

Hans-Georg Heinrich
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(eds.)

Legal Systems in Transition

A Comparison of Seven Post-Soviet Countries



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Preface

The idea for this volume is linked to the General Concept for External Economic Relations (Aussenwirtschaftsleitbild) proclaimed by the Austrian Ministry for Economy, Family and Youth. It departs from the assumption that business practices are embedded in cultural and behavioral standards and patterns of communication which must be correctly unscrambled and applied in business interactions. In this sense, understanding a nation's legal system goes beyond the knowledge of the wording of the law. Such a systemic comprehension cannot substitute an in-depth study of legal prescriptions in the case of litigation, but it permits to define the boundaries and the effect of legal procedures, the role of the legal profession and the importance of the law for practical business activities and other interactions on the ground.

This volume offers a comparison of the legal systems of 7 post-Soviet states. We have dubbed this legal states the "EP|R" implying that it consists of the 6 states covered by the Eastern Partnership program and Russia. The modernization of the legal systems of these states is a paramount objective of the EU. Nevertheless, the transfer and the integration of norms of the *acquis communautaire* into the local legal systems has progressed at a different pace and a different scope. We have asked eminent lawyers and practitioners from the 7 countries under study to assess the results of this process and to present a comprehensive overview of the status quo with a special emphasis on business law.

Our volume addresses not only legal professional and the business community, but also readers who are interested in East European affairs and the impact of Europe on its neighborhood.

The editors would like to express their gratitude to the Federal Ministry of Economy, Family and Youth for initiating, sponsoring and supporting this project. We would also like to highlight the valuable scientific and organizational inputs from ICEUR partners and our own staff. Specifically, we would like to thank Karin Zambra for dealing with this manuscript. Needless to say, the responsibility for faults and omissions lies with the editors.

Hans-Georg Heinrich

Ludmilla Lobova

Vienna, Spring 2012

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The system of public authority and civil society

Central bodies of state power and other state authorities

In accordance with article 11 of the Constitution of the RF state power is exercised by: the President, the Federal Assembly (the parliament, consisting of two chambers – the Council of Federation and the State Duma), the Government and the courts.

The President of the RF [President Rossiyskoy Federatsii] is elected by the people (citizens entitled to vote) in general direct elections (as of 2012 for a term of 6 years, before, for a term of 4 years). Furthermore the presidential office can only be held for two terms in a row. More details about the position and the role of the President in the system of state authority will be provided further below. Here we will only mention that the President of the RF issues decrees (in general, acts of normative character) and orders (usually of individual character).

The Federal Assembly (parliament) [Federalnoye Sobraniye] consists of two chambers.

The Council of Federation [Sovet Federatsii] (the “upper” chamber of the Federal Assembly) is made up by the representatives of the subjects of the Russian Federation. Therefore this chamber is destined to display the *federative character* of Russia. From each federal entity of the RF (below, “region’s) two representatives are delegated: 1 – from the legislative, 1 – from the executive (the representative of the legislative is elected by the regional parliament; the representative of the executive is designated by the Chief Executive and occasionally by the high functionary). If the representative is assigned by the executive, his/her candidature has to be approved by the legislative body of the relevant federal entities. There are no terms of office as representatives, because their tenure in the Council of Federation either depends on the terms of office of the body of legislative or executive power. Alternatively, they can be recalled (i.e. divested of power prior to the end of their term) by the bodies mentioned above.

The State Duma [Gosudarstvennaya Duma] (“lower” chamber of the Federal Assembly) consists of 450 deputies that are elected in general

direct elections by *proportional* representation (with a threshold of 7%). Starting with the elections of 2011, the *term of office* of the State Duma will be 5 years (before, 4 years).

At the time there are 4 parties represented in the Duma – “Yedinaya Rossiya” [“United Russia”] (more than 2/3 of the seats. Party leader is V. Putin), “Spravedlivaya Rossiya” [“Just Russia”] (party leader is S. Mironov, Chairman of the Council of Federation), Communist Party of the RF (party leader is G. Zyuganov) and Liberal Democratic Party (party leader is V. Zhirinovskiy. The ideology of the party corresponds neither with the concept of “liberal” nor with the notion of “democratic”).

