documentation of this connection in reports, earlier publications, and in other chapters of this book, all of them based on thorough and impressive research.[2] Aspects of

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[1] "Poiasnitelnaia zapiska k proektu Federalnogo zakona "O vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks Rossiiskoi Federatsii," (October 26, 2011).

[2] "Symposium Ugolovnaia politika i biznes," 8 December 2011, http://www.lecs-center.org/ru/symposium081211; "Stenogramma parlamentsikh slushanii," 17 October 2011, http://www.lecs-center.org/ru/duma-171011/verbatim-17-october-duma; Kontseptsii modernizatsiia ugolovnogo zakonodatelstva e ekonomicheskoi sfere (Moscow: Liberalnaia missiia, 2010.

this harm include: the regular opening of cases against businesspersons for the purpose of extracting rents; the tendency of businesses to close when their leaders are incarcerated; and the flow of both money and businesspeople (human capital) out of the country to other parts of the world where the climate for legitimate pursuit of business is more favourable. And, according to the best economists, all of this has led to a reduction in not only productive business activity but also economic growth! It will be difficult for Russia to modernize and diversify its economy without the removal of the threat of criminal prosecution from the backs of ordinary business people.

In this essay I want first to reinforce this argument by demonstrating how the criminalization of normal business practices contradicts key aspects of the Rule of Law, whose connection to rates of economic growth and development is well established. Then, I will turn to the choice of remedies for countering the overuse of prosecution in the regulation of business, arguing that a multi pronged approach has the best chance of success. Although this approach should start with legal change (not only decriminalization of particular offenses but also changes principles found in the General Part of the Criminal Code), it might also include other steps, such as attempts to influence the practice of criminal prosecution of business through regulations and changes in the way police and prosecutors are evaluated; and the improvement (sovershenstvovanie) of the sphere of administrative law regulation as an alternative to the criminal realm. Finally, I will address briefly some questions of macro level change raised by LECs members in their meeting of January 31, 2012. How has Rule of Law emerged historically, or any of its component parts like judicial independence? How has corruption been reduced? To what extent does experience identify variables subject to manipulation?

Prosecuting Entrepreneurs and the Rule of Law

The term "rule of law" is used in many ways in Western discourse, popular and scholarly alike, and its transfer to the Russian context introduces further ambiguity. In serious scholarship there is a key distinction between a minimal, thin, or formal variety of rule of law and the deep, thick, or substantive one. The thin or formal versions call for such basic, but far from inevitable features as: open and legitimate procedures for law making; consistent legal hierarchy (regulations subordinate to and implementing laws); transparency of laws and regulations; laws that are prospective, clear, consistent, and stable (if not also fair); and enforcement of the laws that is consistently just and impartial. The thick or substantive version of rule of law adds to the requirements of the minimal version a critical additional feature. The law must also have a moral basis and be based on a normative foundation beyond the state and its laws, such as religion, natural law, or the international law of human rights. In the thick version of rule of law, pravo (jus) consists of more than the laws (leges). It features legal principles and rights that the leaders of the state may not violate or contradict and that take precedence over their legal enactments. This implies that some Court or courts has the responsibility (and power) to decide when laws are not lawful.[3]

Both versions of rule of law, the minimal and the substantive have something in common. Both suggest that law, even when defined in a narrow positivist way, imposes real and meaningful limits on the state and its rulers, not to speak of ordinary officials of the state, whose actions must always be consistent with the laws (zakonny), if not also with right (pravovye). One

[3] This characterization of the concept "rule of law" draws on Brian Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge: Cambridge University Press, 2004); Rachel Kleinfeld, "Competing Definitions of the Rule of Law," in Thomas Carothers, ed., Promoting the Rule of Law Abroad: In Search of Knowledge (Washington: Carnegie Endowment for International Peace, 2006, chapter 3; and Lon L. Fuller, The Morality of Law (Revised Edition: New Haven: Yale University press, 1964).

might add that establishing rule of law involves reforms of public administration overall, not just of law enforcement and courts. It also requires cultural change as well as institutional, for officials and rulers alike need to respect and value law (and laws) for their own sake, not just as instruments for achieving particular ends.

