The Pluralistic Vision: A Summary

For law and development to move forward and effectively assist developing countries in resolving the crisis of law, there is need for a new vision. This vision must be essentially pluralistic and should be rooted primarily in the legal realities and experience of each developing country, rather than in the experience of Western European development. The vision must divorce itself, once and for all, from the law and society and other domestic American jurisprudential movements. It must find a house in societies and movements of international law, not just the American Society, but all international law groups. It must resist a universalist analytical framework, and, in effect, be a grass-roots movement with as many versions and approaches as there are communities and social groups seeking to apply their laws in a manner that would provide them an orderly basis for resolving problems of deprivation. This vision should not be centrally chartered like the old vision; rather, it should be developed in each country and society.

In doing so, within the overall framework of the approach presented here, a number of important conceptual issues will need further consideration: What is the relative role of the government, nongovernmental organizations ("civil society") and individuals in this country-centered approach to law and development? What will be the place of international norms set out in international treaties?

With this approach, the law and development movement will be able to commence the task of assisting countries in developing strategies for the resolution of the crisis of failed and failing legal systems. There will be no master blueprint for such an approach, nor will there be a need for one. The multilateral, and developing country, people-oriented approach of the World Bank, described earlier, would provide an excellent starting point for rethinking current approaches to law and development.

The words of the great Chinese philosopher Lao Tzu, as expressed in the Tao Te Ching, show, with characteristic simplicity, the rich promise of a pluralist approach:

Thirty spokes on the cartwheel; Go towards the hub that is the center; but look, there is nothing at the center and that is precisely why it works.

LAW AND DEVELOPMENT IN RUSSIA: A MISGUIDED ENTERPRISE?

By Kathryn Hendley*

Russia is in the midst of a remarkable metamorphosis. No longer the "evil empire" of the Reagan era, Russia has set before itself the goal of becoming a market democracy that is integrated into the world economy. While some Western commentators have declared success in achieving both the political and economic goals of the transition, cooler heads recognize that the process is still under way, and that final assessments are premature.

In this essay, I examine one part of the transition process—the effort to build the "rule of law" in Russia.

Well before the breakup of the Soviet Union into its constituent republics in December of 1991, the political leaders of both the Soviet Union and Russia had spoken on the record about the importance of creating a state based on the rule of law (pravovoe gosudarst-
This concept of the pravovoe gosudarstvo, while not entirely coterminous with the Western notion of the rule of law, shared certain core elements, such as a belief that the law should bind all citizens equally, regardless of their political or economic clout. The acceptance of such principles represented a significant departure for the leadership away from the highly instrumental conceptions of law that held sway during the Soviet period, in which politics consistently trumped law.

These calls for building a pravovoe gosudarstvo coincided with a more general opening of the Soviet Union to outside influences. The traditional Soviet suspicion and hostility to foreigners and Western ideas gave way to an enthusiastic, almost unquestioning acceptance of anything of Western origin. Western governments and multilateral institutions stepped into the void and, particularly since 1992, have worked closely with the Russian government to introduce new laws and legal institutions of the sort that are arguably necessary for the smooth functioning of a market democracy.

On the surface, the reforms seem impressive. An enormous number of laws have been drafted with the assistance of Western experts. Many have gone on to become law, either through the legislative process or via Presidential decree. Similarly, existing Soviet-era legal institutions have been reformed and new institutions have been created. Thanks in large part to these reforms, from a structural point of view, Russia today bears little resemblance to the Soviet Union. A few examples will serve to prove the point. The members of the lower body of the Russian legislature, the Duma, were chosen in multi-candidate, multiparty elections. The Duma is institutionally independent from the Executive Branch, and pursues its own legislative agenda. The last legislative body that shared those characteristics was the Constituent Assembly, and it sat for only one day before being dissolved by Lenin in January 1918. The domination of the present-day Russian economy by privately owned firms serves as another indicator of apparent change. Private property was, of course, not legal in the Soviet Union; the state owned all firms. These two examples illustrate the progress that has been made—at least on the surface—toward a market democracy. In each case (and countless others), Western assistance facilitated the reform process.

Structural changes in the form of new laws and institutions, while undoubtedly necessary for the development of market democracy, are not sufficient. In order to be meaningful, these seeds of reforms must find fertile ground in Russian legal culture. But for the most part, the structural reforms championed by the West have failed to have the sort of impact on behavior that was predicted and desired. Moreover, many ordinary Russians view Western assistance as an empty gesture. They claim to see no concrete results. They wonder where all the millions of promised dollars disappeared to. Some express their sentiments in more pejorative terms, arguing that the West has sought to undermine, rather than to facilitate, the transition process in Russia. To be sure, this resentment toward the West may not be entirely justified (and it goes to the assistance effort as a whole; it is not directed exclusively at legal assistance programs), but it represents a political reality that must be acknowledged as a legacy of Western assistance.

The question of why the West has taken the brunt of the blame within Russia for the perceived lack of success of the transition deserves to be explored seriously. The realities of Russian politics provide a partial answer. For the political elite of Russia, explanations that focus on external forces are preferable to examining themselves for culpability. This also represents the continuation of a Russian predilection to seek scapegoats. Identifying the West as the guilty party has great resonance in Russia, a country that for centuries has swung back and forth between isolationism and openness to Western ideas.

But the playing out of the long-standing debate between Westernizers and Slavophiles in a new arena does not provide an entirely satisfactory explanation for why Western assistance has been so widely perceived as unsuccessful. Rather than blaming the Russians...
for failing to appreciate Western bounty, it would behoove the Western agencies engaged in providing legal assistance to look inward. A more convincing explanation lies in the structure of the Western assistance programs and in the broader institutional framework in which these programs are embedded. In Russia, these factors doomed Western assistance to the superficial success it currently enjoys.