The parliament enacts two kinds of laws: federal constitutional laws and federal laws. The Constitution of the RF itself provides a list of federal constitutional laws [federalnye konstitutsionniye zakony] (FKZ). In order to enact those laws a qualified majority in both chambers of the Federal Assembly is required. For the adoption of federal laws [federalnye zakony] (FZ) a simple majority of votes is sufficient. Moreover, the Council of Federation does not enact, but only approve (or not approve) federal laws. Apart from laws regarding certain matters, for example the budget, taxes and fees, war and peace, financial, currency, credit and customs regulations, or emission of money (article 106 of the Constitution of the RF), the Council of Federation has the right not to consider the law, enacted by the State Duma, at all. In that case the law is considered as approved “tacitly”. If, however, the Council of Federation considered the law and disapproved of it, it is returned to the State Duma, where a conciliation committee may be set up.

Every law is presented to the President of the RF for signature. The president is obliged to sign FCL, but does not have to sign FL, i.e. can reject them. The State Duma and the Council of Federation have the right to override the President's veto by means of a qualified majority (2/3 in every chamber). But this is rarely the case (it happened only 1 time). At the present time a tendency towards a decrease in the number of rejected laws becomes apparent. For demonstration we present the following table¹:

1 The table has been taken from: Shablinskiy I. Vyklyuchennyy mekhanizm: sderzhki i protivovesy v rossiyskoy konstitutsionnoy praktike // Sravnitelnoye konstitutsionnoye obozreniye. 2010. no. 2.P.111..

Convoca- tion of the State Duma	Total num- ber of fed- eral laws (FL), enacted by the State Duma	Total number of re- jected FL	Number of FL, rejected by the Council of Federa- tion	Number of FL, rejected by the President of the RF	Number of FL, rejected by the Council of Federation and the President of the RF
1996-1999	1045	442	141	180	113
2000-2003	781	102	61	31	10
2004-2007	1087	37	27	7	3
2008	332	2	1	1	0
2009	394	8	7	1	0

The Government of the RF [Pravitelstvo Rossiyskoy Federatsii] is the highest body of executive power. It comprises:

The Government is formed and controlled exclusively by the President (for details see further down). It governs the system of *federal bodies of executive power*, which will be discussed in greater detail in section 2 “Administrative and judiciary systems (organizational structures)”. A characteristic feature of the Russian Government is its huge and extensive apparatus whose head, according to the FCL “On the Government of the Russian Federation”² (1997), is the Federal Minister or even the Vice-Chairman of the Government (Deputy Prime Minister) which underlines the relevance of the governmental apparatus. The structure of the judiciary system and the configuration of the courts are elaborated in the section “administrative and judiciary systems (organizational structures)”. Here we will only indicate, that the Constitution of the RF mentions three particular legal agencies.

2 Collection of the legislation of the RF, 22.12.1997, no. 51, article 5712. This Law just as other laws mentioned in the text have repeatedly been subject to numerous modifications and amendments. Here and in the following analysis the source refers only to the first official publication.

The Constitutional Court of the RF [Konstitutsionnyy Sud Rossiyskoy Federatsii] does not have subordinate courts. The existence of constitutional courts (in republics) and charter courts (in regions [oblast], territories [kray] and autonomous areas [autonomous okrug]) in some regions does not mean, that they are procedurally but rather administratively tied to the Constitutional Court of the RF. The primary objectives of the Constitutional Court are the *examination of constitutionality* of laws being implemented, of presidential decrees, orders of the Government, normative acts of regional authorities as well as to explain the Constitution, and adjudicate upon the competencies of different authorities.

The Supreme Court of the RF [Verkhovnyy Sud Rossiyskoy Federatsii] is head of the subsystem of courts of general competence, to whose jurisdiction civil, criminal and administrative cases are assigned.

The Supreme Arbitration Court of the RF [Vysshiy Arbitrazhnyy Sud Rossiyskoy Federatsii] is in charge of the subsystem of courts of arbitration, whose jurisdiction extends to civil and administrative cases in the sphere of business and other economic activities.

The Constitution and/or the Russian legislation also mention **state authorities** that are not directly assigned to the branches of the government.