For our purposes it is sufficient to refer to the minimal, formal version of rule of law, which, as we shall see, the current law and practice of prosecuting businesspeople in the Russian Federation clearly contradicts. This approach makes further sense because the thick version of rule of law, with its premise that law includes rights as well as legal enactments, has yet to become the dominant understanding of rule of law in the Russian Federation. It is not clear that most Russians understand how different verkhovensto prava is from verkhovenstvo zakona, and it is all too clear that a substantial number of jurists and state officials prefer not to recognize this difference and to cling to a traditional positivist understanding of law.[4]

Suppose we return to the five features that I identified as requirements for the minimal definition of rule of law. The first three of these features, while not fully realized, are fulfilled in part and arguably represent improvements over Soviet reality. Procedures for law-making are more open and legitimate (although behind the scenes activity in the executive branch remains more important than what happens in the legislature). The principles of legal hierarchy may be abused less frequently than in the past; at least there are more developed mechanisms for the review of regulations. And at least laws, if not also regulations, are more transparent (published in accessible places). The other two requirements—"laws that are prospective, clear, consistent

[4] A. Kashanin, "Vliianie gospodstvuiushchego pravoponimaniia na sostoianie i prestizh iurdicicheskoi professii," in: E.A. Mishina, Kakovo eto—byt iuristom? (Moscow, 2010), 24-57. See also E.V. Novikova, et al., Verkhovenstvo prava i problemy ego obespecheniia v pravoprimenitelnoi praktike (2nd edition; Moscow: Statut, 2010).

and stable" and "the enforcement of laws that is just and impartial"-- however, are not fulfilled at a satisfactory level and they are breached in particular in the criminalization and prosecution of business offenses.

The criminal law relating to business includes many provisions that are too open ended to be clear, and their interpretation by the courts has not improved the situation. Offenses like illegal entrepreneurship are inherently vague and can be applied to all sorts of violations of administrative rules. The provisions on self money laundering (Article 174.1) are combined ex post facto with violations of other offenses in an unpredictable manner. The application of the concept "organized group" to the leadership of a company or its board is done when it suits the convenience of enforcers. The definition of "fraud" is also sufficiently vague that it can be applied to past actions that did not seem to involve criminal activity at the time. Moreover, the instability of the criminal law in the new millennium, marked by a constant flow of new offenses and modifications of old ones, makes it difficult for businesspeople to predict the consequences of their actions. In short, the laws themselves do not tell a businessperson when he or she is doing something criminal and supply an element of unpredictability to their activity. At the same time, the criminalization of many of the offenses is inherently unfair and inconsistent with the purposes of criminal law, because the actions or omissions do not cause major harm or involve blame. This last problem, however, may take us beyond the minimal definition of rule of law.

Even worse than the content of the criminal law vis a vis business is the way that it is enforced. Instead of being "just and impartial", the evidence indicates that it is "capricious and corrupt" and shaped above all by the interests of the enforcers. The bulk of charges for crimes included in Chapter 22 lead to prosecutions that are opened and later closed when the accused provides sufficient payment or access to the business. Some prosecutions against businesses

represent police cooperation with rival firms or groups that want to take over a company, thereby qualifying for the label "zakaznye dela". Between these two situations it appears that the majority of cases opened against businesspeople represented unjust and biased enforcement of the law!

While prosecution may be unpredictable, the need to part with large sums of money to avoid conviction is not. Equally predictable is the destruction of businesses for those entrepreneurs who are convicted, especially if they end up in confinement.