Several characteristics of the legal development effort in Russia stand out. For the most part, the programs were top-down and technocratic in their approach. The results of these programs reflected and perpetuated the "disconnect" between the lawmaking process in Moscow and the reality of daily life in the rest of Russia. Given the interconnected nature of these characteristics, I consider them as a group rather than separately.

The top-down nature of the assistance effort is reflected by the almost exclusive focus on legislation and legal institutions. No one can quarrel with the importance of these matters. No one can oppose efforts to make the laws and the institutions fit a market-based democracy. At the same time, however, these reforms ought to fit the specific cultural context. One of the legacies of the Soviet period in Russia is a profound skepticism toward law and a distrust of legal institutions. Soviet history justifies such attitudes. As a result, people view law as something to be avoided rather than as a tool to be used to protect or mobilize their interests. Given this legacy, merely passing new laws and revitalizing legal institutions is not sufficient. If these reforms are to be meaningful, they have to aspire to more; namely, to reshaping basic societal attitudes toward law. Absent attitudinal changes—that is changes in the underlying legal culture—even the best laws (from a technical point of view) will lie dormant.

The top-down approach pursued in legal assistance efforts in Russia allows little room for changing attitudes toward law. Instead, it assumes that the goal is enactment; implementation is a given. If further assumes that law is a fungible commodity; that a law that works well in one setting will work equally well elsewhere. The absurdity of such technocratic assumptions in the Russian context is obvious. A constant refrain in political rhetoric since the days of Khrushchev right up through the present day are complaints about the failure of people to pay attention to the law. These frustrations are not unique to Russia, but it is generally agreed that the gap between the law on the books and the law in practice is more profound in Russia than in most other countries. The Soviet answer to this problem was to pass more laws with ever greater fanfare. Ordinary Soviets knew that when the trumpeting died down, so too would any systematic attention to enforcement. Ironically, the behavior of post-Soviet Russia is remarkably similar, and ordinary Russians behave accordingly.

It might be argued that these new Western-inspired laws will act as a stimulus to Russian society—that they are important on a symbolic level and that compliance will evolve over time. Such arguments, while arguably persuasive in the context of U.S. politics, reflect a lack of understanding of Soviet history. Law as symbolic politics is nothing new for Russians. The Soviet period is replete with examples of law being used to push society in a particular direction: for example, abolishing the veil in Central Asia in the 1920s, or outlawing non-Russian-language schools. For the new regime to justify passing laws on similar grounds—regardless of their underlying theoretical value to the larger enterprise of building a market economy—does little to rebuild respect for law in Russian society. The goal should be to pass laws that can be understood and used, rather than simply to pass the laws deemed necessary according to some informal international checklist.

The heavy emphasis on Moscow in Western legal assistance follows from the top-down technocratic approach. The national legislature, key policy institutions and the top-level courts are all housed in Moscow. Given the focus on drafting new legislation, introducing structural reforms to the courts (both courts of general jurisdiction and arbitrazh courts), and training judges and other legal professionals, the tendency to remain in Moscow is
hardly surprising. But Moscow has never been entirely representative of Russia, and the influx of foreign investment makes it increasingly less so.

An alternative approach would have been to incorporate the needs and interests of ordinary Russians into the process of remaking the legal system. This alternative approach is most easily illustrated with regard to economic law. When working out the new civil code or the new company law, for example, the drafters (and their Western advisors) might have spent time with Russian enterprise managers in order to understand their challenges and their capacity to absorb Western legal concepts. Not only might this have avoided the enactment of laws that failed to address the realities of present-day Russia, but it might have contributed to legitimizing law by including the end-users of the law in the drafting process. The final results under such an alternative approach might have been laws that were less technically sophisticated and, therefore, perhaps less satisfying to Western advisors, but they might have been laws that were more accessible to ordinary Russians.

The legal assistance program in Russia has enjoyed only superficial success; it has succeeded in changing the letter of the law and the structure of legal institutions, but has largely failed to reshape attitudes or behavior relating to law. Sadly, such a result could have been predicted in advance by reading the voluminous literature on the previous incarnation of law and development during the 1960s. This literature teaches us the importance of region-specific knowledge and the danger of ethnocentric assumptions derived from Western experience.

This raises the question of why Western assistance agencies continue to pursue approaches that have been proven unsuccessful in achieving the fundamental goal of building the rule of law. This is a complex and neglected question that deserves systematic study. Several contributory factors can be suggested.

First, the funding structure for legal assistance programs is geared to results that are quickly and easily demonstrated to funders. In most cases, this leads to a desire for quantifiable indicators of success; for example, number of laws passed, number of judges trained or number of computers installed. More subtle but equally important goals, such as changing legal culture, are not so easily proved. In addition, a change in attitudes about law cannot be ordered from above; it requires a grassroots approach that takes considerable patience. Few funders have such patience.

Second, funding sources tend not to value specific knowledge about the country targeted for assistance. Often neither the funders' employee nor the Western consultants understand the culture or the history of the country. Sometimes they do not even speak the language. As a result, it is difficult for them to read the signals and to assess potential partners. In a circular fashion, this contributes to the appeal of technocratic approaches. After all, if such an approach is adopted, then it obviates the need to learn anything about the country itself.

As a long-time student of Russia, I have watched the assistance efforts, at first, with great interest and, as time went on, with great sadness. An opportunity to help Russia achieve its goal of creating a pravovoe gosudarstvo—a state based on the rule of law—has been squandered because of the failure of the West to learn from past mistakes and a refusal to reshape the institutional incentives underlying international assistance.

DISCUSSION

MARTHA B. TROFIMENKO:* Given the need to take cultural differences into account and not to "force" Western legal concepts on developing countries, how do we reconcile this

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