The Public Prosecution of the RF [Prokuratura Rossiyskoy Federatsii] is a unified and centralized system of bodies whose head is the *Prosecutor General of the RF* (article 129 of the Constitution of the RF). More details about Public Prosecution of the RF in section 2.

The Auditing Chamber of the RF [Schotnaya Palata Rossiyskoy Federatsii] is in compliance with article 101 of the Constitution of the RF constituted by the chambers of the Federal Assembly “for the monitoring of the administration of the federal budget”. Thereby the Constitution of the RF shows that the Chamber is a body of parliamentary control. All the more so, as it is said in other articles (102 and 103), that the State Duma appoints the Chairman of the Auditing Chamber and half of the body of its auditors to and releases them from office, as does the Council of Federation the Deputy Chairman and also half of the body of its auditors. Nonetheless, in the Federal Law “On the Auditing Chamber of the Russian Federation”³ (1995)

3 Collection of the legislation of the RF, 16.01.1995, no. 3, article 167.

the Auditing Chamber is extensively described: it is called a body of state *financial control*, and its tasks are:

- organization and exercise of control over timely execution of income and expenditure items of the federal budget and federal extra-budgetary funds in terms of volume, structure and purpose;
- determination of the effectiveness and the expedience of disbursement of state funds and use of federal property;
- evaluation of the validity of income and expenditure items of draft federal budgets and federal extra-budgetary funds;
- financial examination of draft federal laws, as well as of normative-legal acts of federal bodies of state power envisaging expenditures which are covered by the federal budget or which influence the formation and execution of the federal budget and federal extra-budget funds;
- analysis of the revealed discrepancies in the established indicators of the federal budget and federal extra-budgetary funds and the preparation of proposals directed to their elimination and to the improvement of the budgetary process as a whole;
- control over the legality and accurate timing of operations with resources of the federal budget and federal extra-budgetary funds in the Central Bank of the Russian Federation, banks authorized by it and in other financial and credit institutions of the Russian Federation;
- regular presentation of information on the progress of execution of the federal budget and of results of controlling measures being held to the Federation Council and the State Duma;
- though the Auditing Chamber is as a result of these rules a body of parliamentary control, a law passed in the 2000s nevertheless invested the President of the RF with the authority to present to the chambers the candidacy of chairmen and all of the auditors of the Auditing Chamber who are elected by the chambers for 6 years. Thereby this body lost its independence from administrative power and its anti-corruption potential.

Commissioner on Human Rights in the RF [Upolnomochennyj po pravam cheloveka Rossiyskoy Federatsii] (unofficially Ombudsman) is a State office, established as the FKZ "On the Commissioner on Human Rights in the Russian Federation"⁴ (1997) states, "in order to assure the guarantee of *state protection of rights and freedom of citizens*, obser-

4 Collection of the legislation of the RF, 03.03.1997, no. 9, article 1011.

vance and respect of them by state bodies, bodies of local self-governmental and functionaries“. The appointment to this office (for 5 years) is conducted by the State Duma (article 103 of the Constitution of the RF).

Ombudsmen in general examine complaints of citizens, foreigners and stateless persons in regard to decisions or acts (omission to act) of state authorities, bodies of local self-government, functionaries and government officials, if earlier on the complainant appealed against these decisions or acts (omission of acts) by judicial or administrative settlements, but did not agree with the decision made concerning his/her complaint. However his/her chances are small. Mostly he/she carries out inspections of the complaints and can, along with the certification of the facts presented in the complaint, admit an application for protection of violated rights and freedoms to court; turn to qualified state authorities with a motion to undertake disciplinary or administrative proceedings or a criminal case in regard to the guilty functionary; file a motion with the court or the Public Prosecution Office to examine the decision coming into legal effect, a court sentence, determination or decision of a court or an order of a judge and so on.

The Central Bank of the RF [Tsentrallyy Bank Rossiyskoy Federatsii] is a body that accomplishes the *emission of money, the protection and guarantee of the stability of the rouble* (article 75 of the Constitution of the RF). The Federal Law “On the Central Bank of the Russian Federation (Bank of Russia)”⁵ (2002) stipulates other functions, too, including:

- adopting rules to effect settlements in the Russian Federation;
- setting rules for the realization of banking operations;
- servicing the budget account on all levels of the budgetary system of the Russian Federation;
- efficiently managing the international reserves of the Bank of Russia;
- supervising the activities of credit institutions and banking groups;
- foreign exchange regulation and foreign exchange control;
- other matters.