It is clear, then, that the reliance on the criminal law to regulate business in the Russian Federation produces extreme and frequent violations of two of the core elements of the minimal version of "rule of law", and this has clear implications for economic development. There is a large academic literature linking the quality of law and legal institutions in a country to its economic development and growth. The universal assumption is that high levels of trust (or "credible commitment") engendered by fair, accessible and transparent law and legal institutions helps economic growth and that their absence hinders it.[5] Empirical studies also support this line of argument. As especially influential and thorough study is the World Bank's Governance Project that measured institutional quality in nearly 200 countries and correlated it with economic growth. One of the six dimensions of the governance index used in the project is an index for "rule of law", an index that includes all of the standards that I included in the minimal version of rule of law. The correlation between this particular index and per capita income is dramatic, with small improvements in the rule of law relating to large changes in economic indicators. Thus, in the words of Daniel Kaufmann "an improvement in the rule of law by one

[5] For a sharp and comprehensive summary of the literature, see Kenneth W. Dam, The Law-Growth Nexus: The Rule of Law and Economic Development (Washington: Brookings Institution Press, 2006. See also Kevin E. Davis and Michael J. Trebilcock, "The Relationship between Law and Development: Optimists versus Skeptics," The American Journal of Comparative Law 56 (2008), 895-946.

standard deviation from the current levels in Ukraine to those 'middling levels prevailing in South Africa' would lead to a fourfold increase in per capita income in the long run."[6] Improvements in any aspect of the Rule of Law (any of its standards or requiements) would help the economy of a country such as Russia, including the development of the independence of individual judges as part of fair enforcement.

The basic point is simple. The criminalization of common business practices and overuse of the criminal law as a tool for business regulation in the Russian Federation inflicts major damage to the economy, both directly through its impact on the willingness of would be entrepreneurs to pursues business in Russia and indirectly through its negative impact on the quality of law and legal institutions, which themselves affect economic growth and development. The problems lie both in the inherent unfairness of many of the provisions in the law and in their capricious and corrupt enforcement.

Fixing the Problem through a Multipronged Strategy

The main approach adopted by reformers to date has focused on **the law**, including changes in criminal, criminal procedure, and administrative law. As we shall see, this approach has already yielded benefits, and the changes proposed by the LECs group in late 2011 promise further gains. In my view, however, it would be useful to go further and pursue, in addition to legal change, two complementary strategies—influencing the implementation of the criminal law, especially through regulations affecting police, prosecutors and judges; and improving the

[6] Daniel Kaufmann, Government Redux: The Empirical Challenge,` in The Global Competitiveness Report edited by Xavier Sala-i-Martin (Oxford: Oxford University Press, 2004) , 137-164. Also on Social Science Research Network website, quotation at page 14..

alternative mechanisms for the regulation of business, including what in Russia is called "administrative law". I shall consider each of these three prongs.

Helping Business through Legal Change

Already in the early months of 2010, as the Concept of Modernization of Criminal Legislation in the Economic Sphere was being drafted by the LECs group, it began promoting the decriminalization of a whole series of business offenses. This effort did result later that year in the decriminalization of failure to pay taxes on time (under most conditions), and in 2011 in the removal from the criminal code of failure to pay import duties on otherwise legal importation. Moreover, in winter 2010 the criminal procedure code was changed to disallow the holding in pretrial detention of businessmen charged with Chapter 22 crimes. The impact of this latter measure was particularly startling. Despite resistance by law enforcement and incomplete implementation, this ban led to a dramatic drop of at least one third in the overall number of prosecutions opened for business crimes overall, including of 65% for illegal entrepreneurship (article 171) and 80% for money laundering (174.1. This drop in prosecutions reflected that reluctance of police officials to start cases when they could no longer use release from custody to get businessmen to pay for stopping the case (Diatlikovich, 2010; Peshkova, 2010; Nikitinskii, 2011).[7] The bulk of the business crimes targeted for removal from the Criminal Code remained in place through 2011, albeit with a new provision for some allowing accused to admit guilt, pay a steep fine, and avoid a conviction.

[7] Viktor Diatlikovich, `Svoboda kak politika,`` http://rusrep.ru/article/2011/04/19/freedom ; Olga Peshkova, "Ogranicheniia aresta predprinimatelei. Pervye rezultaty sudebnoi praktiki," Sud'ia (May, 2011), 30-33; Leonid Nikitinskii, "Gosudarstv 'silovykh struktur' mozhet postroit tol'ko 'rynochnuiu ekonomiki bez predprinimatelei". Predprinimateli sidiat na zonakh," Novaia gazeta (24 April 2011).

Late in 2011 the LECs group produced a new set of legislative proposals that repeated all of the remaining targets of decriminalization along with more developed recommendations about the changes in the general part of the Code and in regular offenses used against business people (e.g. fraud).[8] The proposed changes in the general part of the Code strike me as especially important. Often the most excessive punishments levied against businesspeople result not from the existence of particular offenses but from broad interpretations of offenses, multiple charging, strange combinations of charges (for example involving article 174.1), the treatment of crimes committed by "groups" or "organized groups" as aggravating factors—practices authorized in the general part. The definition of groups and their significance in Russian criminal law is a true anomaly on a world scale, especially the perverse treatment of the leaders of a business firm (or their boards) as "organized criminal groups". In my view, the changes proposed in the general part of the Criminal Code are especially important for adoption now.

At the same time, I would suggest that some of these changes in principles, concepts and methods of charging be repeated in the most relevant articles in the special part of the code. Judges in Russia, like their counterparts in other post communist countries, such as the Czech Republic) do not always think to apply the principles of the general part in dealing with particular charges, following instead a narrow formalist approach that treats the text of each offense as sacrosanct.[9] Some redundancy might improve the chances of principles stated in the general part being applied. Even so, it may require reinforcement from Supreme Court

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[8] "Proekt Federalnyi zakon "O vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks Rossiiskoi Federatsii," (October 26, 2011); "Poiasnitelnaia zapiski".

[9] Z. Kuhn, "Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, American Journal of Comparative Law , 52 (2004), 531); M. Bobek, "The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries," European Public Law,14 (2008), 99; A. Kashanin, "Vliianie gospodstvuiushchego pravoponimaniia".

regulations to ensure implementation of new principles introduced in the General Part, including the principle that criminal liability requires the imposition of harm..

Shaping Enforcement through Regulations and Incentives

The second prong of a strategy for reducing the inappropriate prosecution of businesspeople focuses on the enforcement of the criminal law by investigators and prosecutors. Inevitably, the officials enforcing the law have considerable discretion regarding when to start a case and which charges to use. The question is how to get these enforcers to act responsibly and avoid prosecutions except in situations where they can demonstrate both real harm and blameworthiness on the part of the alleged perpetrators.[10] It is possible to influence the choices made by police and prosecution through the issuance of regulations (instructions) or what are sometimes called podzakonny akty that specify how they are to apply or use the law. It may also be possible to use the system of reporting and evaluation of the same officials for the same purpose.

In the United States the Office of the Attorney General in Washington attempts to shape how federal attorneys prosecute business through periodic guidelines known as Memoranda. There are 93 offices of federal attorneys in the USA, which operate relatively autonomously, but the guidelines specify when and how they are to use prosecute or turn to alternatives to prosecution (such as the deferred prosecution agreement). On some points the memoranda are advisory, on others treated as mandatory. Note that these memoranda are openly published

[10] A study of state and local prosecutors in the United States in the 1990s found that such a careful use of prosecutorial discretion was common in most parts of the country. For details see Michael L. Benson and Francis T. Cullen, Combatting Corporate Crime: Local Prosecutors at Work (Boston: Northeastern University Press, 1998)./

documents that have become the subject of critical debate among lawyers and businesspeople. The later memoranda often include changes that emerged from the discussions of earlier ones, not to speak of decisions of courts. The openness of prosecution policy helps to make the use of the criminal law against businesspeople more transparent and predictable.[11]

In Russia, including in Soviet times, there have been an abundance of agency regulations (vedomstvennye instrukstii) that defined the operational meaning of laws and on occasion in ways not anticipated by legislators. The problem of instructions effectively standing above laws was highlighted by reformers in the perestroika years, and the establishment of legal hierarchy an aspiration in post soviet legal reform. Arguably, progress has been made on this count, and regulations are less often to distort or contradict laws, but they still have enormous significance in defining the norms for law enforcement.[12] As such, they have much potential as instruments for shaping the prosecution of business crimes.