The Central Election Commission of the RF (TsIK RF) [Tsentralnaya izbiratel'naya komissiya Rossiyskoy Federatsii] is a body which organizes the preparation and conduct of elections and referenda in the Russian

5 Collection of the legislation of the RF, 10.07.2002, no. 28, article 2709.

Federation and is also in charge of the system of subordinate election commissions. The TsIK RF counts the votes of electors and publicly notifies the election results. It can find them to be invalidated or invalid. The Constitution of the RF does not mention this body.

The Federal Law “On the basic guarantees of electoral rights and the right of citizens of the Russian Federation to participate in a referendum”⁶ (2002) informs about the composition and the competencies of the TsIK RF. The TsIK RF is put together for 4 years on basis of a quota regulation. It consists of 15 members, 5 of which are appointed by the President of the RF, 5 by the State Duma and 5 by the Council of Federation.

Apart from bodies that were given public authority, we need to mention one more body – the **State Council** [Gosudarstvennyy sovet], which is the *advisory* body under the President of the RF. The State Council (Gos-sovet) is governed by the President of the RF and consists of the regional leaders (higher functionary). This body is neither specified by the Constitution of the RF nor by the legislation. It was founded by the decree of the President of the RF⁷ in the year 2000 (by means of the same decree the Provision regarding the State Council was approved too) as a minor political compensation to the heads of the federal subjects of the RF, who lost the legal possibility to directly exert influence on the federal legislative process in connection with changes in the manner of formation of the Council of Federation⁸. Simultaneously, the State Council allows the President of the RF to get a feeling for the spirit of the regional elites.

Special judicial status of the President of the RF

Despite the proclamation of the principle of the division of power, of political and ideological pluralism and the existence of constitutional justice, in reality these and other institutions, destined to guarantee the legal and democratic character of the state, stay formal in many respects. In this short report it is not possible to analyze all the reasons for these cir-

6 Collection of the legislation of the RF, 17.06.2002, no. 24, article 2253.

7 Collection of the legislation of the RF, 04.09.2000, no. 36, article 3633.

8 From 1995 up until June of 2000 higher functionaries (heads) of federal subjects and representatives of regional bodies of legislative power entered this chamber of the parliament in terms of an office.

cumstances. We can only briefly point out the *essential institutional factors that impede the development of the principle of the division of power and political competition*.

The Russian Federation is a state with a semi-presidential (combined) system of government. To this group of countries in Europe belong for example France, Portugal, Slovenia, Bulgaria, Croatia and Poland (a similar model was framed for the first time in the Weimar Constitution of Germany in 1919).

A majority of countries belonging to the CIS chose this system. Political analysts and journalists often call the Russian system “super-presidential”, however this is not true. Jurists don't recognize this system, because institutionally neither the existence of a rather weak president (e.g. in Poland⁹) nor the existence of a strong one (as in Russia or in France) means, that the system of the government itself changes. All of these forms are modifications of a combined system.

A different matter (and therein lies the distinctiveness of Russia) is the constitutional status of the President of the RF which is constituted in such a way that the head of the state appears to *practically defy the control* of other public-governmental institutions and, as a consequence, of the society. On what grounds is this possible? In compliance with part 2 article 80 the President of the RF guarantees the *concerted functioning and cooperation of the bodies of state power*. Some researchers thereunder understand the function of a political arbitration that is without doubt natural for the head of the state. But then, first of all, it is necessary to understand in which cases the President has to resort to such an arbitration. The Constitution of the RF only mentions that the President can use conciliation procedures to dissolve controversies between federal bodies of state power and bodies of state power of the federal subjects, as well as between bodies of state power of federal subjects.

Thereby the President is not granted the right to dissolve political conflicts, when their opponents are merely federal bodies of power. Here lies an obvious constitutional deficiency which in practice leads to a rather broad conception of this function of the head of the state (anyway, the

9 Therefore it is sometimes mistakenly counted for a part of parliamentary republics.