Suppose that one wanted to ensure that investigators and prosecutors opened cases relating to Chapter 22 offenses and also fraud sparingly, using warnings and administrative charges instead of criminal wherever possible and limiting prosecutions to situation where the officials could demonstrate both real harm and blameworthiness (if not intent, then at least gross negligence in the face of warnings). It would be possible to lay out such sensible ground rules in orders (prikazy) of the Sledstvennyi komitet and the MVD. Resolutions (Postanovleniia) of Supreme Court plenary sessions could also tackle these matters from the vantage point of judicial practice.

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[11] Anthony Barkow and Rachel Barkow, eds. Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (N.Y. and London: NYU Press, 2011).

[12] Peter H. Solomon, Jr., "Pravo v gosudarstvennom upravlenii: otlichiia Rossiia?" in Anton Oleinik i Oksana Gaman-Golutvina, eds., Administrativnye reformy v kontekste vlastnykh otnoshenii: Opyt postsotsialisticheskikh transformatsii v sravnitelnoi perspektive (Moscow: Rosspen, 2008), 121-143.

To what extent do regulations already exist governing the activities of the regulation of business in Russia through the criminal law? The website of the Procuracy contains materials on procuracy supervision over the regulatory practices of other government agencies vis a vis business, but nothing on prosecutorial practices. The website of the independent Investigatory Committee (existing from 2009) publishes about two thirds of its Orders prikazy (including those relating to the careers and benefits of employees) but none on operational matters. The website of the Ministry of Internal Affairs includes administrativnye reglamenty, but once again nothing relating to the practice of processing cases of any kind, let alone businesses.[13] The absence of these documents in the public realm does not mean that they do not exist. It might well be that operational instructions for law enforcement officials in Russia are treated as confidential (sluzhebnye) documents.

I am suggesting that there might be fewer inappropriate criminal prosecutions for economic crimes, if the operational instructions for investigators and procurators called for a cautious approach to prosecution, favoured the use of alternative approaches, and limited the opening of cases to situations where the heads of firms had intentionally caused harm through violations of the criminal law. To be sure, the issuing of instructions of this kind would require the cooperation of the leaders of law enforcement in the effort to protect businessmen from prosecution. Achieving this might not be easy, given the differing mindsets of criminal law reformers and many of the top officials of the police and procuracy, but the effort to bring them on side will be worth it. Needless to say, if regulations of this kind were also published, businessmen would have more confidence that the rules were not stacked against them. Such

[13] www.mvd.ru ; www.genproc.gov.ru ; www.sledcom.ru

open regulations might provide the new plenipotentiary for the protection of business (that presidential candidate Vladimir Putin promised to establish) an additional instrument on which to draw.[14]

Whether or not the regulations themselves were published, it would also be useful to arrange discussions of the favoured new, economical and principled approach to the prosecution of business offenses at conferences of law enforcement officials and in their various journals. I have in mind particularly journals addressed to these officials, including both agency journals like Vestnik sledstvennogo komiteta, Vestnik Akademii Generalnoi Prokuratury RF, and Ekonomicheskii vestnik MVD and free standing journals like Rossiiskii sledovatel and Zakonnost.

At the same time, the Supreme Court through its studies of judicial practice and resolutions of its Plenary sessions could address periodically the types of cases that come before the courts, encouraging lower court judges to hold law enforcement officials to high standard in their charging practice, including the observance of relevant principles in the General Part of the Criminal Code and the need to use alternatives to prosecution wherever possible (including administrative offenses).

Another way to influence the conduct of law enforcement vis a vis business is through improvements in the system of performance evaluations. In the ongoing discussions of reforming the police in Russia over the past two years, there was criticism of the reliance on certain quantitative indicators in the assessment of police (palochnaia sistem) and the opening of the

[14] "Putin ob'iavil o vvedeniia dolzhnosti upolnomochennogo po pravam biznesmenov," Vedomosti, 2 February 2012. See also "Avtorskaia stat'ia Vladimira Putina 'O nashikh ekonomichesikh zadachakh'" ibid. And at www.putin2012.ru/events/149

door to a remaking of the system of evaluation.[15] In that context, it would be useful to introduce qualitative indicators relating to the appropriateness of prosecutions and fairness of charges (to be effected in periodic reviews or attestations). It would also be possible to design criteria of assessment to be used only for police and procuracy officials who specialize in the regulation of business, and that will reward officials who comply with the spirit as well as the letter of the efforts to reshape regulation to help rather than hinder business activity on the ground.

A powerful combination of regulations that redefine the public expectations from the police vis a vis business and changes in the bases upon which police are assessed and rewarded might offset the benefits of opening criminal prosecutions of business to extract bribes directly from the affected parties and from competitors who order cases. The pursuit of criminal cases against the owners and managers of business firms all too often connects to corrupt practices, and this fact alone suggests a need to do more than decriminalize some offenses. Announcing a struggle against corrupt practices among responsible police officials will also prove insufficient. Law enforcement officials need to believe that they have more to gain from honest behaviour than they do from the usual corrupt practices.

Reinforcing Regulatory Alternatives

Legal scholars in the West recognize that policing and prosecution of business represent just one part of the spectrum of regulation. As a rule, in places where other forms of regulation such as administrative law are well developed, there is less need to invoke the criminal law. This is the predominant pattern within countries of Western Europe, and it applies to many of the state of the USA as well. The federal government of the US, by contrast, which still has relatively

[15] See, for example, "Reforma MVD i palochnaia sistema," Blog Ilia Yashina, Radio Ekho Moskvy, 12 October 2011, http://www.echo.msk.ru/blog/yashin/820026-echo/; and Ilya Yashin and Vladimir Milov, "Perestroika MVD: Ot militseiskogo proizvola k professionalnoi politsii,"at www.rusolidarnost.ru

limited regulatory instruments compared to the states, relies more on criminal law than do most of the states, where the use of the criminal law is usually limited to situations where offending firms have been warned and exposed to civil or administrative remedies, have continued the offensive behaviour, and are causing genuine harm.[16]

Arguably in the Russian Federation a number of agencies (taxation, anti monopoly, environmental protection) are involved in the regulation of business, as well as agencies connected to particular sectors of the economy. If anything, there is an excess of administrative regulations that affect business. The work of these agencies and the administrative law itself deserve might well be simplified and rationalized, and at the same time made more effective in accomplishing their most important goals. Functions that are now in the province of police and criminal law might well be assumed by officials charged with enhancing particular values in the world of business. At the same time, careful attention must be given to the incentives affecting the work of these officials, so that they perform their obligations in a fair and neutral way.

Cultivating the Rule of Law

For this book, members of the LECS team have moved discussion beyond the challenge of producing a friendly legal environment for business to such larger issues like the state of law and legal practice in Russia and what might lead to the creation of Rule of Law in Russia. Helpful suggestions included the need to identify and strengthen the hands of elites interested in these developments; the need for cultural change (through education) in society and in particular

[16] Fernando Molina, "A Comparison between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It," New Criminal Law Review, 14:1 (2011), 123-38; Benson and Cullen, Combating Corporate Crime; Darryl K. Brown, "Criminal Law`s Unfortunate Triumph over Administrative Law," revised version August 2011, http:ssrn.com/abstract=1792524

among jurists and law enforcement personnel; the utility of improved transparency of law enforcement and active public supervision, through both parliament and public councils; improved procedures for the making of laws (a law on laws) and arguably also for the issuing of regulations; and changes in the informal practices that define the meaning of particular laws. The range of proposals is appropriately broad and includes improving both the supply of and demand for law.[17]

The development of the Rule of Law, and its key components like judicial independence, has been the object of empirical study in Western countries, especially by legal historians and political scientists, and it is useful to review its highlights. The most influential and theoretically sophisticated study of the emergence of Rule of Law (verkhovenstvo prava) and of the law-based state (pravovoe gosudarstvo), two varieties of "legal order" (pravovoi stroi), was written by Roberto Unger a few decades ago. Its core argument focuses upon the role of political competition, in particular competition between old and new elites, in which most groups come to value legal protection of property and power alike. The way that the new competition played out determined whether a country ended up with rule of law or a law based state.[18]

The competition hypothesis has reoccurred often in studies of the emergence of both judicial independence and judicial power in countries that have not had established democracies. In countries of post communist central and eastern Europe competition connected to new democratic polities helped to foster judicial independence, as political parties representing different elite groups recognized the utility of legal protections.[19] At the same time, in Latin

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[17] "Stenogramma kruglogo stola 'Verkhovenstvo prava kak opredeliaiushchii faktor ekonomiki'," 31 January 2012, (Moscow, INSOR), at www.lecs-center.ru under "khronika sobytii".

[18] Roberto Unger, Law in Modern Society (N.Y.: Free Press, 1976), 47-86, 155-192.

[19] Pedro C. Magalhaes, "The Politics of Judicial Reform in Eastern Europe," Comparative Politics, 32:1 (October, 1999), 43-62.

America (Mexico, Argentina) and East Asia alike (South Korea), threats that ruling elites might lose political power made their members see the utility of strong courts that might protect their property. According to the theory, strong independent courts might supply a form of "insurance" against dispossession when these groups lost power.[20]

While the scholarly consensus focused upon the necessity of political competition as a condition for the emergence of strong law and courts, it turned out that competition alone was not necessarily sufficient. The nature of that competition and the underlying conditions also mattered. Thus, in post Soviet Ukraine the divisions among competing elites were so sharp and the relationship between property and power so close, that instead of seeking the protection of law and courts the competing power groups (clans) tried to gain control of the courts or at least particular courts and to pressure judges to serve their interests. Arguably, this was rational behaviour, since the costs of so doing were low.[21]

The emphasis on political competition and its influence upon the demand for law among powerful persons in particular countries has considerable explanatory power in the study of legal transition. Unfortunately, however, it does not offer to the promoters of law and courts a variable that is subject to easy manipulation. There is even an element of circular reasoning in the argument that rule of law develops mainly when there is democratic competition, and democracy mainly where there is rule of law.

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[20] On insurance theory see especially Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (N.Y.: Cambridge University Press, 2003) and Jodi Finkel, Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s (Notre Dame, University of Notre Dame Press, 2008). See also Rebecca Bill Chavez, Rule of Law in Nascent Democracies: Judicial Politics in Argentina (Palo Alto: Stanford University Press, 2004), which correlates regional differences in political competition with levels of judicial independence.

[21] Alexei Trochev, "Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine," Demokratizatsiya, 18:2 (Spring 2010), 122-147; Maria Popova, Politicized Justice in Emerging Democracies: A Case Study of the Courts in Russia and Ukraine (N.Y: Cambridge University Press, 2012).

Just as studies of the emergence of rule of law stress political competition, so do studies of the reduction of corruption in public life.[22] This should not be surprising, since corruption refers to informal practices that contradict if not undermine the operation of formal legal institutions. In the United States of the late 19th century and early 20th centuries, new competition at different levels of government facilitated the attack on corruption, the creation of civil services, and the detachment of officials from patronage. One should stress again that completion among elites was necessary, but not necessarily sufficient to produce cleaner government, but the interplay of political and social forces did produce this effect at the national level and in some states and cities.

The development of authentic competition for political power in Russia, say first at the local and regional levels, could facilitate the emergence of elements of the Rule of Law, but only if these were combined with a detachment of property from power and a reduction in the costs of losing political power. Even before the development (in some regions revival) of political competition, it would still be possible to improve law and courts and to move in the direction of Rule of Law before its key conditions are present. The rich discussions among LECS have identified many useful steps: improvements in education, especially of jurists and judges; improvements in the processes of making laws and regulations; improving the accountability of officials everywhere through increase transparency, rethinking performance evaluation, and the development of public supervision (through parliaments and public councils). On the macro level, strategies for changing the legal culture of the society and elites so that law (pravo) becomes a basic social value would be useful. And most crucially, there needs to be a systematic

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[22] Anna Grzymala-Busse, Rebuilding Leviathan: Party Competition and State Exploitation in Post-Communist Democracies (Cambridge: Cambridge University Press, 2007).; Yu-Shan Wu, "Robust Competition Checks State Exploitation: The Post-Communist Experience," (review of Rebuilding Leviathan) , Taiwan Journal of Democracy, 3:2 (December, 2007) , 183-187.

and fundamental separation of political power and property ownership, which means partial undoing of the perverse redistribution of property of the past fifteen years.